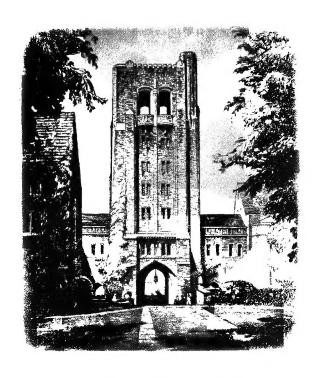


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## COMMENTARIES

ON THE

# LAW OF MASTER AND SERVANT

BY

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OF THE BAR OF SAN FRANCISCO, CAL.

## In Three Volumes

VOLS. I. AND II.—EMPLOYER'S LIABILITY.
VOL. III.—RELATION, HIRING AND DISCHARGE, COMPENSATION, STRIKES, ETC.

VOL I.

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#### $\mathbf{TO}$

## SEYMOUR D. THOMPSON, LL. D.,

FORMERLY A MEMBER OF THE ST. LOUIS

COURT OF APPEALS

THIS TREATISE IS DEDICATED,

AS A SLIGHT TOKEN OF THE ADMIRATION WHICH THE AUTHOR
FEELS FOR THE DISTINGUISHED SERVICES WHICH HE
HAS RENDERED TO THE LEGAL PROFESSION,
BOTH IN HIS JUDICIAL AND
LITERARY CAPACITY.

## PREFACE.

The two volumes here offered to the profession deal with the nature and extent of a servant's right to maintain an action against his master for personal injuries, and form the first part of a treatise which, when finished, will be a complete commentary upon the law of master and servant. It has been the author's aim to cite every decision which has been rendered by a court of review in any of the countries in which the common law is the prevailing system of jurisprudence, and the materials collected represent the result of an exhaustive examination of all the reports, whether official, semiofficial, or nonofficial, which have been published in the following countries: England, Scotland, Ireland, the United States, Canada, Australia, and New Zealand. A brief summary of the law of employers' liability under the systems which are founded upon the civil law has also been added.

The date of each case is always specified. The insertion of this detail has appreciably augmented both the cost and the bulk of the volumes; but its utility will be readily conceded by every lawyer who has learned to realize the fluctuating and unstable condition of the law of employers' liability, and the vital importance of gauging the significance and weight of each ruling with reference to the precise period of doctrinal evolution by which it was produced.

To prevent any risk of a misunderstanding, it is proper to mention that, as a general rule, no cases are cited which are of a later date than those collected in the volumes of the General and American Digests which were published in the spring of 1902. The manifest advantage of this arrangement is that it fixes a definite starting point for such researches as it may be desired to make in the later volumes of those digests or elsewhere, and obviates the want of homogeneity which would have resulted from undertaking to utilize all the most recent cases in a treatise which has necessarily required a considerable time to put through the press. The chapter relating to the English Workmen's Compensation Act of 1897 constitutes the one important exception to the scheme thus adopted. The unique and novel

vi PREFACE.

character of that remarkable statute, and the extraordinary amount of litigation which it has engendered during the few years of its existence, have been deemed to furnish a sufficient justification for stating the effect of all the decisions relating to it which have been reported up to the end of 1902.

The supplementary citations of reports other than those which belong to the official or semiofficial class are, it is considered, sufficiently useful to compensate for the outlay and consumption of space which their insertion has entailed. Wherever the only citation given is that of a nonofficial series, the case is not found except in a report of that description.

The elaborate index which is appended to this portion of the treatise has been compiled by Mr. Cyrus W. Phillips, one of the associate editors of the Lawyers' Reports Annotated.

To some readers these volumes will, perhaps, appear inordinately It may be advisable, therefore, to take this opportunity of explaining that the great length to which they have been extended is due to the impossibility of discussing adequately within a narrow compass the enormous mass of authorities bearing upon a subject which may, without any exaggeration, be said to enjoy the unenviable distinction of having been the occasion of a larger number of conflicting doctrines and inconsistent decisions than any other branch of law. In order to show with something like reasonable clearness and precision the conclusions at which the various courts have arrived, the author has found himself constrained to enter upon a far more minute and detailed analysis of the cases than is customarily undertaken in a commentary of this general character. Without such an analysis the development of the law even in a single state cannot be satisfactorily elucidated; and the necessity for an unusually microscopic examination of the authorities is rendered still more imperative by the fact that, as regards many of the more important of the principles discussed, the evolution of doctrines has proceeded in each jurisdiction upon lines which are, in some degree, at least, independent. these circumstances, it is clear that the subject cannot be handled with any thoroughness except by adopting a method of treatment which will enable the reader to understand not only the mutations and antagonisms of theory which are frequently apparent in the decisions rendered in the same state, but also the manifold points with respect to which the courts of the various countries hold discordant views. The most striking illustration of the difficulties which are entailed by the necessity of considering territorial lines is undoubtedly that which is furnished by the chapters relating to common employment; but many other examples of the confusion, obscurity, and uncertainty which are traceable to the same source may readily be found in these volumes. If the anxiety of the author to produce a reasonably clear account both of the past and present condition of the law has sometimes occasioned what may seem an excessive diffuseness, he hopes that lawyers who consult these volumes will not be inclined to criticise very severely an error of judgment which must, at all events, inure to their advantage.

It will scarcely be disputed by anyone who is familiar with the law of employers' liability that the deplorably chaotic condition to which it has been reduced in the United States is due to a cause which is probably more potent for mischief in actions to recover damages for injuries received by servants than in any other class of cases involving the existence or nonexistence of negligence,—viz., the differences of opinion which prevail with respect to the limits of the power of a court to override the verdicts of juries. In some of the states so large a measure of authority in this regard has been arrogated to themselves by appellate judges that the actual, as distinguished from the theoretical, system of procedure may fairly be described as being virtually one which compels a plaintiff to establish his case to the satisfaction, not of one jury, but of two. No arguments are needed to demonstrate that such a condition of affairs, instead of tending to produce that stability of doctrine which Blackstone and other writers have culogized as being one of the most beneficial results of the delimitation of the provinces of courts and juries, is certain to beget an infinitude of uncertainties and inconsistencies. In those cases—and they are by no means few-where a finding of facts or an inference from facts is rejected by a divided bench, the situation approaches perilously close to the ridiculous. It might be supposed that considcrations of courtesy, if not of logic, should be sufficient to dissuade a portion of the members of a court from pronouncing a judgment which, under such circumstances, amounts essentially to a formal declaration that their dissenting brethren have, by accepting the conclusions of the jury, forfeited ad hanc vicem the right to be classed in the category of those typically reasonable and fair-minded men who are assumed, for the purposes of the decision, to be incapable of rendering such a verdict as the one in question.

A preface is not an appropriate place for the discussion of the important topic here touched upon. But it is not amiss to point out that, so far as the law of employers' liability is concerned, a large por-

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tion of the opportunities for the perpetration of this abuse of judicial functions would be eliminated if the doctrine which, on the ground either of an implied assumption of the risk or of contributory negligence, precludes a servant, as a matter of law, from obtaining damages for an injury resulting from an abnormal risk of which he had knowledge, actual or constructive, before the accident occurred, were abolished by statute. That there is no class of cases in which courts of review have exercised such extensive powers, as regards the overriding of verdicts, as in those which turn on the question whether the servant appreciated, or should have appreciated, the given hazard, will be abundantly apparent to any one who collates, with reference to the facts involved, the cases which are collected in chapter xxI. scens not unreasonable to suppose that, if the question whether the servant was chargeable with notice of the danger from which his injury resulted were no more than one of the elements of an investigation leading up to a mere issue of fact, the courts would not be tempted to scrutinize so minutely as at present the findings of juries with regard to such notice. It is obvious that, if this should be the result of the change in the law which is suggested above, one prolific source of disagreement would be to a large extent removed.

The consideration just adverted to is, however, not the only one which points to the expediency of abrogating the doctrine in question. Whether that doctrine is or is not sustainable on grounds of abstract logic, there would seem to be no escape from the conclusion that, under existing industrial conditions, it cannot be applied in employers' liability cases without frequently producing consequences which are intolerably harsh and severe. The author ventures to hope that the publication of these volumes which, by the simple process of showing in detail the circumstances under which it has prevented the recovery of compensation, have brought into clear relief its inherent unfairness, may induce a larger number of legislatures to follow the lead of those which have already enacted remedial legislation upon the subject.

Another doctrine which the author considers to be thoroughly inequitable in its essence is that which precludes a servant from recovering damages from his employer in cases where the injury was caused by the negligence of a coservant. It is little short of marvelous that a rule of law which rests upon such unsubstantial foundations (see §§ 472–475), and which presses so hardly upon the classes which form the most numerous section of every community, should have survived up to the present time. But, as it has already been

abolished in one state, and its domain has been greatly circumscribed in many others, there would seem to be good ground for anticipating that the day is not very far distant when it will be excised entirely from Anglo-American jurisprudence,—the only modern system, it should be observed, of which it has ever formed a permanent part. See chapter XLVII.

It may readily be conceded that, even if carried out, the reforms here outlined would still leave in the law of employers' liability numerous defects which it would be desirable to remedy. But the changes proposed would, at all events, remove its most repulsive excrescences; and it would be an immense gain if the courts were relieved once for all from the necessity of considering two doctrines which are not only unduly favorable to the employer, but have also engendered such an enormous mass of subtle and refined distinctions—often as unreasonable and paltry as those which have made medieval scholasticism a by-word—that they are no longer fitted to be a part of a practical science which is concerned with the elementary affairs of every-day life.

ROCHESTER, January, 1904.



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## MASTER AND SERVANT.

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  - Extent of a master's duty to protect a servant against casualties not due to his negligence.
- 1. Introductory statement.— The doctrines which define the extent of a servant's right to recover damages for personal injuries received in the course of his employment represent, broadly speaking, the results of a compromise between the principle that a servant agrees to assume all the risks incident to the work undertaken by him, and the principle that a master is answerable for the consequences of any negligent acts which may be committed by himself or his agents. In the last analysis, therefore, every problem in the law of employers' liability consists essentially in the determination of the question Vol. I. M. & S.—1.

whether the facts under review shall be controlled by the one or by the other of these principles.1

The remarkable conflict of opinion disclosed by the decisions is due, in the main, to three causes. In the first place, no criteria which are at once reasonably precise and universally accepted are available for the purpose of fixing the boundary line between the respective territories of the two antagonistic elements from the interaction of which this branch of law has been developed. In many instances, it should be observed, the divergence of views, so far as it arises from this circumstance, appears to be even greater than it actually is, owing to the fact that "the language of courts in the opinions delivered is sometimes shaded by the facts in the particular case then under consideration, and thus may sometimes give rise to an apparent difference in the rules applied, when none really exists."<sup>2</sup> In the second place, the difficulty of determining to which of two or more recognized rules the rights of the parties ought, in any given instance, to be referred, is unquestionably greater in this than in any other class of cases. In this connection, the numerous dissenting opinions in the reports, and the reasons assigned for the conclusions arrived at, are very instructive.3 The third, and perhaps the most prolific, source of uncertainty and discrepancy is the accident of liti-

<sup>1</sup>In the more general statements of mentioned together. The following passage from an oft-cited case is one of a See, for example, such a case as many hundreds of the same tenor which the quoted: "While it is true, the one hand, that a workman or ion of the majority of the court proservant, on entering into an employ-ceeded on the theory that a switchman ment, by implication agrees that he at a junction where foreign cars with the city of the court proservant. 85 Am, Dec. 720.

<sup>2</sup>Texas & P. R. Co. v. Barrett (1895) doctrine these principles are regularly 14 C. C. A. 373, 30 U. S. App. 196, 67 Fed. 214.

ment, by implication agrees that he will undertake the ordinary risks incident to the service in which he is to be engaged, among which is the negligence of other servants employed in similar services by the same master, it is also true, on the other hand, that the employer or master implicitly contracts that he will use due care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service, and will also take due precaution to adopt and use such matchinery, apparatus, tools, appliances, and means as are suitable and proper for the prosecution of the business in which his servants are engaged, with all care in their original pliances, or to faults in their original a reasonable degree of safety to life and pliances, or to faults in their original security against injury." Snow v. construction, and that the true ques-Housalonic R. (o. (1864) 8 Allen, 441, tion was whether the machinery, as a whole, was reasonably safe, and whether

gation, from which it resulted that, in the earliest cases in which the extent of a master's responsibility was investigated, the questions presented were discussed from the standpoint of the servant's assumption of the risks of the employment, and not from that of the master's duty to protect the servant against those risks. The doctrines enunciated under such circumstances were such as naturally tended to emphasize the disabilities of the servant, rather than the obligations of the master, and the subsequent evolution of the law has consisted essentially in a process of defining and explaining the qualifications to which the sweeping general rules which were originally laid down are subject. Under any circumstances such a process must inevitably produce many inconsistent decisions and unsatisfactory distinctions, and in the present instance it has resulted in a doctrinal confusion even worse than usual, owing to the fact that it has been carried on simultaneously in a large number of separate states, and the question how far the various proposed limitations of principles should be admitted has been answered in many different ways.4

The outcome of the juristic compromise which has been effected along the lines indicated in the foregoing remarks is to be seen in the three fundamental principles which are stated in the following sections.5

knew of the danger, the learned judge down,—as, for instance, where the inwas of opinion that the evidence left jury is occasioned to the servant by the fact of such knowledge an open that of which the master might be propjury was conclusive.

III.-VIII., post.

remarking that in *Priestley* v. Fowler could engage in it without incurring (1837) 3 Mees. & W. 1, Murph. & H. liability to the injury complained of. 305, 1 Jur. 987, it was laid down in That appears to be a rational qualificasible for injuries occurring to his serv- ter from liability for injuries arising ant in the course of his employment from accidents to those in his employdertake the duty for which he is paid, of the dangerous nature of the employsubject to all the risks which may oc-ment. But there is a further class of cur during its continuance, proceeded cases, in which it would appear that thus: "In process of time it came to there was engrafted on this latter be discussed whether that proposition qualification somewhat of a limitation,

ordinary care had been used to have it was to be adopted in those unqualified so. So far as this conclusion might be terms, and certain qualifications were modified by the fact that the servant then superadded to the rule so laid question, upon which the verdict of a erly deemed to have been the cause, ry was conclusive. namely, when the injury arises, not The chaotic condition to which the from a merely accidental occurrence law has been reduced by the operation in the course of the servant's employof these causes is shown more particu- ment, but from gross negligence on the larly by the cases collected in chapters part of the master in respect of his duty towards the servant; and this The earliest case in which the no-qualification which was so engrafted on tional and chronological relation of the original rule was this,—that a these principles is adverted to seems to master should not employ his servant be Potts v. Plunkett (1859) 9 Ir. C. L. in a work which the master is aware Rep. 290, where Lefroy, Ch. J., after is of such a nature as that no man substance, that a master is not respon- tion of the rule which exempts the masgenerally, though being a result of it, ment. and involves the existence of because the servant is supposed to un- knowledge on the part of the master

A. Master's liability determined with reference to the risks WHICH ARE AND ARE NOT ASSUMED BY THE SERVANT

2. Risks resulting from the master's negligence are not assumed by the servant.— A proposition which has so frequently been enunciated by the courts as to have become axiomatic is that, prima facie, a servant does not assume any risks which may be obviated by the exercise of reasonable care on the master's part. In other words, the abnormal, unusual, or extraordinary risks which the servant does not assume as being incidental to the work undertaken by him are those which would not have existed if the master had fulfilled his contractual duties.1

Occasionally the inference has been drawn that there was negli-

tion."

not be reviewed here in detail.

This qualification of the general principle that a servant assumes all the risks ordinarily incident to his em-Hough v. Texas & P. R. Co. (1879) 100 gence was one of the risks assumed by

namely, that if the cause producing the ter, of vices or imperfections in the injury be equally known and equally carriage used by the servant injured, palpable to the person employed as to would make him liable, it was said: the master, then the servant cannot "He (the master) is, no doubt, bound complain, for it may be said that be went into the danger with his eyes of the course of his employment, to the open. This, then, appears to me to best of his judgment, information, and have been the course of the decisions: belief." In Chief Justice Shaw's fafous opinion in Farwell v. Boston & W. P. Co. (1842) 4 Met. 49, 38 Am. Dec. next, engrafting a qualification upon that principle; and, lastly, introducing a sort of limitation of that qualifies—served acceptance of the simple notion. a sort of limitation of that qualifica- served acceptance of the simple notion that the existence of certain duties on <sup>1</sup>The cases in which this doctrine is the master's part created an exception stated under its various aspects are col- to the doctrine of the servant's aslected in §§ 270 et seq., post, and need sumption of the risks of the employment seems to have been reached with some hesitation. In Seymour v. Maddox (1851) 16 Q. B. 326, 20 L. J. Q. B. N. S. 327, 15 Jur. 723, a chorus singer ployment was more than half conceded injured by falling through a hole in in Priestley v. Fowler (1837) 3 Mees. the floor of a passage in a theatre, ow-& W. 1, Murph. & H. 305, 1 Jur. 987. ing to the want of light and fencing, In that case, as has been pointed out in was held unable to recover from the proprietor of the building, the court U. S. 213, 25 L. ed. 612, the question holding that a declaration setting out whether the risk of the master's negli- these facts showed no cause of action. This decision turns upon a point of gence was one of the risks assumed by This decision turns upon a point of a servant was not involved, or, at all technical pleading, and is therefore of events, was not determined in that a narrow scope; but, even when this case. The decision was placed by Lord fact is taken into account, it cannot be Abinger partly upon the ground that, in the "sort of employment". . . See the criticisms in Ryan v. Fowler the plaintiff must have known as well (1862) 24 N. Y. 410, 82 Am. Dec. 315. the plaintiff must have known as well (1862) 24 N. Y. 410, 82 Am. Dec. 315. as his master and probably better, Language indicating a similar trend of whether the van was sufficient, whether judicial opinion is found in the followit was overloaded, and whether it was ing cases: Dynen v. Leach (1857) 26 likely to carry him safely;" and although the court declared that it was dale (1861) 6 Hurlst. & N. 445, 30 L. not called upon to decide how far J. Exch. N. S. 87, 9 Week. Rep. 347; knowledge, upon the part of the masgence on the master's part, for the reason that the risk was an extraordinary one.2 But this succession of ideas, considered as suggestive of the lines on which the inquiry into the rights and liabilities of the parties may be conducted, is open to objections similar to those which may be urged against the converse theory, that the exercise of due care may be inferred from the fact that the risk was an ordinary See next section.

3. Risks not resulting from the master's negligence are assumed by the servant.— A second proposition, which is also beyond the reach of controversy, is that every risk which an employment still involves after a master has done everything that he is bound to do for the purpose of securing the safety of his servants is assumed, as a matter of law, by each of those servants. This doctrine prevents recovery unless evidence is introduced which warrants the inference that the injured person was incapable of appreciating the risk from which his injury resulted. According to the standpoint taken, such evidence may be regarded either as tending to show that one of the essential elements of an assumption or acceptance-viz., knowledge-is lacking, or that the master exposed the servant to risks which he did not comprehend,—a situation which manifestly implies that the master did not fulfil all his duties (see chapters vii. and xvi., post),—and which, if it is established, indicates that the case is governed by the principle enunciated in the preceding section.

The risks which are thus considered to have been assumed are those which are commonly described as "ordinary." See §§ 259 et seq.

When stated with reference to the general rule which throws on the servant the burden of proving negligence on the master's part (chapter XLIII. B), this principle assumes the form that, in the absence of definite proof of such negligence, an accident is regarded as one of the hazards of the employment of which the servant takes the risk.2

Sometimes we find the courts deducing the conclusion that there was no negligence on the master's part from the consideration that the risk in question was an "ordinary one." This logical succession

<sup>2</sup>Colorado Midland R. Co. v. Naylon (1892) 17 Colo. 501, 30 Pac. 249.

<sup>1</sup> For cases which explicitly state or

(1892) 150 Pa. 598, 17 L. R. A. 450, 25

3 Dartmouth Spinning Co. v. Achord (1889) 84 Ga. 14, 6 L. R. A. 190, 10 S. E. 449; Murphy v. Greeley (1888) 146 Mass. 196, 15 N. E. 654; Jackson v.

N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405; Mellors recognize this doctrine, see §§ 259 et v. Shaw (1861) 1 B. & S. 437,30 L.J. Q. seq.
B. N. S. 333, 7 Jur. N. S. 845, 9 Week. 

2 Mensch v. Pennsylvania R. Co. Rep. 748; McDermott v. Pacific R. Co. (1860) 30 Mo. 115; Buzzell v. Laconia Mfg. Co. (1861) 48 Me. 113, 77 Am. Dec. 212.

of ideas is not unnaturally suggested when the evidence is such as to bring into special prominence the conception that the conditions which caused the injury are met with so frequently in the given employment that they may reasonably be regarded as normal, so far as the servant is concerned. See § 261, post. In many instances, however, the servant will inevitably be prejudiced to some extent by this mode of conducting the investigation, and it seems to be decidedly preferable to obtain a definite starting point by treating the existence or absence of culpability on the master's part as the essential point to be determined at the outset.

- 4. Rationale of these two complementary principles. The distincttion thus made between the risks which are and the risks which are not created by the master's negligence may be referred directly to the conception that the fact of the defendant's being the master of the plaintiff is not a reason for excluding the operation of the general principle of jurisprudence which is embodied in the maxim, Culpa tenet auctores suos. But it is also sustainable on the more special ground that, in view of the circumstances attending the contractual relations of the parties, the servant may reasonably be presumed to foresee that he will be exposed to risks of the latter class, but ought not to be charged with the consequences of an anticipation that risks of the former class will be encountered. There is, accordingly, no sufficient ground upon which the existence of an implied agreement not to hold the master responsible for the consequences of his defaults can properly be predicated. This conception is fully developed in a later chapter. See §§ 260, 272.
- 5. Injuries due to known risks not generally actionable, even when they result from the master's negligence.—The presumed knowledge or ignorance of the servant being the essential basis upon which rest the two principles by which he is charged with the acceptance of one class of risks incident to his employment, and the nonacceptance of another class, there is an obvious logical propriety in taking the position that in any case in which the presumption of ignorance which is entertained with regard to risks caused by the master's negligence is rebutted by positive evidence which establishes knowledge, actual or constructive, of the particular peril which caused the injury, it must, at the very least, be a question for the jury whether the servant did not, by continuing to expose himself to the peril thus known to him, show his intention to take upon himself the responsibility for any accident which might happen to him by reason of its existence, or, in

Missouri P. R. Co. (1891) 104 Mo. 448, R. Co. (1891) 109 Mo. 187, 18 S. W. 16 S. W. 416; Thomas v. Missouri P. 980,

other words, to waive any right of action which, apart from such knowledge, he would have possessed. This position possibly represents the doctrine which, since the recent decisions as to the effect of the maxim, Volenti non fit injuria, prevails in England. See chapter xx., post, and § 276. But there does not appear to have been any deliberate and formal announcement of such a doctrine, in a case where the question of a contractual assumption of the risk was explicitly presented.

The doctrine applied in the older English cases and in all the American cases up to the present time, with a few possible unimportant exceptions, is that, in the case of all adult servants except seamen, the action must be declared not to be maintainable, as a matter of law, if the evidence leaves no reasonable doubt that the servant comprehended the abnormal risk which caused his injury. See §§ 273 et seq.

## B. Analysis of the master's duties.

6. General statement.— From the foregoing sections it is abundantly manifest that although, as a mere matter of historical development, the law of employer's liability must be regarded as being essentially based on the conception of the servant's assumption of some risks and his nonassumption of others, the ultimate question to be first determined in every case is whether the master is guilty of a breach of duty to the servant who brings the action. The cases bearing upon that question, therefore, will be first considered.

It is well settled that the duties of a master to his servants arise out of the contract of employment, and are limited to those obligations which, under that contract, he has impliedly agreed to perform.1

"Wilson v. Merry (1869) L. R. 1 H. O'Neill v. Chicago, R. I. & P. R. Co. L. Sc. App. Cas. 326, 19 L. T. N. S. (1901; Neb.) 86 N. W. 1098. "The 30; Smith v. Baker [1891] A. C. 325, case [of Priestley v. Fowler (1837) 3 362, 60 L. J. Q. B. N. S. 683, 65 L. T. Mees. & W. 1, Murph. & H. 305, 1 Jur. N. S. 467, 55 J. P. 660, 40 Week. Rep. 397], might have been rested upon the 392, per Lord Herschell; Williams v. principle that there was no contract on Birmingham Battery & Metal Co. the part of the master safely to carry [1899] 2 Q. B. 338, 68 L. J. Q. B. N. S. the servant, and that, where there is no 918; Farucell v. Boston & W. R. Corp. contract, there is no breach of duty for (1841) 4 Met. 49, 38 Am. Dec. 339; which an action will lie." Lawson, J., Slater v. Jewett (1881) 85 N. Y. 61, 73, in Hoey v. Dublin & B. Junction R. Co. 39 Am. Rep. 627; Kain v. Smith (1870) Ir. Rep. 5 C. L. 206, 18 Week. (1882) 89 N. Y. 375; Larmore v. Crown Point Iron Co. (1886) 101 N. Y. 391, part of one person as toward another 54 Am. Rep. 718, 4 N. E. 752; Sullivan always involves a breach of duty on v. India Mfg. Co. (1873) 113 Mass. the part of the former as toward the 396, 398; Fificld v. Northern R. Co. duty, there can be no culpable negligence of tral R. Co. (1865) 31 N. J. L. 293; gence, and it is only for negligence of

Stated in their most general form, these duties are: (1) To see that suitable instrumentalities are provided; (2) to see that those instrumentalities are safely used.

Both on principle and authority is it clear that, in a broad sense, servants, as well as machinery, apparatus, premises, etc., may be described as instrumentalities, appliances, or agencies of the master's business.2 But the qualitative attributes of the agencies of the master's business, which are animate and organic, are in some respects sufficiently unlike those of the agencies which are inanimate and inorganic to entail some corresponding difference between the courses of conduct which are obligatory, according as one or other of these classes of agencies may be the subject-matter of the duty of seeing that they are in proper condition for the performance of the functions assigned to them. For this reason it has been considered advisable to discuss separately the cases relating to each of these kinds of agencies. See the remarks at the commencement of chapter XIII., post.

7. Duty to see that the inorganic instrumentalities are suitable both as respects quality and quantity.— The plant which forms the subject-matter of this duty is usually treated as being divisible into two parts: (1) The place in which the work is done; (2) the machinery, tools, implements, etc., by which the work is done.

But, as a basis for a general classification of the cases, this method of division is open to two objections. First, the accidents are, in many instances, of such a nature that the instrumentalities which, as a mere matter of lexicographical definition, belong to the second of these categories, must, in a logical point of view, be regarded as being, ad hanc vicem, a part of the entirety described as the place of work, rather than as agencies for doing the work. Secondly, it is

a culpable character that any person can be held responsible in law." Rush (1890) 77 Wis. 51, 45 N. W. 807; Texv. Missouri P. R. Co. (1887) 36 Kan. as & P. R. Co. v. Rogers (1893) 6 C. 129, 12 Pac. 582. It would seem, however, that under the strict forms of 378; Thorpe v. Missouri P. R. Co. common-law pleading this theory is not (1886) 89 Mo. 650, 58 Am. Rep. 120, carried to its logical conclusions, for, 2 S. W. 3. carried to its logical conclusions, for, in Riley v. Baxendale (1861) 6 Hurlst. & N. 445, 30 L. J. Exch. N. S. 87, 9 Week. Rep. 347, it was held that the duty of the master had been improperably declared on as a contract. The difficulty pointed out by Pollock, C. B., where a boiler exploded and injured a ly declared out by Pollock, C. B., where a boiler exploded and injured a teamster, or the cases in which a machine is fractured and the pieces are thus converted into dangerous projectiles. McAlpine v. Laydon (1896) 115 demur, because it was possible that Cal. 68, 46 Pac. 865; Hall v. Emerson-there might have been such a contract in point of fact, whereas, if the obligation had been alleged as a simple duty, the defendant might have demurred.

often difficult, if not impossible, to say with confidence which of these two conceptions is appropriate to the facts in evidence. Thus, a locomotive, which is clearly a piece of machinery so far as the engineer and firemen are concerned, is just as clearly something which makes the place of work unsafe as regards a trackman who is run down by it. Under the circumstances here suggested, the duties of the injured person have no connection with the instrumentality which causes his injury. But it is obvious that the same ambiguous situation may also present itself where his duties have such a connection. For example, the same machine may, as regards the operation, be conceived of merely as a heavy object which, if not properly secured, is likely to fall on him, or as an apparatus which, if defective in certain ways, may injure him while it is performing the functions for which it is designed. Compare, also, the cases referred to in the last note.

These considerations suggest the advisability of basing the classification of the cases upon the principles which are applicable to all inorganic instrumentalities alike, rather than on an assumed essential distinction between the place of work and the appliances by which the work is done. The general discussion of the master's duties in chapters 11.—v11. has therefore been conducted along the lines thus indicated. But in chapter v111, this discussion has been supplemented by collating the authorities with special reference to the concrete facts in evidence, for the purpose of bringing out with greater distinctness the effect of the principles involved, and the remarkably conflicting views which the different courts hold with respect to the liability of the master for injuries due to the same, or virtually the same, conditions.

Suitable instrumentalities are obviously not provided in any reasonable sense of the word, unless they are not only suitable when they are first brought into use, but also maintained in a suitable condition as long as they remain in use. Hence, it has uniformly been held that the duty now under review is continuous, and requires that the various instrumentalities should be kept up to the obligatory standard of safety by proper repairs, or by replacing worn-out or otherwise defective parts. See chapters ix., xi., and xii., post.

It is clear that neither the duty of original supply, nor that of subsequent maintenance, can be adequately performed without subjecting the instrumentalities to a more or less minute examination for the purpose of discovering such defects as may not be obvious and palpable. Hence, the duty of active inspection may be, and usually is, regarded as incidental to, and deducible from, those duties. But from a merely logical point of view it may evidently be considered

as one which arises out of the general duty to see that the business is conducted on a safe system. See chapter xv., post.

- 8. Duty to see that the organic instrumentalities are fitted for their functions and adequate in number.—The subject-matter of this duty consists of (1) the servants themselves; (2) such animals as may be used as a part of the business organism.
- a. Servants.—(See also chapter XIII., post.) The duty of seeing that each servant is competent for his position is predicated with a view, both to his own security, and to the security of his fellow servants.

Under both of these aspects the duty suggests, as an incidental obligation, that of giving instructions to the servant in any case in which his ignorance of the proper methods of work is likely to be a source of danger either to himself or to other employees. But, like other incidental obligations, this may also be viewed as one of those which appertain to the main duty to see that the instrumentalities are safely used. See next section.

It should be observed, moreover, that, in so far as the obligation to instruct is concerned merely with the safety of the person to whom the instruction is to be given, it may also be deduced from the consideration that the imparting of information which enables a servant to appreciate fully the risks of the employment will, at the very least, entitle the master to go to the jury upon the question whether the action is not barred by one or other of the three defenses which are based upon the servant's knowledge, or, as most of the authorities hold, will absolutely prevent recovery, as a matter of law. In this instance, accordingly, the obligation may be viewed as one which is predicated either for the reason that an uninstructed servant is not competent for his position, or for the reason that, by discharging it, the master shifts to the servant the responsibility for such injuries as may result from the existence of the risks which are the subject-matter of the instructions.

The continuous nature of this duty is not less indisputable than in the case of inorganic instrumentalities. But, owing to the different character of the instrumentality to be dealt with, the performance of the duty must be effected in a different way. An incompetent servant cannot be converted into a competent one in the same way as a defective apparatus can be converted into a sound one, though perhaps it is theoretically possible to argue that, where a servant is hired for a definite period, and during that period his physical or mental faculties become so far impaired by sickness that his condition becomes

a source of abnormal danger to himself and to his fellow workmen, the proper course for the master to pursue is to suspend him from his functions until his health has been restored, and during such suspension to furnish him with suitable medical attendance. When the incompetency of a servant is discovered after he has entered the employment, the only remedies usually available are to give proper instructions, or to dismiss him. The duty associated with the former of these remedies has been already adverted to. If the latter remedy is applied, the master will ordinarily proceed to hire a new servant,—a situation which obviously charges him with the same obligations as those to which he is subject when he is hiring the original staff of assistants.

The conception that suitable servants are to be provided may reasonably be regarded as involving the conception that they shall not only be competent when considered as individual units in the business organism, but also sufficient in number for the proper performance of the work. But it is clear that this duty, like those of inspection and instruction, may also be deduced from the duty to conduct the business on a safe system. See chapter xv., post.

- b. Animals.—(See also chapter xiv., post.) The methods by which dangers due to the viciousness of animals, or their physical incapacity for the work to be done, or the inadequacy of their number for that work, are customarily remedied, seem to bear a closer analogy to those which are applied in the case of dangers created by unfit servants, than to those which are produced by inorganic instrumentalities. In both instances there is practically no resource except to substitute a suitable instrumentality for the unsuitable one. For this reason the duty predicated with respect to the use of animals seems to be, for the purposes of classification, more appropriately associated with the duty of hiring suitable servants than with the duty of furnishing suitable machinery, etc.
- 9. Duty to see that the instrumentalities are so used that the servants will not be exposed to unnecessary dangers.— The distinctive and characteristic elements of the duty to see that the instrumentalities are safely used are obviously: (1) General orders issued for the guidance of the servants. (2) Particular orders with reference to the details of the work during its progress.

As regards general orders, the master may be conceived to be subject to three obligations: (1) To frame suitable rules and regulations. (2) To bring those rules and regulations to the knowledge of the servants for whose benefit they are framed. (3) To carry out

those rules and regulations in such a manner that the objects for which they are framed may be attained.

But it is obvious that, in practice, the responsibility of the master in respect to the second and third of these obligations-more especially the third—is considerably diminished by the operation of the doctrine of common employment. See chapters xxvi.-xxxii., post.

A similar remark is applicable to the duty of the master in respect to particular orders, except in those cases in which he is himself superintending the work; for, according to the theory accepted in most jurisdictions, a servant cannot recover for injuries caused by compliance with the directions of a superior servant who is not a vice principal. See chapter xxvIII., post.

Under this head, also, as already mentioned, may be classed, as subsidiary obligations, the duties of inspection, of imparting necessary information, and of seeing that the work is not undertaken with an inadequate number of servants. Frequently, indeed, the methods by which the proper performance of these duties shall be secured are a matter specifically provided for in the rules and regulations framed by the master.

Under one of its aspects the duty of imparting information is almost purely administrative,—that is to say, where its subject-matter is a transitory risk arising out of the details of the work. And here, again, it is proper to remark that the breach of the duty of warning servants as to such risks will, in most jurisdictions, seldom constitute a cause of action, for the reason that in practice it is ordinarily discharged by employees who are not vice principals.

## C. Limits of the master's duty to protect the servant.

10. Master liable for his personal negligence, of whatever kind it may be.—There is no exception to the rule that the violation by the master himself of any of the duties enumerated in the foregoing sections constitutes a cause of action in favor of a servant who is injured thereby.1 A prima facie right to indemnity exists, therefore,

master was always liable, and still is or negligence of the master,—as, where liable, at common law, both to his own workmen and to the general public who come upon his premises at his invitation on business in which he is concerned." Bowen, L. J., in Thomas v. Quartermaine (1887) L. R. 18 Q. B. inson (1883) 61 Md. 64. "Whenever Div. 685, 691, 57 L. T. N. S. 537, 35 the injury results from the direct act.

whether the master's culpability was, under the doctrine prevailing in the jurisdiction where the accident occurred, one appertaining to the performance of a duty belonging to the non-delegable class,2 or a mere detail of the work.3

An obvious corollary of this principle is that the defense of common employment is not available where the person whose negligence caused the injury is a partner of the defendant, as well as a fellow workman of the injured person.4

So, also, a corporation is liable for the personal negligence of a director.5

& N. 213, 3 Jur. N. S. 469, 26 L. J. Exch. 319 (master builder directed scaffold to be constructed from poles known to be unsound); Kaspari v. Marsh (1889) 74 Wis. 562, 43 N. W. 368 (master supervised erection of defective scaffold); Scott v. Cray (1862) 24 Sc. Sess. Cas. 3d series, 789, 34 Sc. Sess. Jur. 401 (similar facts); Stanwick v. Butler-Ryan Co. (1896) 93 Wis. 430, 67 N. W. 723 (master specially directs the use of a defective stringer in a particular place in a scaffold); Mellors v. Shaw (1861) 1 Best & S. 437, 30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845 (mine owner who was his own manager held liable where a large stone 39 Atl. 552. fell from the side of a shaft on a miner while he was ascending a shaft in a

of his servants as in any other." Kee- protected by the customary bonnet); gan v. Western R. Corp. (1853) 8 N. Bradbury v. Goodwin (1886) 108 Ind. Y. 175, 180, 59 Am. Dec. 476. "The 286, 9 N. E. 302 (negligent constructions") doctrine that a servant on entering the tion of an anchorage to be used in movservice of an employer takes on him- ing a heavy safe); Stevens v. Howe self, as a risk incidental to the service, (1890) 28 Neb. 547, 44 N. W. 865 (dethe chance of injury arising from the fective scaffold erected under defendnegligence of fellow servants engaged ant's own superintendence); Scott v. in the common employment has no ap- Craig (1862) 24 Sc. Sess. Cas. 3d plication in the case of the negligence series, 789 (same facts); Sweain v. of an employer. Though the chance of Donahue (1899) 105 Wis. 142, 81 N. injury from the negligence of fellow W. 119 (skid which was being pulled servants may be supposed to enter into out of its bed suddenly became loose the calculation of a servant in under- and swung around and struck the plaintaking the service, it would be too much tiff, who had not been duly warned by to say that the risk of danger from the the master as to what was going on); negligence of a master when engaged Finneghan v. Peters (1861) 2 Sc. Sess. with him in their common work enters Cas. 2d series, 260; Haley v. Case in like manner into his speculation. (1886) 142 Mass. 316, 7 N. E. 877; From a master he is entitled to expect Flynn v. Harlow (1892) 46 N. Y. S. R. the care and attention which the supe- 872, 19 N. Y. Supp. 705 (building conrior position and presumable sense of tractor subjected floor of scaffold to duty of the latter ought to command." twice the weight it was intended to Ashworth v. Stanwix (1861) 3 El. & bear); Wood v. Pitfield (1887) 26 N. El. 701, 7 Jur. N. S. 467, 30 L. J. Q. B. B. 210 (master held liable for a defective rope). A declaration is not de-<sup>2</sup> Roberts v. Smith (1857) 2 Hurlst. murrable which is susceptible of being construed in such a sense that the injury may have been caused by the negligence either of the defendant himself or of one occupying the position of general manager. Macdonald(1874) 34 U. C. Q. B. 623.

<sup>3</sup> Folk v. Schaeffer (1898) 186 Pa. 253, 40 Atl. 401; Moran v. Harris (1884) 63 Iowa, 390, 19 N. W. 278 (master operated machinery negligent-

<sup>4</sup> Ashworth v. Stanwix (1861) 3 El. & El. 700, 7 Jur. N. S. 467, 30 L. J. Q. B. N. S. 183, 4 L. T. N. S. 85; Webster v. Foley (1892) 21 Can. S. C. 580; Rhoades v. Varney (1898) 91 Me. 222,

<sup>5</sup> Harrison v. Detroit, L. & N. R. Co. (1890) 79 Mich. 409, 7 L. R. A. 623, hoisting cage which was not properly 44 N. W. 1034; Warner v. Erie R. Co.

The master cannot, of course, be made liable on the ground of his personal interference in the work, unless, while so interfering, he was guilty of some specific act of negligence, and that act was an efficient cause of the injury in suit.6

The right of a servant to recover for injuries caused by positive acts of negligence on the master's part while the work is in progress cannot be defeated by showing that he has frequently done similar acts on previous occasions. The doctrine of assumption of risks has

pr application to such a case.7

11. Master who does not exercise personal supervision, not liable for the manner in which the details of the work are carried out. - Except in the cases in which the master is himself directing the work in hand, his obligation to protect his servants does not extend to protecting them from the transitory risks which are created by the negligence of the servants themselves in carrying out the details of that work. In other words, the rule that the master is bound to see that the environment in which a servant performs his duties is kept in a reasonably safe condition is not applicable where that environment becomes unsafe solely through the default of that servant himself, or of his fellow employees. It is obvious that this is merely an alternative way of stating the effect of the doctrines of contributory negligence and common employment.<sup>1</sup> The limits of the master's responsibility in this direction will, therefore, be more appropriately treated in that portion of the treatise in which those defenses are discussed. (Chapters XIX., XXVI.-XXXII.) It will be seen, from the cases collected in chapter xxxII., in which the subject of vice principalship as

(1867) 49 Barb. 558, Reversed, but not factor in respect to the giving of the superintendent to make failure of the superintendent to make the repair, the intervention of the giving of the cout of the general rule that a master is not such as to take the case ployee.

ternative direction by which the jury 433. were told that if the defendant inter-

deduced from the character of the act is dealt with, that, under certain circumstances, the master is free from liability for negligence committed by the servants themselves, not only in the use, but even in the selection, preparation, and maintenance, of the instrumentalities.

- 12. Master not liable for injuries caused by abnormal conditions of which he has no notice, actual or constructive. - Another principle which qualifies very largely the responsibility of a master is that no action can be maintained against him for an injury caused by abnormal risks, unless he knew, or ought, as a reasonably prudent man, to have known, of the existence of those risks. This subject will be fully discussed and developed in chapters x. and xi.
- 13. Extent of a master's duty to protect a servant against casualties not due to his negligence.— The cases under this head fall into two classes: (1) Those in which the question was whether the master was bound to provide means to lessen, alleviate, or prevent the harmful results of such an event as that which caused the injury complained of; (2) those in which the point to be determined was whether, after some catastrophe had actually occurred, he did all that a prudent man could have done to minimize its consequences.

As regards the first class, it is well settled that, apart from statute, a master is not required to construct his instrumentalities, or so to arrange the place where his servants work, that they shall be protected from the consequences of a casualty for which he is not responsible.

<sup>1</sup> In Jones v. Granite Mills (1878) safety of the servant from the conse-126 Mass. 84, 30 Am. Rep. 661, it was quence of a casualty to which his neg-argued that the defendant was negli-igence does not directly contribute. gent for the reason that he had not The common law gives a remedy to a constructed proper fire escapes. But servant who is injured by the wrongful this contention was rejected. "We or negligent act of the master; the lia-

know of no principle of law," said the bility arises upon the doing of the act. court, "by which a person is liable in But the common law goes no further; an action of tort for mere nonfeasance it does not provide a remedy when the by reason of his neglect to provide master is not responsible for the act, means to obviate or ameliorate the con- on the ground that he has omitted to sequences of the act of God, or mere provide means to avoid its consequenced accident, or the negligence or misconces." In another case arising out of duct of one for whose acts towards the the same accident, Keith v. Granite party suffering he is not responsible. Mills (1878) 126 Mass. 90, 30 Am. Rep. If such a liability could exist it would 666, the plaintiff requested the judge be difficult, if not impossible, to fix any to instruct the jury that it was the limit to it. And we are therefore of duty of the defendant (1) to provide opinion that it is no part of the duty proper and suitable means of extinof a master to his servant, employed in guishing fire, (2) proper and suitable a building properly constructed for the ways and means of escape, and (3) of a building properly constructed for the ways and means of escape, and (3) of ordinary business carried on within it, giving alarm to its servants in case of in the absence of a statute requirement, fire. The judge instructed the jury to provide means of escape from it, or that it the room in which the plaintiff to have remedial agencies at hand to was at work was a suitable place, and alleviate the results, or to insure the there were proper and suitable means

The true doctrine applicable to the second class of cases is, in one of its aspects at least, equally clear. If the conditions which caused the injury supervened suddenly, and were such that the master was not bound to anticipate that they would arise, he cannot be charged with negligence, unless he had notice, actual or constructive, of the danger, at least long enough before the injury was inflicted to have enabled him to form an intelligent opinion as to the means by which the injury might be avoided and to apply the appropriate remedy.<sup>2</sup> Compare the cases in chapter ix. with regard to the obligation to remedy defective conditions. But there seems to be some divergence of opinion as to the master's liability where the effect of the catastrophe was to put the servant in jeopardy for some considerable period of time, and the gravamen of the complaint is that the master did not take proper measures to extricate him. Some cases proceed upon the theory that, when an employee, without fault on the master's part, is placed in a dangerous or painful situation, the master is under no positive legal duty of exercising all reasonable care and diligence to effect such employee's speedy release. Being in no way responsible for the unfortunate occurrence, the master, it is declared, cannot be said to be guilty of a tort for the reason that he does not promptly take active steps in coming to the rescue. The only duty arising under such circumstances is deemed to be one of humanity, and for a breach thereof the law does not impose any liability.3

of extinguishing fire, and the means of of providing means of escape, and is to egress and escape were suitable and be governed by the same principles."

\*\*Independent Tug Line v. Jacobson (1898) 84 Ill. App. 684; United States menting on this instruction, the court Exp. Co. v. McCluskey (1898) 77 Ill. said that, as applied to the first request, it was sufficiently favorable to v. Johnson (1882) 103 Ill. 512.

\*\*The plaintiff, and proceeded thus:

\*\*Allen v. Hixson (1900) 111 Ga. 460, 187 Co. u. In Stater v. Troy Laure.

"Even if it was the duty of the defendant, in a case like this, to provide propdry Co. (1901) 38 Or. 480, 53 L. R. A. er means of extinguishing fire, and to 459, 63 Pac. 645, where a servant sued have the same ready for use, the jury for an injury received by her hand behave found the duty to have been pering caught between the rollers and the formed. Upon the second request, the drum of a mangle, and it was shown instructions were also sufficiently fathat the injury was aggravated by the vorable to the plaintiff. For the reasons stated in *Jones v. Granite Mills*, for some time because the managers sons stated in Jones v. Granite Mills, for some time because the managers the presiding judge might properly did not know how to operate the mahave declined to submit that question chine to release it, but that they did to the jury. . . . The third instruction requested was properly refused. It is no part of the master's duty the jury that, if the plaintiff was in to his servants to provide special means of notifying them of a fire or other caself, she was still entitled to recover if ualty occurring on his premises. The the defendant failed to do any act duty here sought to be imposed upon which would minimize her injury. The master is of the same kind as that Upon the whole, the case last cited

It seems that, under some circumstances, culpability may be predicable of the failure to warn a servant who is endangered by the occurrence of a casualty of the class discussed in this section. See § 209a, post.

seems to embody the more correct principle. Questions of this type ought, perintendent fails to adopt proper
it is submitted, to be decided by the methods for saving the lives of laborers
jury, and should not be treated as if caught in the mine in which a fire has
they were concluded by an absolute broken out, was held in Bessemer Land
rule of law absolving the master under & Improv. Co. v. Campbell (1898) 121
such circumstances. That the owner Ala. 50, 25 So. 793.
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### CHAPTER II.

WHAT DEGREE OF CARE A MASTER IS BOUND TO EXERCISE FOR THE PROTECTION OF HIS SERVANT.

#### A. GENERALLY.

- Master bound to exercise as much care as a prudent man would exercise under the circumstances.
- 15. Master not bound to exercise more care than a prudent man.
- 16. Care exercised is to be proportioned to the dangers to which the servant is exposed.
  - a. Rule applied to the disadvantage of the master.
  - b. Rule applied to the advantage of the master.
- 16a. Master's violation of, or compliance with, a rule made by himself; implication from.
- 16b. Right to rely upon the recommendations and advice of others.
  - Comparison between the degrees of care owed to a servant and to a stranger.
- B. STANDARD OF DUE CARE; HOW FAR QUALIFIED BY THE MINORITY OF THE SERVANT.
  - Negligence not inferable from the mere employment of a minor to do dangerous work.
  - 19. Greater care must be exercised for the protection of young servants.
  - 20. Limits of this obligation.
  - 21. Employment of minor without his father's consent; effect of.

#### A. GENERALLY.

14. Master bound to exercise as much care as a prudent man would exercise under the circumstances.— The rule defining the nature and extent of the master's obligation with respect to the condition of the agencies of his business may be stated in its most general form as follows: The degree of care required of an employer in protecting his employees from injury is the adoption of all reasonable means and precautions to provide for the safety of his servants while in the performance of their work.¹ What shall be deemed "due care" is to be

¹Dobbins v. Brown (1890) 119 N. Y. N. S. 918. A master "is, no doubt, 188, 23 N. E. 537. "If the employment bound to provide for the safety of his is of a dangerous nature, a duty lies servant in the course of his employon the employer to use all reasonable ment, to the best of his judgment, inprecautions for the protection of the formation, and belief." Priestley v. servant." Romer, L. J., in Williams v. Fowler (1837) 3 Mees. & W. 1, Murph. Birmingham Battery & Metal Co. & H. 305, 1 Jur. 987. (1899) 2 Q. B. 338, 345, 68 L. J. Q. B.

"estimated on a consideration of the facts of each particular case."2 It is "such care as reasonable and prudent men would use under similar circumstances."3 The care which such a man is, for the purposes of this rule, assumed to exercise, is that which he would exercise for his own safety if the instrumentality in question was furnished for his own personal use.4 That is to say, a master is required to furnish "such [appliances] as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances."5

<sup>2</sup> Clarke v. Holmes (1862) 7 Hurlst. caution which a reasonably prudent & N. 937, 31 L. J. Exch. N. S. 356, 8 man would exercise under like circum-Jur. N. S. 992, 10 Week. Rep. 405, per stances." Pullman Palace Car Co. v. Byles, J.

<sup>8</sup> Bertha Zinc Co. v. Martin (1895) 215, 32 N. E. 285; Chicago & A. R. Co. 93 Va. 791, 22 S. E. 869. "The test of v. Mahoney (1879) 4 Ill. App. 262. It negligence is the presence or absence of is not error to refuse an instruction to that degree of area which ordinarily the effect that a master is released." that degree of care which ordinarily the effect that a master is released prudent persons are accustomed to ob- from liability to an employee working prudent persons are accustomed to obfrom flatinty to an employee working serve about the same or similar affairs in a dangerous place, simply because in the same or similar circumstances." the injury was not wilfully inflicted.

Guinard v. Knapp-Stout & Co. Co. St. Louis & T. H. R. Co. v. Egymann (1897) 95 Wis. 482, 70 N. W. 671. To (1895) 60 Ill. App. 291, Affirmed in same effect, see Bergquist v. Chandler (1896) 161 Ill. 155, 43 N. E. 620. The Iron Co. (1892) 49 Minn. 511, 52 N. W. degree of diligence due, respectively, 136. The standard of the duty to use between employer and employee under care "is fixed by reference to what we the laws of another state will be held should expect in like case from a man to be only ordinary diligence, in the about of ordinary sense, knowledge, and prusence." Pollock, Torts, p. 24. A few Richmond & D. R. Co. v. Mitchell variants of this form of expression may (1893) 92 Ga. 77, 18 S. E. 290. 

and careful man exercises in like of "reasonable and ordinary care, skill, similar work." Jungnitsch v. Michiand diligence"]); or, "such care as a gan Malleable Iron Co. (1895) 105 prudent man would exercise for his Mich. 270, 63 N. W. 296. A master is own protection if his own person or life "held to the employment of every pre-were exposed to the danger which would

In the case of a corporation the obligation is to use "such watchfulness, caution, and foresight as, under all the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise."6

The phrases used by judges in describing the nature of the care which this ideally prudent man may be supposed to employ are quite numerous and diversified. For purposes of illustration, some of these phrases are tabulated in the note below; but it is scarcely necessarv to say that the list of authorities does not pretend to be exhaustive as regards the simpler and more common combinations of words. Additional examples of similar terminology will be found in the subsequent chapters which deal with the master's duties as to Inspection (xi.), Employment of Servants (xiii.), and Rules (xv.).

result from their use" (Sappenfield v. prudent men exercise in their own af-[1890] 91 Ala. 487, 8 So. 552). In stances." Warner v. Erie R. Co. Louisville & N. R. Co. v. McCoy (1883) (1868) 39 N. Y. 468. [1890] 91 Ala. 201,
Louisville & N. R. Co. v. McCoy (1883)
81 Ky. 403, the plaintiff in error had obtained from the trial judge an instruction to the effect that "ordinary Ayers v. Richmond & D. R. Co. (1888) eare is that degree of care which an ordinarily careful and prudent man usually exercises under like or similar (1856) 28 Vt. 59, 65 Am. Dec. 222.

Diligence and circumspection. Coulong Richmond & D. R. Co. (1881) 84 the transaction of his business, when the transaction of his business, when the same may endanger the safety of others." But this attempt to enlarge the obligations of the master did not succeed. "It is against the laws of nature." State and caution. Porter v. By the obligations of the master did not succeed. "It is against the laws of nature." State and caution. Porter v. Skill, care, and caution. Porter v. Mo. 66, 36 Am. Rep. 454; Muirhead v. succeed. "It is against the laws of nature." State and caution. Porter v. All Mainhald & St. J. R. Co. (1885) 19 Mo. succeed. "It is against the laws of nature," said the court, "to expect a man ture," said the court, "to expect a man of the greatest prudence to take the same care of an adult engaged in the dangerous employment of brakesman, (1856) 25 L. J. C. P. N. S. 261, 18 C. which he has voluntarily taken upon himself, and agreed to perform with that degree of care upon his own part which ordinarily prudent persons of his class usually take in protecting themselves from danger, as he would of his own family placed in a like predication of the sect-sugar Co. (1895) 71 Fed. 270; ment. For what would not a husband and father hazard to protect his own Woughter (1892) 56 Ark. 206. 19 S. W. family from the ordinary dangers to 575; Matthews v. Bull (1897; Cal.) 47 which a brakesman is exposed?" Pac. 773; Wells v. Coe (1886) 9 Colo.

<sup>6</sup> Wabash R. Co. v. McDaniels (1882) Main Street & Agri. Park R. Co. [1891] 107 U. S. 454, 37 L. ed. 605, 2 Sup. Ct. 91 Cal. 48, 27 Pac. 590); or, "the care Rep. 932. Or "such reasonable care as and diligence which a man of ordinary a corporation managed by prudent men prudence, engaged in a like business, could use." Union P. R. Co. v. O'Brien would exercise for his own protection, (1892) 1 C. C. A. 354, 4 U. S. App. 221, and the protection of his property" 49 Fed. 538. Or, as another case has (Smoot v. Mobile & M. R. Co. [1880] it, the directors are required to exer-67 Ala. 13, 18; Louisville & N. R. Co. cise that "reasonable care, skill, and v. Allen [1885] 78 Ala. 494); or, "that foresight over the affairs of the corpodegree of care which very careful and ration which reasonable and prudent men occupying such positions ordinar-

App. 634 (instruction to that effect ap-

and father hazard to protect his own Woughter (1892) 56 Ark. 206, 19 S. W.

(1893) 119 Mo. 316, 24 S. W. 782; kind." Wright v. Acw York C. R. Co. (1858)

159, 11 Pac. 50; Diamond State Iron which the declaration in Priestley v. Co. v. Giles (1887) 7 Houst. (Del.) Fowler (1837) 3 Mees. & W. l, Murph. 556, 11 Atl. 189; Chicago Anderson & H. 305, 1 Jur. 987, was held to be Pressed Brick Co. v. Sobkowiak (1892) insufficient were deemed unsatisfactory. 45 Ill. App. 317; Consolidated Coal Co. "The declaration," said the court, v. Scheller (1892) 42 Ill. App. 619; "seems to have been considered as set-Indianapolis & St. L. R. Co. v. Watson ting forth a right of action growing out (1888) 114 Ind. 20, 15 N. E. 824; Louis- of a contract of warranty; whereas, in ville, N. A. & C. R. Co. v. Bates (1896) fact, it alleged substantially that from 146 Ind. 564, 45 N. E. 108; Greenleaf the relation of master and servant there v. Illinois C. R. Co. (1870) 29 Iowa, 14, was to be implied, on the part of the 4 Am. Rep. 181; St. Louis, Ft. S. & W. master, a contract to use due and R. Co. v. Irwin (1887) 37 Kan. 701, 16 proper care. If the implied contract Pac. 146; Atchison, T. & S. F. R. Co. were that the master should use ordiv. Holt (1883) 29 Kan. 149; Cherokee nary care in procuring a suitable car-& P. Coal & Min. Co. v. Britton (1896) riage and suitable fellow servants for 3 Kan. App. 292, 45 Pac. 100; Illinois the plaintiff, the inconvenient and ab-C. R. Co. v. Hilliard (1896) 99 Ky. surd consequences which the decision in 684, 37 S. W. 75; Britton v. Northern that case seems to have been intended P. R. Co. (1891) 47 Minn. 340, 50 N. to avoid would not have resulted from W. 231; Kcoun v. St. Louis R. Co. holding the declaration sufficient. The (1897) 141 Mo. 86, 41 S. W. 926; terms 'ordinary and reasonable care Burnes v. Kansas City, Ft. S. & M. R. and diligence' have an exactly defined Co. (1895) 129 Mo. 41, 31 S. W. 347; meaning in law, and perhaps they Williams v. St. Louis & S. F. R. Co. should be used in declarations of this

Reasonable care. Smith v. Baker 28 Barb. 80; Chesson v. John L. Roper [1891] A. C. 325, 362, 60 L. J. Q. B. N. Lumber Co. (1896) 118 N. C. 59, 23 S. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, Lumber Co. (1690) 118 N. C. 39, 25 S. S. 603, 65 L. I. N. S. 407, 55 J. P. 600, E. 925; Gibbes v. Greenville & C. R. Co. 40 Week. Rep. 392; Williams v. Bir-(1883) 19 S. C. 492; East Tennessee, mingham Battery & Metal Co. [1899] V. & G. R. Co. v. Aiken (1890) 89 2 Q. B. 338, 68 L. J. Q. B. N. S. 918; Tenn. 245, 14 S. W. 1082; Gulf, C. & Holland v. Tennessee Coal, I. & R. Co. S. F. R. Co. v. Silliphant (1888) 70 (1890) 91 Ala. 444, 12 L. R. A. 232, Tex. 623, 8 S. W. 673; Gulf, C. & S. F. 850. 524; Mackey v. Mackey C. P. R. P. Co. v. Welle (1891) 81 Tor 685 17 Co. (1890) 8 Mackey 2020 G. P. R. R. Co. v. Wells (1891) 81 Tex. 685, 17 Co. (1890) 8 Mackey, 282; Colorado S. W. 511; Southwest Virginia Improv. Midland R. Co. v. O'Brien (1891) 16 Co. v. Andrew (1889) 86 Va. 270, 9 Colo. 219, 27 Pac. 701; O'Keefe v. Na-S. E. 1015; Baltimore & O. R. Co. v. tional Folding Box & Paper Co. (1895) McKenzie (1885) 81 Va. 71; Chesa- 66 Conn. 38, 33 Atl. 587; Quinn v. peake & O. R. Co. v. Lash (1896; Va.) Johnson Forge Co. (1892) 9 Houst. 24 S. E. 385; Hoffman v. Dickinson (Del.) 338, 32 Atl. 858; Edward Hincs (1888) 31 W. Va. 142, 6 S. E. 53. An Lumber Co. v. Ligas (1898) 172 Ill. (1888) 31 W. Va. 142, 6 S. E. 53. An Lumber Co. v. Ligas (1898) 172 III. instruction defining the extent of the 315, 50 N. E. 225, Affirming (1896) 68 master's duty by this epithet is unex- III. App. 523; United States Rolling ceptionable. Gibbes v. Greenville & C. Stock Co. v. Wilder (1886) 116 III. R. Co. (1883) 19 S. C. 492. In Ex 100, 5 N. E. 92; Pioneer Fireproof parte Johnson (1883) 19 S. C. 492, Constr. Co. v. Howell (1901) 189 III. counsel contended that the true meas- 123, 59 N. E. 535; Pennsylvania Co. v. ure of liability was "all reasonable and Witte (1896) 15 Ind. App. 583, 43 N. proper care," and that these words E. 319, 44 N. E. 377; Clark County Ceshould have been used in the instruction. But the court said it did not see App. 630, 45 N. F. 817; Correct Co. tion. But the court said it did not see App. 630, 45 N. E. 817; Corson v. Coal any appreciable difference in the two Hill Coal Co. (1897) 101 Iowa, 224, 70 phrases. The rule that ordinary care N. W. 185; Hannah v. Connecticut satisfies the requirements of the law River R. Co. (1891) 154 Mass. 529, 28 necessarily involves the corollary that N. E. 682; Tierney v. Minneapolis & St. an employer is not culpable where the L. R. Co. (1885) 33 Minn. 311, 53 Am. evidence shows that a "very high de-Rep. 35, 23 N. W. 229; Brown v. Hergree of care" had been exercised. Al- shey Land & Lumber Co. (1896) 65 lerton Packing Co. v. Egan (1877) 86 Mo. App. 162; Comben v. Belleville Ill. 253. In Fifield v. Northern R. Co. Stone Co. (1896) 59 N. J. L. 226, 36 (1860) 42 N. H. 225, the grounds upon Atl. 473; Coppins v. New York C. &

H. R. R. Co. (1890) 122 N. Y. 557, 25 N. E. 915, Affirming (1888) 48 Hun, 292; Bailcy v. Rome, W. & O. R. Co. (1893) 139 N. Y. 302, 34 N. E. 918; Nutt v. Southern P. Co. (1894) 25 Or. 291, 35 Pac. 653; Philadelphia, W. & B. R. Co. v. Keenan (1883) 103 Pa. 124; Wannamaker v. Burke (1886) 111 Pa. 423, 2 Atl. 500; Moore v. Pennsylvania R. Co. (1895) 167 Pa. 495, 31 Atl. 734; Houston & T. C. R. Co. v. Myers (1881) 55 Tex. 110; Bonner v. La None (1891) 80 Tex. 117, 15 S. W. River R. Co. 803; Oliver v. Ohio (1896) 42 W. Va. 703, 26 S. E. 444.

Due care. Hewitt v. Flint & P. M. R. Co. (1887) 67 Mich. 61, 34 N. W. 659; Sanders v. Etiwan Phosphate Co. (1883) 19 S. C. 510; Little Rock & Ft. S. R. Co. v. Eubanks (1886) 48 Ark. 460, 3 S. W. 808; Cullen v. National Sheet Metal Roofing Co. (1887) 46 Hun, 502; Rice v. King Philip Mills (1887) 144 Mass. 229, 59 Am. Rep. 80, 11 N. E. 101; Roth v. Northern Pacific Lumbering Co. (1889) 18 Or. 205, 22 Pac. 842.

Proper care. Ryan v. Fowler (1862) 24 N. Y. 410, 82 Am. Dec. 315. That the phrases "ordinary care" and "proper care, are identical in meaning, see Louisville & N. R. Co. v. Kelly (1894) 11 C. C. A. 260, 24 U. S. App. 103, 63 Fed. 407; Wabash R. Co. v. McDaniels (1882) 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932, § 16, note 15, and § 22a, note 5, post.

Suitable care. Gibson v. Pacific R. Co. (1870) 46 Mo. 163, 2 Am. Rep. 497.

Ordinary diligence. Missouri P. R. Co. v. Lyde (1882) 57 Tex. 505; Quintana v. Consolidated Kansas City Smelting & Ref. Co. (1896) 14 Tex. Civ. App. 347, 37 S. W. 369; Jones v. Shaw (1897) 16 Tex. Civ. App. 290, 41 S. W.

Reasonable diligence. Wabash R. Co. v. McDaniels (1882) 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; The France (1894) 8 C. C. A. 185, 20 U. S. App. 212, 59 Fed. 479; Bennett v. Syndicate Ins. Co. (1888) 39 Minn. 254, 39 N. W. 488; Chicago & E. I. R. Co. v. Driscoll (1897) 70 III. App. 91.

Proper diligence. Anderson v. Bennett (1888) 16 Or. 515, 19 Pac. 765.

Ordinary care and diligence. Warner v. Eric R. Co. (1868) 39 N. Y. 468; Bohn v. Chicago, R. I. & P. R. Co. (1891) 106 Mo. 429, 17 S. W. 580.

Ordinary care and prudence. Gibson v. Pacific R. Co. (1870) 46 Mo. 163, 2 Am. Rep. 497; Mansfield Coal & Coke

Co. v. McEnery (1879) 91 Pa. 185, 38

Am. Rep. 662.

Ordinary skill and care. Pennsylvania Co. v. Whitcomb (1887) 111 Ind. 212, 12 N. E. 380; Chesson v. John L. Roper Lumber Co. (1896) 118 N. C. 59, 23 S. E. 925.

Ordinary diligence or common prudence. Central R. & Bkg. Co. v. Lanier (1889) 83 Ga. 587, 10 S. E. 279.

Ordinary care, skill, and diligence. Trinity County Lumber Co. v. Denham (1892) 85 Tex. 56, 19 S. W. 1012.

Reasonable care and caution (or precaution). Missouri, K. & T. R. Co. v. Baker (1896; Tex. Civ. App.) 37 S. W. 94 (instruction embodying this phrase is wrongly refused); Burlington & C. R. Co. v. Liehe (1892) 17 Colo. 280, 29 Pac. 175; Porter v. Hannibal & St. J. R. Co. (1879) 71 Mo. 66, 36

Am. Rep. 454.

Am. Rep. 454.

Reasonable care and diligence. Atchison, T. & S. F. R. Co. v. Napole (1895) 55 Kan. 401, 40 Pac. 669; Hallower v. Henley (1856) 6 Cal. 209; Southern P. R. Co. v. Aylward (1891) 79 Tex. 675, 15 S. W. 697; Babcock v. Old Colony R. Co. (1890) 150 Mass. 467, 23 N. E. 325; Cleveland, C. C. & St. L. R. Co. v. Selsor (1894) 55 Ill. App. 685. No higher measure of care App. 685. No higher measure of care than that expressed by this phrase can be demanded, even where the handling of the appliance which caused the injury was outside the scope of the servant's employment. Mary Lee Coal & R. Co. v. Chambliss (1892) 97 Ala. 171, 11 So. 897.

Reasonable care and prudence. Washington & G. R. Co. v. McDade (1890) 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; The France (1894) 8 C. C. A. 185, 20 U. S. App. 212, 59 Fed. 479; Louisville & N. R. Co. v. Orr (1882) 84 Ind. 50; Marshall v. Widdicomb Furniture Co. (1887) 67 Mich. 175, 34 N. W. 541; Harley v. Buffalo Car Mfg. Co. (1894) 142 N. Y. 31, 36 N. E. 813; Probst v. Delamater (1885) 100 N. Y. 266, 3 N. E. 184.

Reasonable care and skill. Rogers v. Leyden (1890) 127 Ind. 50, 26 N. E.

210.

Reasonable skill and diligence. Plefka v. Knapp-Stout Lumber Co. (1897) 72 Mo. App. 309.

Reasonable care, skill, and diligence. Chicago & E. R. Co. v. Lee (1897) 17 Ind. App. 215, 46 N. E. 543.

Due care and diligence. Painton v. Northern C. R. Co. (1880) 83 N. Y. 7;

A master is bound to exercise ordinary care in furnishing instrumentalities, whether they are of a simple character, or unusually dangerous and complicated.8

## 15. Master not bound to exercise more care than a prudent man.—

Ballard v. Hitchcock Mfg. Co. (1889) Covey v. Hannibal & St. J. R. Co. 51 Hun, 188, 4 N. Y. Supp. 940.

Due care and skill. Union P. R. Co.

S. App. 221, 49 Fed. 538.

Ordinary and reasonable care. Wormell v. Maine C. R. Co. (1887) 79 Me. Sup. Ct. Rep. 756; Gibson v. Pacific R. 397, 10 Atl. 49; Carlson v. Phanix Co. (1870) 46 Mo. 163, 2 Am. Rep. 497. Bridge Co. (1890) 55 Hun, 485, 8 N. Y. Supp. 634; Union P. R. Co. v. Fray and diligence. Brymer v. Southern P. (1890) 43 Kan. 750, 23 Pac. 1039; Co. (1891) 90 Cal. 496, 27 Pac. 371. Joseph Garneau Cracker Co. v. Palmer Reasonable and proper care and dili-(1889) 28 Neb. 307, 44 N. W. 463; gence. Ardesco Oil Co. v. Gilson (1869) Ambrose v. Angus (1895) 61 Ill. App. 63 Pa. 146; Reilly v. Campbell (1894) 304; Consolidated Coal Co. v. Scheller 8 C. C. A. 438, 20 U. S. App. 334, 59 (1891) 42 Ill. App. 619; Mad River & Fed. 990. L. E. R. Co. v. Barber (1856) 5 Ohio St. 541, 67 Am. Dec. 312. An instruc- diligence. Mad River & L. E. R. Co. tion is not erroneous in which the word v. Barber (1856) 5 Ohio St. 541, 67 "judgment" is added to this phrase, as Am. Dec. 312. it is regarded as synonymous, in this connection, with "prudence." Joseph knowledge, care, and discretion. Gal-Garneau Cracker Co. v. Palmer (1889) veston, H. & S. A. R. Co. v. Davis 28 Neb. 307, 44 N. W. 463.

Reasonable and proper vigilance. 301, Atchison, T. & S. F. R. Co. v. Holt 1019.

(1883) 29 Kan. 149.

Ordinary and reasonable care and v. Pacific R. Co. (1870) 46 Mo. 163, 2 diligence. Rush v. Missouri P. R. Co. Am. Rep. 497. (1887) 36 Kan. 129, 12 Pac. 582; St. Louis & S. F. R. Co. v. Weaver (1886) 35 Kan. 412, 57 Am. Rep. 176, 11 Pac. 402; Mad River & L. E. R. Co. v. Barber (1856) 5 Ohio St. 541, 67 Am. Dec. 312; Camp Point Mfg. Co. v. Ballou (1874) 71 Ill. 417; Missouri, K. & T. R. Co. v. Young (1896) 4 Kan. App. 219, 45 Pac. 967; Mangum v. Bullion, B. & C. Min. Co. (1897) 15 Utah. 534, 50 Pac. 834; Missouri, K. & T. R. Co. v. Kirkland (1895) 11 Tex. Civ. App. 528, 32 S. W. 588; Wabash, St. L. & P. R. Co. v. Fenton (1883) 12 Ill. App. 417; Warner v. Chicago, R. I. & P. R. Co. (1895) 62 Mo. App. 184.

Ordinary and reasonable care and supervision. McKee v. Chicago, R. I. & P. R. Co. (1891) 83 Iowa, 616, 13 L.

R. A. 817, 50 N. W. 209.

Reasonable and ordinary care and tion and skill." skill. Hannibal & St. J. R. Co. v. Kanaley (1888) 39 Kan. 1, 17 Pac. 324.

Ordinary and reasonable care and 56 III. App. 181.

foresight. Krampe v. St. Louis Brew
\* Warner v. Chicago, R. I. & P. R.

ing Asso. (1894) 59 Mo. App. 277; Co. (1895) 62 Mo. App. 192.

(1885) 86 Mo. 635.

Reasonable and ordinary care and v. O'Brien (1892) 1 C. C. A. 354, 4 U. prudence. Union P. R. Co. v. Daniels (1894) 152 U.S. 684, sub nom. Union P. R. Co. v. Snyder, 38 L. ed. 597, 14 Reasonable and ordinary care, skill,

Reasonable and proper care and dili-

Reasonable and ordinary care and

Reasonable and proper foresight, (1893) 4 Tex. Civ. App. 468, 23 S. W. 301, Affirmed on rehearing in 23 S. W.

Suitable care and foresight. Gibson

Ordinary precautions. Berns v. Gaston Gas Coal Co. (1885) 27 W. Va. 285, 55 Am. Rep. 304.

Reasonable precautions. Moran v. Corliss Steam Engine Co. (1899) 21 R. I. 386, 45 L. R. A. 267, 43 Atl. 874.

All reasonable precautions. Paterson v. Wallace (1854) 1 Macq. H. L. Cas. 748, per Ld. Cranworth; Buzzell v. Laconia Mfg. Co. (1861) 48 Me. 113, 77 Am. Dec. 212; Cooper v. Central R. Co. (1876) 44 Iowa, 134. See also the cases cited in note 1, supra.

Proper attention and skill. In Knoxville Iron Co. v. Dobson (1881) 7 Lea, 367, it was held that the jury were properly instructed that it is the duty of the employer to see that his machinery is always, while in use, kept in perfect repair, "so far as that can be done by the application of the proper atten-

Ordinary care, prudence, and skill. Chicago & A. R. Co. v. Du Bois (1894)

As the master is deemed to be culpable if he fails to exercise that degree of care which is denoted by one or other of the expressions used to describe the hypothetical conduct of a man of ordinary prudence, so, on the other hand, he is not required to satisfy any higher standard of diligence or skill than that which such a man may be supposed to exercise under the circumstances. Any instruction is correct which embodies this principle.2 On the other hand, it is a misdirection to charge the jury in language the effect of which is to subject the master to more extensive obligations than those indicated by the phrase "ordinary care" or its equivalents.<sup>3</sup> Similarly, any declara-

¹ All that can be required of the mascoln Street R. Co. v. Cox (1896) 48 ter is "that he shall use due and reasonable diligence in providing safe and L. E. R. Co. v. Barber (1856) 5 Ohio sound machinery, and in the selection St. 541, 67 Am. Dec. 312; Hannibal & of fellow servants of competent skill St. J. R. Co. v. Kanaley (1888) 39 and prudence, so as to make it reasonably probable that injury will not oc-P. Co. (1894) 25 Or. 291, 35 Pac. 653; cur in the exercise of the employment." Texas & P. R. Co. v. McCoy (1896) 90 Wonder v. Baltimore & O. R. Co. Tex. 264, 38 S. W. 36; Missouri, K. & (1870) 32 Md. 411, 3 Am. Rep. 143. T. R. Co. v. Hauer (Tex. Civ. App. If the master "employs such reasonable 1897) 43 S. W. 1078. In one case it care and prudence in selecting or order-was remarked that the master is bound There is no obligation incumbent upon him to use the highest skill, the greatest foresight, extraordinary care. East Tennessee, V. & G. R. Co. v. Aiken Cooper v. Central R. Co. (1876) 44 (1890) 89 Tenn. 245, 14 S. W. 1082. Iowa, 134. Compare the language used in Peirce v. Clavin (1897) 27 C. C. A. a railroad company cannot recover for 227, 53 U. S. App. 492, 82 Fed. 550; an injury caused by a defect common Atchison, T. & S. F. R. Co. v. Meyers to railroads, and such as could not have (1894) 11 C. C. A. 439, 24 U. S. App. been avoided by reasonable care and at-295, 63 Fed. 743; Reed v. Stockmeyer tention on the part of the company, (1896) 20 C. C. A. 381, 34 U. S. App. was approved in Little Rock & Ft. S. 727, 74 Fed. 186; Louisville & N. R. R. Co. v. Eubanks (1886) 48 Ark. 460, Co. v. Johnson (1897) 27 C. C. A. 367, 35 W. 808.

3 N. So. W. 808.

3 N. instruction that a master is bound "to do everything that can be 73 U. S. App. 381, 81 Fed. 679; Little

8 An instruction that a master is

Rock & Ft. S. R. Co. v. Duffcy (1880) bound "to do everything that can be

35 Ark. 602; North Chicago Rolling reasonably done for the safety of his

Mills Co. v. Monka (1879) 4 Ill. App. employees" is erroneous. Galveston, H.

care and prudence in selecting or order- was remarked that the master is bound ing what he requires in his business as to provide for the servants' safety "to every prudent man is expected to emthe best of his skill and judgment." ploy in providing himself with the con-Baltimore & O. R. Co. v. McKenzie veniences of his occupation, this is all (1885) 81 Va. 71. But the cases cited that can be required of him, and he is in the next note show that this phrase only responsible where he has failed to would, in many courts at least, be conuse such care in securing the making sidered misleading if used in an inof such machinery by competent and struction to a jury. The mere fact skilful persons, or in the selection that a corporation, an employee in thereof." Marshall v. Widdicomb Fur- whose machine shop was killed, was niture Co. (1887) 67 Mich. 175, 34 N. also the owner of a railroad which it W. 541. "Extraordinary vigilance" is operated, and was sued as such in its not exacted of the master. Ardesco corporate name, does not fix upon it a Oil Co. v. Gilson (1869) 63 Pa. 146. different or higher degree of liability There is no obligation incumbent upon than that of other machine owners to-

664; Missouri, K. & T. R. Co. v. Young & S. A. R. Co. v. Gormley (1898) 91 (1896) 4 Kan. App. 219, 45 Pac. 963; Tex. 393, 43 S. W. 877. A charge that Atchison, T. & S. F. R. Co. v. Winston a railway company should protect its (1896) 56 Kan. 456, 43 Pac. 777; Line employees from injury by reason of la-

tion is bad which is based on the assumed existence of a duty to use any higher degree of care than that described as "ordinary;" but it will be construed as a whole, and if, when subjected to this test, it does not propose an excessively high standard, it will stand against a demurrer.4

A mere error of judgment does not import culpability.<sup>5</sup>

A master is not bound to take into account the contingency that either his servants or third persons will fail to use ordinary care. See chapter IV., post. Nor is he required to anticipate improbable occurrences. See chapter x., post.

# 16. Care exercised is to be proportioned to the dangers to which the

tent defects, "so far as human care or foresight" can do it, is erroneous. Missouri P. R. Co. v. Lyde (1882) 57 Tex. 505. To the same effect is Cleveland, C. C. & St. L. R. Co. v. Selsor (1894) 55 Ill. App. 685, where an instruction declaring the defendant to be bound to do "all that human care, vigilance, and foresight can do" was disapproved. An instruction that negliunder similar circumstances, and that want of ordinary care on the part of plaintiff is the absence of such care as ordinary persons "skilled in the busi-ness" he was engaged in ordinarily obness" he was engaged in ordinarily observe under similar circumstances, is where one count declares that it was erroneous. English v. Galveston, H. & his duty "to use due and proper care S. A. R. Co. (1899) 22 Tex. Civ. App. for the safety" of the plaintiff, and "to 3, 53 S. W. 57. A requested amendment of an instruction with reference to the degree of care which a master must exercise, by the addition of the words "to the best of its skill and judg-to keep the machinery, etc.," in as good words "to the best of its skill and judg-ment," is properly refused. McDonald v. Norfolk & W. R. Co. (1897) 95 Va. 98, 27 S. E. 821. An instruction that a railway company should keep its track in the condition least likely to cause injury, so far as this can reasonably be done, in an action for negligently causing the death of one of its brakemen, is erroneous as imposing on the company the duty to use the "highest degree of diligence." Missouri P. merely with a duty to use "reasonable" R. Co. v. Gibson (1896) 56 Kan. 661, care. South West Improv. Co. v. 44 Pac. 612. An instruction that a Smith (1888) 85 Va. 306, 7 S. E. 365. railroad company owes the "highest degree of care" to its employees is error. (1898) 20 Wash 294, 55 Pac. 119. tions was to the effect that a railway the death of some of the miners.

tent defects, "so far as human care or company's duty is not performed simply by employing competent men to re-pair and inspect its cars, but it must see that they are actually kept in repair; and its failure to do so will render it liable for any injury to an employee resulting therefrom. In another and foresight can do" was dis-approved. An instruction that negli-gence on the part of defendant is the want of such care and prudence as per-sons "skilled in that business" about the was also laid down that the meas-ure of the company's duty was to ex-ercise "ordinary care." It was held that, taken as a whole, the instruction did not impose any greater duty. it was also laid down that the measdinary care.

<sup>4</sup> A complaint is not demurrable on the ground that it alleges that the employer was bound to use a degree of

order, safe condition, and under as good control as human care, foresight, and The words "due and proper care," in the first count, and the word "reasonably," in the second, qualify the remainder of the expressions, and permit the complaint to be construed in such a sense that it charges the employer

neous. Texas C. R. Co. v. Lyons (Tex. where the stopping of the air shaft of Civ. App.; 1896) 34 S. W. 362. In For- a fan in a mine under the influence of dyce v. Culver (1893) 2 Tex. Civ. App. the excitement and confusion occa-569, 22 S. W. 237, one of the instruc- sioned upon the discovery of fire caused servant is exposed.—a. Rule applied to the disadvantage of the muster.—The well-known definition of negligence by Willes, J., as being "the absence of care according to circumstances" is applicable to cases involving injuries to servants.2 The degree of care, therefore, which the master is bound to exercise, is measured by the dangers to be apprehended or avoided,3 or, as another case puts it, "must be proportionate to the dangerous nature of the means, instruments, and machinery used;"4 or, in the words of the Supreme Court of the United States, the "master is bound to observe all the care which prudence and the exigencies of the situation require, in providing the servant with machinery or other instrumentalities adequately safe for use by the latter."5

Dell v. Phillips Glass Co. (1895) 169 Pa. 549, 32 Atl. 601.

(1879) 71 Mo. 72, 36 Am. Rep. 454 (in-

App. 634. master is "to exercise greater care, the premises and their surroundings, when . . . [the machinery] in use There are employments that of themwas known, or might by inquiry and selves are necessarily dangerous, in inspection have been ascertained, to be connection with which no position can dangerous, than when it was comparable made secure. In such case the law Turner v. Goldsboro Lumber Co. (1896) ordinary care that the dangers of the 119 N. C. 387, 26 S. E. 23. What is employment are not unnecessarily enreasonable and ordinary care depends larged; that he shall take proper care on the nature and character of the imto furnish such safeguards as are custometric to furnish such safeguards as are custometric to furnish such safeguards.

<sup>1</sup> Vaughan v. Taff Vale R. Co. (1860) plements, and the dangers to be encoun-5 Hurlst. & N. 679, 688, 29 L. J. Exch. tered in their use. Covey v. Hannibal N. S. 247, 6 Jur. N. S. 899, 2 L. T. N. & St. J. R. Co. (1885) 86 Mo. 635. S. 394, 8 Week. Rep. 594. "In determining the question of reason-<sup>2</sup> Cases in which it was expressly able care on the part of the master, adopted are Gates v. Pennsylvania R. . . . regard must be had to the Co. (1893) 154 Pa. 566, 26 Atl. 598; risks and dangers attending the use of the instrumentality furnished the servant in his employment." Anderson v. Minnesota & N. W. R. Co. (1888) 39 Minn. 523, 41 N. W. 104. "The care <sup>8</sup> De Graff v. New York C. & H. R. Minnesota & N. W. R. Co. (1888) 39 R. Co. (1879) 76 N. Y. 125. Minn. 523, 41 N. W. 104. "The care \*Porter v. Hannibal & St. J. R. Co. that the law requires for the safety of the employee is that care which is restruction approved); Muirhead v. Han-garded by the good common sense of nibal & St. J. R. Co. (1885) 19 Mo. mankind as reasonably due under all the circumstances of the case." Co-<sup>6</sup> Hough v. Texas & P. R. Co. (1879) lumbus & X. R. Co. v. Webb (1861) 12 100 U. S. 213, 25 L. ed. 612. Other Ohio St. 475. "The measure of a masstatements of a similar tenor are the ter's duty to his servant is reasonable following: "The measure of skill and care, having relation to the parties, the following: "The measure of skill and care, having relation to the parties, the care required of those who use and control such agencies of power and danger must bear proportion to the consequentus bear proportion to the consequentus bear proportion to the consequentus and attention." Oliver v. Ohio River R. Co. (1896) 42 W. Va. 703, 26 S. E. such care and skill." Texas & P. R. 444. In Reed v. Stockmeyer (1896) Co. v. Barrett (1895) 14 C. C. A. 373, 20 C. C. A. 381, 34 U. S. App. 727, 74 30 U. S. App. 196, 67 Fed. 214. "The amount of care required is measured by duty of the master to provide a reasonthe circumstances of each case, dependably safe place in which the servanting upon the kinds of machinery used, may perform his work, and to keep it the circumstances of each case, depending upon the kinds of machinery used, may perform his work, and to keep it the risks incident to its use, and the in such suitable condition, said: "This hazard of the business in which used." duty is not absolute, but relative. It Jones v. New York C. & H. R. R. Co. is measured by the nature and characters in "the everying greater age." the premises and their surroundings. tively safe under all circumstances." requires of the master that he shall use

The cases in which this principle suggests itself as the appropriate criterion of the master's fulfilment or nonfulfilment of his legal obligations may be said to fall into three categories:

(1) Those in which the business carried on by him is, as regards its ordinary incidents, unusually dangerous, such as that of a railway company,6 or of mine owners,7 or of persons operating an elevator,8

tomarily employed in the performance of like hazardous service, so that the nies are engaged in conducting for servant exercising proper care may renprofit a business which at the best is der his service without exposure to hazardous to human life. In providing scope of the employment as usually car- use of their employees, their plain legal ried on." In Harroun v. Brush Electury, to say nothing of the dictates of tric Light Co. (1896) 12 App. Div. 126, humanity, requires great vigilance. 42 N. Y. Supp. 716, the court approved They cannot be heard to excuse themacharge, that "the care and prudence selves from taking all reasonable care [exercised by the employer in the selectury on the ground that care involves labor lexercised by the employer in the selection and provision of appliances for or expense." Morton v. Detroit, B. C. the use of the employee] must be produced to what may properly be expected of him under the circumstances, and increase in a corresponding ratio 552; St. Louis, A. & T. R. Co. v. Tripwith the danger and hazard necessarily lett (1891) 54 Ark. 289, 11 L. R. A. connected with the use of the appliantion of the connected with the language used in in which the injured servant was expensed to the "extreme" dangers of the ces." Compare the language used in in which the injured servant was exNew York & C. Mining Syndicate & Co.
v. Rogers (1887) 11 Colo. 6, 16 Pac.
rose (1887) 11 Colo. 6, 16 Pac.
rose (1897) 101 Ky. 626, 42 S. W. 744,
said to be the duty of a railroad comlace (1897) 101 Ky. 626, 42 S. W. 744,
said to be the highest degree of
diligence" to construct a safe roadbed,
sa Md. 257, 34 Atl. 872; Lincoln Street
R. Co. v. Cox (1896) 48 Neb. 807, 67 N. Columbus, C. & I. C. R. Co. v. Troesch
W. 740; Anderson v. Bennett (1888)
16 Or. 515, 19 Pac. 765; Missouri P. R.
16 Or. 515, 19 Pac. 765; Missouri P. R.
17 Ov. Crenshaw (1888) 71 Tex. 340, 9
18 Tex. 340, 9
19 Tex. 340, 9
11 Tex. 340, 9
11 Tex. 340, 9
12 Tex. 340, 9
13 Tex. 340, 9
13 Tex. 340, 9
14 Tex. 340, 9
15 Tex. 340, 9
16 Tex. 340, 9
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18 Tex. 340, 9
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13 Tex. 340, 9
14 Tex. 340, 9
15 Tex. 340, 9
16 Tex. 340, 9
17 Tex. 340, 9
18 Tex. 340 tioned to such risk); Croker v. Pusey & [1874] 71 III. 294). These statements J. Co. (1900) 3 Penn. (Del.) pt. 1, p. seem to be inconsistent with that of the 1, 50 Atl. 61; Trihay v. Brooklyn Lead Illinois court of appeals in a very remin. Co. (1886) 4 Utah, 468, 11 Pac. 612; Stockwell v. Chicago & N. W. R. the master is not bound to exercise a Co. (1898) 106 Iowa, 63, 75 N. W. 665. "high degree" of diligence. Wabush R. It has, however, been held that an instruction that it was the duty of the defendant to exercise that degree of care, lace (1897) 101 Ky. 626, 42 S. W. 744, caution, and vigilance which the circumstances justly demanded is objectionable as submitting to the jury, as owner must use "all appliances readily the standard of care required, their the standard of care required, their attainable, known to science, for the own opinion as to what caution and prevention of accidents arising from diligence were demanded by the circum- the accumulation of gas or other exstances of the particular case. The plosive substances in the mine," was aptrial judge should state that ordinary proved in Western Coal & Min. Co. v. care is the standard, and then define Berberich (1899) 36 C. C. A. 364, 94 what ordinary care is. Texas Midland Fed. 329. R. Co. v. Taylor (1898; Tex. Civ. App.) 44 S. W. 892.

6 "The managers of railroad compadangers that are not within the obvious sound tools and safe appliances for the

<sup>8</sup> McGregor v. Reid, M. & Co. (1898) 76 Ill. App. 610 (master bound to use or engaged in the preparation, storage, or handling of explosive and inflammable substances, 9 or using steam-boilers, 10 or using electrical appliances.11

mand the exercise of "ordinary" care.

ciple that, in all occupations which are attended with great and unusual danson (1869) 63 Pa. 146. ger there must be used all appliances readily attainable, known to science, 14 C. C. A. 373, 30 U. S. App. 196, 67 for the prevention of accidents, and that the neglect to provide such readily son v. Boston & M. Consol. Copper & S. attainable appliances will be applianced by the such readily son v. Boston & M. Consol. Copper & S. attainable appliances will be applianced by the such readily son v. Boston & M. Consol. Copper & S. attainable appliances will be regarded as proof of culpable negligence. If an 298 (similar accident). occupation attended with danger can be "In view of the subtle

"great care"). In Wise v. Ackerman 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464. (1892) 76 Md. 375, 25 Atl. 424, the "Persons and corporations using dancourt held that, as an elevator is a dan- gerous and explosive chemicals in exgerous machine in many respects, an perimental processes are charged with employer is bound to exercise "great the highest degree of care to prevent accare" to render "as free from danger cident and injury to others. The law as careful foresight and precaution may imposes upon them the employment of reasonably dictate" an elevator which all reasonable safeguards against danis intended primarily for freight, but ger from explosion. Not only should which employees are authorized to use. the machinery be safe, but all persons A contrast was drawn between such an engaged in working about it should be elevator and freight elevators which informed of the dangerous character of servants are allowed to use as mere lithe appliances and material used." censees, in which case they can only demand the exercise of "ordinary" care. (1900) 95 Ill. App. 601–604. It may ""All occupations producing articles properly be found to be negligence to or works of necessity, utility, or con- carry dynamite and caps in sawdust, in or works of necessity, utility, or concarry dynamite and caps in sawdust, in venience may undoubtedly be carried an exposed condition, on a locomotive, on, and competent persons familiar where they are unprotected from with the business and having sufficient sparks. Schwartz v. Shull (1898) 45 skill therein may properly be employed W. Va. 405, 31 S. E. 914. Compare, upon them; but in such cases, where also, Myrberg v. Baltimore & S. Min. & the occupation is attended with danger Reduction Co. (1901; Wash.) 65 Pac. to life, body, or limb, it is incumbent 539, where it was held that the exposon the promoters thereof and the employers of others thereon to take all months, within a few feet of the enreasonable and needed precautions to trance to defendant's mine, where plainreasonable and needed precautions to trance to defendant's mine, where plainsecure safety to the persons engaged in tiff and other employees were daily resettle safety to the persons engaged in the and tokel employees were daily retheir prosecution, and for any negligence, gence in this respect, from which injury (The evidence was that exposure renfollows to the persons engaged, the produced the dynamite more liable to exmoters or the employers may be held plode.) "What is due care and ordiresponsible, and mulcted to the extent nary diligence will much depend on the of the injury inflicted. . . . Occu- kind of business which is carried on, pations, however important, which can- and the sort of material which is hannot be conducted without necessary dled. The proprietor of a powder mill danger to life, body, or limb, should not must exert more precaution than the be prosecuted at all without all reason- master of a blacksmith shop. So, in able precautions against such dangers such an establishment as that carried afforded by science. The necessary on by the defendants below,-in refindanger attending them should operate ing oil from crude petroleum, a mateas a prohibition to their pursuit with- rial highly inflammable and explosive, out such safeguards. Indeed, we think -we are bound to examine the question it may be laid down as a legal prin- of negligence with a regard to this cir-

son v. Boston & M. Consol. Copper & S. Min. Co. (1895) 16 Mont. 164, 40 Pac.

11 In view of the subtle and dangerous prosecuted by proper precautions with- nature of electricity, a master who out fatal results, such precautions must makes use of it to operate a crane is be taken by the promoters of the purbound to exercise a "very high degree suit or employers of laborers thereon." of care" to see that any part of it Mather v. Rillston (1894) 156 U. S. which is liable to come in contact with

- (2) Those in which the perils incident to working with one particular instrumentality or set of instrumentalities are greater than those incident to working with other instrumentalities employed in the same concern. 12
- (3) Those in which the necessity for exercising an unusually high degree of care is predicated for the reason that, on some particular occasion, the servant's environment is rendered specially perilous by some cause which is not operative under the normal conditions of the employment.13

danger to life; and . . . when the duty of making provision against the legislature authorizes a corporation to increased risk arising from its being use such an agency in the public streets built in proximity to a mountain range, the law implies a duty of using a very Union P. R. Co. v. O'Brien (1892) 1 high degree of care in the construction C. C. A. 354, 4 U. S. App. 221, 49 Fed. and operation of the appliances for the 538. In a mining case it was said: use of that agency, requiring the corporation to employ every reasonable present to machinery and appliances is caution known to those possessed of the much less where the service required to knowledge and skill requisite for the be performed is on the surface of the safe treatment of such an agency, for earth, in open day, and its character providing against all dangers incident and appliances are simple, than when to its use, and holds it accountable for the injury of any person due to the neglect of that duty, whether the person injured is or is not one of its own em-### Indicates of the control of the "greatest care and diligence" are demanded where the employment is a dangerous one, like that of a lineman. See also Denver Consol. Electric Co. v. Simpson (1895) 21 Colo. 371, 31 L. R. A. 566, 41 Pac. 499.

12 In Columbus & X. R. Co. v. Webb (1861) 12 Ohio St. 475, it was laid down that "reasonable care for the safety of the employee, which requires of the employer always an attention, in did not take such precautions as were measure, commensurate to his exposproper in view of the morning being ure to danger, for the reasonable protection and safety of the employee, would evidently require of the employer buffers of foreign cars overlap has been greater vigilance and care in regard to referred to as a special reason for seethe roadworthiness of an express train, ing that there is no such overlapping. or even a common passenger train, than Gottlieb v. New York, L. E. & W. R. of a freight train." A railway com- Co. (1885) 100 N. Y. 462, 3 N. E. 344. pany is bound to use more care in keep. Where a railroad company locates a ing the surface of a large and busy switch on a grade and curve in its yard in safe condition than is incum-track, so that the danger to employees bent upon it in this respect where the in the operation of its road is increased,

the workmen is properly insulated yard is a small one. Rifley v. Minne-Moran v. Corliss Steam Engine Co. apolis & St. L. R. Co. (1898) 72 Minn. (1899) 21 R. I. 386, 45 L. R. A. 267, 469, 75 N. W. 704. The "ordinary 43 Atl. 874. A "trolley wire ... care" to construct a safe track, required is charged with an agency of exceeding of a railroad company, includes the the machinery used is dangerous and complicated, or the work is performed in a place and at a time when the surrounding dangers are not so obvious. Goven v. Harley (1893) 6 C. C. A. 190, 12 U. S. App. 574, 56 Fed. 973. A brakeman is entitled to assume that the company will take that degree of care of a switch commensurate with the increased danger of its location on a grade and a curve in its track. International & G. N. R. Co. v. Johnson (1900) 23 Tex. Civ. App. 160, 55 S. W.

R. Co. v. Fox (1889) 41 Kan. 715, 21 Pac. 797 (a case where men were at work on a trestle over which trains were run at intervals, and the company very foggy). The fact that there is a greater likelihood of accident if the

It will be observed that, in the formulation and discussion of the principle that the master is bound to exercise a degree of care commensurate with the dangers to be apprehended, the courts have not infrequently used language which, if taken literally, would imply that, where the work is such as to subject the servant to unusually great perils, the master does not satisfy his legal obligation by exercising that degree of care which is described by the phrase "reasonable and ordinary," or any of the various equivalents of that phrase which are enumerated in § 14, ante. But manifestly this is not the true import of the principle. The correct juristic concept is that which is indicated by the remark that "reasonable care is care proportioned to the danger to be guarded against, and, in dangerous situation, means great care."14 In other words, ordinary or reasonable care varies with the circumstances. 15 Any instruction which is inconsistent with this concept is regarded as erroneous.16

ple, Richardson v. Cooper (1878) 88 Ill. 270, where the judge lays it down

it must exercise a commensurate degree prosecution. Brann v. Chicago, R. I. of care for the safety of its track at & P. R. Co. (1880) 53 Iowa, 595, 36 that point. International & G. N. R. Am. Rep. 243, 6 N. W. 5. "Ordinary Co. v. Johnson (1900) 23 Tex. Civ. care in the selection and retention of App. 160, 55 S. W. 772. The implied servants and agents implies that degree assumption of trains on the rough and exigencies of the particular service reaunfinished track of a railway which is under construction (see § 29, post) is view of the consequences that may repredicated, subject to the proviso that such trains are operated in a reasonably require. It is such care as, in under construction (see § 29, post) is view of the consequences that may repredicated, subject to the proviso that such trains are operated in a reasonal ployees, is fairly commensurate with ably careful manner. Meloy v. Chithe perils or dangers likely to be encago & N. W. R. Co. (1889) 77 Iowa, countered." Wabash R. Co. v. McDan-744, 4 L. R. A. 287, 42 N. W. 563. A iels (1882) 107 U. S. 454, 27 L. ed. railway company which permits its 602, 2 Sup. Ct. Rep. 932. "The duty of track to become unsafe will be held to a railway company is to exercise due, an increased responsibility towards its and employment of its servants and trains are run on such track. Wilson agents, having respect to their partictrains are run on such track. Wilson agents, having respect to their partic-v. Louisiana & N. W. R. Co. (1899) 51 ular duties and responsibilities and the La. Ann. 1133, 25 So. 961. Observe consequences that may result from that in Louisiana a conductor is a vice their want of competence, skill, or care in the performance of their duties." <sup>14</sup> Sprague v. New York & N. E. R. Baulec v. New York & H. R. Co. Co. (1896) 68 Conn. 345, 37 L. R. A. (1874) 59 N. Y. 356, 17 Am. Rep. 325; 638, 36 Atl. 791. It is not uncommon Wall v. Delaware, L. & W. R. Co. to find judges passing, in the same (1889) 54 Hun, 454, 7 N. Y. Supp. 709. opinion, from one of these forms of expression to the other. See, for exam
Gormley (1898) 91 Tex. 393, 43 S. W. 877, declaring erroneous a charge that "the degree of care of all parties is in one place that the master must use higher when the lives and limbs of "all reasonable precautions," and in anthemselves or others are endangered other place requires him to exercise "a than in ordinary cases;" Bertha Zinc Co. v. Martin (1895) 93 Va. 791, 22 16 Union P. R. Co. v. O'Brien (1892) S. E. 869, where a charge that an em-1 C. C. A. 354, 4 U. S. App. 221, 49 ployer is required, in providing appli-Fed. 538. What is "ordinary care" ances, methods of work, and means of must be measured by the character of safety for its employees in thawing dythe business and the risks attending its namite, to use such reasonable care as

struction is not necessarily erroneous because the word "ordinary" or "reasonable" is not used for the purpose of defining the obligatory degree of care. 17 As to the obligation to use more than ordinary care, which is predicated in the case of minor servants, see §§ 18 et seq., post.

b. Rule applied to the advantage of the master.—In the cases hitherto cited, the principle under discussion has been applied for the purpose of holding the master to a stricter accountability. But it also inures to his benefit. Thus, the standard of ordinary care is held to be satisfied by the use of very primitive and inefficient implements where the risk of injury is but small.<sup>18</sup> So, a less degree of care may be sufficient in the case of a merely temporary structure erected for a particular purpose, than in the case of one which is intended to be permanently used as a part of the plant. 19 But the higher obligations attach if the temporary structure is allowed to remain so long that it becomes, for practical purposes, a permanent one.20 Other cases bearing upon this aspect of the principle are referred to in § 29, post.

16a. Master's violation of or compliance with a rule made by himself: implication from.— The fact that the injury was due to the master's breach of a rule which he himself had promulgated for the protection of the servants is, at the very least, evidence from which negligence may be warrantably inferred. But an instruction to the effect that

was disapproved on the ground that it public street or alley is not an insurer was calculated to create the impression of the safety of passers-by, but is that more than ordinary care was debound to the highest degree of care, manded of the master.

17 In Wabash R. Co. v. McDaniels same safe against accidents so far as (1882) 107 U. S. 454, 27 L. ed. 602, 2 such safety can, by the use of such care Sup. Ct. Rep. 932, the court approved and diligence, be secured,—is not eracharge in which the jury were told roneous, although it is better to inthat, in view of the consequences which struct that the company is bound to exresult to employees from the careless- ercise that reasonable care and caution ness of telegraphic operators, upon which would be exercised by a reasonwhose reports depend the movement of ably cautious and prudent person untrains, the defendant is bound to exerder the same circumstances. Denver cise "proper and great care" in select- Consol. Electric Co. v. Simpson (1895) ing them. The meaning of the charge 21 Colo. 371, 31 L. R. A. 566, 41 Pac. was, as was pointed out, put beyond 499. the reach of any possible misapprehension, not only by the words which led Mo. 551, 21 S. W. 515, 859 (said of a up to this statement, but by the subseladder). quent declaration, that there could be no recovery unless it was affirmatively Mass. 575. shown that the defendant knew, or 20 Norfolk & W. R. Co. v. Gilman could by "reasonable diligence" have (1891) 88 Va. 239, 13 S. E. 475. known, that the negligent employee <sup>1</sup> Baltimore & O. R. Co. v. Camp was incompetent. An instruction that (1895) 13 C. C. A. 233, 31 U. S. App.

is "commensurate with the danger to a company maintaining an electric wire be reasonably apprehended therefrom," carrying a dangerous current over a skill, and diligence, so as to make the

<sup>18</sup> Steinhauser v. Spraul (1893) 114

<sup>19</sup> See *Elmer* v. *Locke* (1883) **135** 

a violation of rules by employees for whose acts the master is responsible is negligence per se is held to be erroneous, for the reason that rules of conduct prescribed by the master himself are not on the same footing as statutes and municipal ordinances which fix the legal standard of duty towards the persons for whose protection they are designed.<sup>2</sup> Presumably, however, such an instruction would be perfectly proper if the rule violated was one promulgated in accordance with some statutory provision, as in the English case cited in note 1; and, even apart from that element, there would seem to be room for considerable doubt whether it is not perfectly justifiable to lay it down, as a matter of law, that a master who fails to attain a standard of careful conduct which he himself has fixed is guilty of a clear breach of duty.

There can, of course, be no hesitation in rejecting the doctrine that the rules of the employer can, as against the servant, be referred to as

R. A. 131, 19 Pac. 191, the fact that a 43 S. W. 193. railway company had broken one of its command rules in allowing a structure to (1898) 71 Minn. 216, 73 N. W. 853 be so close to the track as the one which (disregard of rules as to the manage-New Haven Ice Co. (1893) 63 Conn. 9, ants. See chapter XXXIX., post,

213, 65 Fed. 952; Louisville & N. R. 27 Atl. 235, the court said that, even (%) v. Bryant (1893) 15 Ky. L. Rep. apart from the existence of the rule, it 181, 22 S. W. 606. In Senior v. Ward would have been justifiable to find the (1859) 1 El. & El. 385, 28 L. J. Q. B. defendant to be negligent, but that the N. S. 139, 5 Jur. N. S. 172, 7 Week. case against it was made much stronger N. S. 139, 5 Jur. N. S. 172, 7 Week. case against it was made much stronger Rep. 261, recovery was denied on the by the fact that it had violated its own ground that the maxim, Volenti non fit rule. In Bailey v. Rome, W. & O. R. injuria, was applicable, but, except for Co. (1893) 139 N. Y. 302, 34 N. E. 918, this consideration, it was agreed that the defendant was held liable on the the master was liable for the reason ground that an inspection pursuant to that he was guilty of negligence in havone of its rules would have disclosed ing failed to enforce a rule which, in the defect in question; but presumably accordance with the provision of the the result here was not affected by the mines act he had promulgated with re-existence of the rule. In Thair v. Old accordance with the provision of the the result here was not affected by the mines act, he had promulgated with regard to the testing of the hoisting apparatus before it was used for the conveyance of the miners. A nonsuit is implied recognition of the doctrine, improper where the answer in an action for injuries received by a car repairer admits that, while cars are being repaired upon other than repair tracks, could be enlarged by showing that "ordinary prudence, care, and the customs and regulations of the company" tion of the dangerous conditions from require that such work should not be which the risk resulted. Since the require that such work should not be which the risk resulted. Since the require that such work should not be which the risk resulted. Since the done except while the car is being prolaw, irrespective of the rules of a rail-tected by watchmen or other suitable road company, imposes upon it the protection. Luebke v. Chicago, M. & duty of inspecting its cars properly, it St. P. R. Co. (1883) 59 Wis. 127, 48 is not error to allow a plaintiff to Am. Rep. 483, 17 N. W. 870. In Boss prove that the rules of the company rev. Northern P. R. Co. (1891) 2 N. D. quired an inspection at terminal and 128, 49 N. W. 655, and Pidcock v. Unintermediate points. Kentucky C. R. ion P. R. Co. (1888) 5 Utah, 612, 1 L. Co. v. Carr (1897) 19 Ky. L. Rep. 1172, R. A. 131, 19 Pac. 191, the fact, that a. 43 S. W. 193

caused the injury was mentioned as a ment of trains),—a case decided under corroborative reason for upholding a the statute abolishing the defense of verdict for the plaintiff. In Gerrish v. coservice in the case of railway servevidence that a certain way of doing the work was careful. The law, and not the rule of the employer, defines negligence.3

16b. Right to rely upon the recommendations and advice of others.-The general rule has been laid down, that a master is usually justified in relying on the advice and recommendations of persons of skill and experience. This rule has been applied in cases where the question to be settled was whether the master had attained the legal standard of safety with respect to the quality of an instrumentality,2 and in cases where the legal quality of the method adopted for carrying out the work in hand was in dispute,3—especially if he himself was not an expert or specialist in respect to the subject-matter of such advice or recommendations.4 On the other hand, it has been held that the master is not necessarily absolved from liability for this reason.<sup>5</sup>

17. Comparison between the degrees of care owed to a servant and to a stranger.—In so far as no special rule of law intervenes to create a duty to use a degree of care higher than that designated as "ordinary," it is manifest that, supposing the circumstances to be similar, a master's obligations to a stranger must be virtually identical with those which he owes to a servant. Whether a person enters upon the premises of another to perform a contract of service, or to transact some business, or by the direct request of the owner, the person extending the implied or express invitation owes to the person accepting it the duty of seeing that at least ordinary care and prudence are exercised to protect him against dangers which are neither actually nor constructively known to him. But the scope of this principle is necessarily much restricted in practice by the doctrine of assumption

63, 46 Atl. 292 (unsafe boiler); Kcl- advice of an architect believed to be ley v. Forty-second Street, M. & St. N. competent).

Ave. R. Co. (1890) 58 Hun, 93, 11 N.

Diamond State Iron Co. v. Giles Y. Supp. 344 (force pump selected by (1887) 7 Houst. (Del.) 556, 11 Atl. persons having experience in the use of 189; Irmer v. St. Louis Brewing Co. such apparatus); Kcith v. Walker Iron (1897) 69 Mo. App. 17) (recognizing & C Co. (1888) 81 Ga. 49, 7 S. E. 166 the duty to guard the servant against (not negligence to take the opinion of pitfalls); Musick v. Jacob Dold Pack-

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<sup>3</sup> Pennsylvania Co. v. Stoelke (1882) block and tackle under the advice of an

petent for such a purpose).

<sup>1</sup> M'Gill v. Bouman (1890) 18 Sc. 337, 68 N. W. 36 (plans for the construction of a cictom 4). Sess. Cas. 4th series, 206.

Service v. Shoneman (1900) 196 Pa.

46 Atl. 292 (unsafe boiler); Kel
advice of an architect believed to be

a c Co. (1888) 81 Ga. 49, 7 S. E. 166 the duty to guard the servant against (not negligence to take the opinion of pitfalls); Musick v. Jacob Dold Packan expert mason as to the safety of the part of a structure which he has just part of a structure which he has just put up).

\*Sykes v. Packer (1882) 99 Pa. 465 (laborer engaged in the demolition of a structure injured by its collapse, servant from that of a mere licensee which was due to the removal of a entering on premises to secure employ-

<sup>104</sup> Ill. 201 (error to allow a witness experienced rigger). to be asked a question based on the hypothesis that such evidence was com-Pa. 63, 46 Atl. 292, supra.

of risks, the operation of which is far less extensive where the parties litigant are strangers than it is where they bear to one another the relation of master and servant.2

On the other hand, where a person is required by the policy of the law to exercise a higher degree of care than that described as "ordinary" for the protection of those who do business with him, it will often happen that a servant will be unable to recover under circumstances which, if the injured person had been a stranger, could have constituted a cause of action. Thus, the courts have uniformly declined to hold that the peculiar obligations imposed upon carriers of passengers are predicable in cases where a servant is traveling, in the course of his employment, upon a public conveyance belonging to his master.3

of a master to his servant for injuries

ment. In an early Maine case it was low servants who may be assigned to ment. In an early Maine case it was low servants who may be assigned to laid down that, as regards bridges, operate and guard them." Salters v. passageways, or ladders, "at least the Belaware & H. Canal Co. (1874) 3 same care and precaution [should] be Hun, 338. This seems to be the only used for the safety of the servant as for ground upon which it is possible to acthat of the stranger whose accidental cept the broad doctrine laid down in an presence business may require within Australian case, that circumstances the same limits." Buzzell v. Laconia which might entitle a stranger or visimfg. Co. (1861) 48 Me. 113, 77 Am. tor to recover damages do not apply in Dec. 212. It has also been remarked the case of a "workman," and the decina recent case that the relation of sion based upon that doctrine, that a master and servant is not analogous to shipowner is not liable for failing as master and servant is not analogous to shipowner is not liable for failing, as that of guardian and ward, and the ob- darkness comes on, to place a light near ligation of the master in regard to ap- an open hatchway, so as to secure the pliances furnished for the use of the safety of employees who have been servant is not different from what it working near it all day,—so long, at would be if such appliances were fur- least, as the darkness has not become nished for the use of one not a servant. so profound that the employees cannot Garnett v. Phænix Bridge Co. (1899) by using slightly increased vigilance 98 Fed. 192. avoid the orifice: McLachlin v. Serv-<sup>2</sup> The cases asserting the nonliability ice (1871) 2 Vict. L. Rep. (1) 198.

<sup>3</sup> Warner v. Erie R. Co. (1868) 39 caused by defective instrumentalities N. Y. 468, 471; Smith v. St. Louis, K. are treated as an exception to the genC. & N. R. Co. (1878) 69 Mo. 32, 33 eral principle that "no man may, in Am. Rep. 484. While, in the case of conducting business, unnecessarily and passengers, railroad companies are wantonly disregard the rights of other bound to avail themselves of all new inpeople, whether employees or stran-ventions and improvements known to gers," for these reasons: (1) That the them, which will contribute materially servant is not secretly or involuntar-to the safety of their passengers, the ily exposed to the peril; (2) that he is utility of which has been tested, and paid for the exact position and hazard the adoption of which is within their which he assumes; and (3) that he power so as to be reasonably practica-may terminate his employment when, ble, they are not so bound as to emfrom unforeseen perils, he finds his reployees. Salters v. Delaware & H. ward inadequate or unsatisfactory. Canal Co. (1874) 5 Thomp. & C. 559, Hayden v. Smithville Mfg. Co. (1861) 3 Hun, 338. In Columbus & X. R. Co. 29 Conn. 548. Compare the statement v. Webb (1861) 12 Ohio St. 475, the that "the servant undertakes his em-court rejected the special contention of ployment, relying upon the fact that counsel that, as both the railway comthe appliances are safe if carefully pany and the plaintiff knew it was the used, and he knows that their careful legal duty of the company as common use depends upon himself and his fel- carrier to furnish as perfect brakes

# B. STANDARD OF DUE CARE; HOW FAR QUALIFIED BY THE MINORITY OF THE SERVANT.

18. Negligence not inferable from the mere employment of a minor to do dangerous work.— (Compare § 180, post.) A master is not culpable simply because he hires a minor servant for the performance of dangerous duties.1 Whether a minor may, without negligence, be set to do dangerous work, "depends upon the particular circumstances of each case, upon the character and degree of the danger, and the capacity of the minor to comprehend and avoid it." If the servant is of such tender years as to be unable, by reason of his immature judgment or bodily strength, to perform the duties imposed upon him,

upon the passenger cars as was practicable, it was a reasonable implication that, when the plaintiff entered the employment as brakeman, the company undertook the obligation of furnishing a brake as safe as it was bound to furnish for the safety of the passengers. The fallacy of this argument, it was pointed out, consisted in its ignoring the effect of the essential element of the servant's assumption of the ordinary risks of his employment. In Gates v. Southern Minnesota R. Co. (1881) 28 Minn. 110, 5 N. W. 579, a charge was held to be erroneous which allowed the jury to infer that the degree of care which a railway company must exercise in the maintenance of a safe roadbed for its employees is as high as that required of a carrier in regard to passenger and injury received by a minor man in the passenger (1893) 55
Minn. 101, 57 N. W. 152, followed in McGregor v. Reid, M. & Co. (1899) 178
Ill. 464, 53 N. E. 323, Reversing (1898)
76 Ill. App. 610. The distinction bewas lost sight of in Nashville & C. R. Co. v. Elliott (1861) 1 Coldw. 611, 78
Am. Dec. 506.

1 Youll v. Sioux City & P. R. Co. (1885) 66 Iowa, 346, 23 N. W. 736; Houston & G. N. R. Co. v. Miller (1879) 51 Tex. 270. "There is no rule jury to infer that the degree of care which a railway company must exercise in the maintenance of a safe roadbed for its employees is as high as that sengers, in respect to employees in his Atl. 1104. business, in using a freight elevator in or down from, the stories of the build- of fifteen employed as brakeman).

required of a carrier in regard to passible for an injury received by a minor sengers. In O'Connell v. Baltimore & employed on such machine." Buckley O. R. Co. (1863) 20 Md. 212, 83 Am. v. Gutta-Percha & Rubber Mfg. Co. Dec. 549, it was declared that the doc- (1889) 113 N. Y. 540, 21 N. E. 717. trine laid down by the Supreme Court "If boys are not allowed to use machinof the United States in Stokes v. Salery until they have become accustomed tonstall (1839) 13 Pet. 191, 10 L. ed. to its use, it would be difficult for them 115, that a carrier warrants the safety to learn any useful trade or occupation of passengers as far as human care and by which to earn a livelihood." O'Keefe foresight can go, was not applicable to v. Thorn (1889) 24 W. N. C. 379, 16 a case where the plaintiff was a la- Atl. 737. An employer has a right to borer who was carried to and from his presume that a youth applying to him work on a train, without any contract for employment is possessed of the aver-of carriage and without paying any age capacity of youths of his age and a fare. Similarly, the owner of a build- competent knowledge of the employing owes only the care required from a ment he seeks, if it is such as is usually master toward his servant, and not followed by such youths. Adams v. that due from a common carrier of pas- Clymer (1893) 1 Marv. (Del.) 80, 36

<sup>2</sup> Anderson v. Morrison (1875) 22 which such employees are permitted, Minn. 274; Hamilton v. Galveston, H. but not required, to ride in going up to & S. A. R. Co. (1881) 54 Tex. 556 (boy

it may be that the master should be deemed negligent in placing him in a dangerous position.3 A similar inference may doubtless be drawn if the servant is wholly inexperienced in the work for which he is engaged.<sup>4</sup> In the latter case, negligence is usually imputed on the specific ground of an omission to give instruction (chapter xvi., post); but in the former case it is easy to see that there may be some extreme circumstances in which, considering the age of the servant and the nature of the duties, it might not be consistent with ordinary prudence to set him to work, even though he may have received full instructions. The impropriety of imputing negligence to the master merely on the ground that the servant was a minor and the work dangerous becomes more and more unquestionable as the servant approaches his majority. He will not be allowed to retain a verdict based solely on that ground, where he was of such an age that he may well have looked like an adult, and no evidence has been produced to show that his minority was indicated by his stature and general appearance, or that the master had knowledge of his real age, or was in some way put upon inquiry as to that fact.5

19. Greater care must be exercised for the protection of young servants.— The materiality of the fact that a servant is not of full age consists in this,—that it is in many instances regarded as a ground for predicating the existence of certain additional obligations on the master's part to see that the servant is adequately protected. almost universally accepted doctrine is that the care to be observed to avoid injuries to children is greater than that in respect to adults. That course of conduct which would be ordinary care when applied to persons of mature judgment and discretion might be gross, and even criminal, negligence toward children of tender years. same discernment and foresight in discovering defects and dangers cannot be reasonably expected of them, that older and experienced

<sup>3</sup> Youll v. Sioux City & P. R. Co. the boy to undertake work of the char-(1885) 66 Iowa, 346, 23 N. W. 736. acter required. Hayes v. Colchester

<sup>(1885) 66</sup> Iowa, 346, 23 N. W. 736. acter required. Hayes v. Colchester 'Youll v. Sioux City & P. R. Co. Mills (1894) 69 Vt. 1, 37 Atl. 269. (1885) 66 Iowa, 346, 23 N. W. 736. Syoull v. Sioux City & P. R. Co. Whether a master was negligent in directing an immature boy who had been The fact that the servant obtained em-

employed to do such work around a ployment by deception and fraud as to factory as should be suited to his cahis age will not prevent a recovery for pacity, to perform a dangerous operainjuries sustained by the negligence of tion, in the course of which the boy was the employer. Chicago & A. R. Co. v. injured, depends upon the capacity of Pettigrew (1898) 82 III. App. 33.

persons habitually employ; and therefore the greater precaution should be taken where children are exposed to them. Upon this ground he has been held liable for the following kinds of negligence: Not insisting on the use by a minor of certain safeguards provided for the servants; 2 requiring a minor to do work which is not within the compass of his age and experience; requiring a minor to encounter risks of an unusual kind, although such work is within the scope of his employment;4 augmenting the risks of a minor's service by giving him additional duties to perform; transferring a minor to new duties involving greater dangers than those involved in the work for which he was originally hired; setting a minor at a task which he has neither the strength nor the skill to perform; failing to prevent a minor from doing work in a dangerous way, when there is a temptation to a person of his years to do it so; allowing a minor to do things injurious to health.9

385, 20 N. E. 466. That the duty of same principle is conceded in Texas & the master with reference to the exer- P. R. Co. v. Carlton (1883) 60 Tex. cise of care increases in proportion a minor's want of capacity was declared in Texas & P. R. Co. v. Carlton

E. 10. Whether an employer exercised bight the circumstances re-

years engaged in filling soda-water bottles, which at one stage of the operation teen years old to fasten a scaffolding, are liable to explode, a jury is justified was held to be for the jury to deterin finding that it is not sufficient for mine, in Henry v. Brady (1879) 9 in finding that it is not summer for many, the defendant to provide a mask, but Daly, 142.

The big duty also to point out to \*In Marbury Lumber Co. v. Westher the existence of the danger, and to brook (1898) 121 Ala. 179, 25 So. 914, insist on her wearing the mask, the court approved a charge to the ef-Crocker v. Banks (1888) 4 Times L. R. feet that particular work which is no

<sup>3</sup> Brazil Block Coal Co. v. Gaffney (1889) 119 Ind. 455, 4 L. R. A. 850, 21 N. E. 1102 (boy of ten years in a coal mine directed to couple coal cars).

Fed. 716 (cleaning machinery in mo- injured because he rode up and down

The question of the defendant's negligence is for the jury, where there is evidence that a boy was employed to 180, 53 Am. Rep. 806, 24 N. W. 730, a

<sup>1</sup> Cleveland Rolling Mill Co. v. Corri- Supp. 785, Affirmed (1900) 161 N. Y. gan (1889) 46 Ohio St. 283, 3 L. R. A. 636, 57 N. E. 1125. Apparently the

<sup>2</sup> In the case of a girl of seventeen the care which the circumstances required, in directing an apprentice six-

more dangerous for a man than another employment may, nevertheless, be more dangerous to a boy because of his inexperience and the peculiar traits incident to adolescence, holding it not to \*Robertson v. Cornelson (1888) 34 be merely abstract, where a boy was on a log-carriage, instead of remaining on the floor of the sawmill.

<sup>9</sup> In Nelson v. Johansen (1885) 18 Neb. drive a mule in a mine, and had imposed master was held liable for allowing a on nim the additional task of opening a girl of eleven to go across a prairie in door to see whether the track ahead was clear, and that a regular attendant should have been placed at the v. Berquist (1885) 34 Kan. 334, 55 Am. door, and that the absence of the superintendent was the cause of the accident. Weaver v. Iselin (1894) 161 the employment of an inexperienced girl of tender years her menses began, that on him the additional task of opening a girl of eleven to go across a prairie in Pa. 386, 29 Atl. 49.

of tender years her menses began, that

"Ntimper v. Fuchs & L. Mfg. Co. defendant advised her that menstrua(1898) 26 App. Div. 333, 49 N. Y. tion was a dangerous disease, likely to

From the doctrine that the master is subject to this larger measure of responsibility, some courts have deduced consequences which practically amount to a declaration that the same superior servant may be a vice principal as to a minor, and not a vice principal as to an adult.<sup>10</sup> Another result of the doctrine is that the master will sometimes be held liable to children for the insecurity of portions of the

cause insanity and death, and that the cover because their lesser lords violated best and only known remedy was hard orders which superior magnates had and unremitting labor, and that, by given them." The court then proreason of this advice, she was induced ceeded thus: "It makes no difference, to work far beyond her strength, and therefore, in this case, whether Cobb, to work far beyond her strength, and therefore, in this case, whether Cobb, was permanently crippled and disabled. the man under whom they worked that <sup>10</sup> See the comments of Lords Crannight, violated his superior's orders or worth and Chelmsford in Bartonshill not. The children looked to him. Coal Co. v. Reid (1858) 3 Macq. H. L. Him they must obey or lose their Cas. 266, 4 Jur. N. S. 767, on the places. Nor does it vary the question Scotch case of O'Bryen v. Burn (1854) that, after working hours were over, 16 Sc. Sess. Cas. 2d series, 1025, as another servant of the corporation, a stated in § 247, neet. In Atlanta Cat. watchmap, had charge granular of the stated in § 247, post. In Atlanta Cot- watchman, had charge generally of the ton Factory Co. v. Speer (1882) 69 Ga. factory, and that he and Cobb had some 137, 47 Am. Rep. 750, it was held that altercation about the latter's putting a girl fifteen years old could recover the girls in that room. They were put damages under the following showing in there by the person to whom they of facts: She was a night hand in a were accountable. Besides, the watchcotton factory which used to shut down man yielded to Cobb and permitted at 3 o'clock on every Sunday morning, them to be taken to the cloth room, and and was allowed, with some other ope- when the matter thus terminated beat 3 o'clock on every Sunday morning, and was allowed, with some other operatives, to occupy the basement till daylight. The night overseer of the room where she worked, seeing them there one Sunday night, told them to go to one of the upper rooms, which was better lighted and more comfortable, and removed them in spite of objections made by the watchman who had charge of the building when the work stopped. The plaintiff children then began to play hide and seek with some other children, and while so engaged went out into an adjacent passage where there was no light, and fell into an opening in which an elevator was about to be placed. The majority of the court held that the night overseer was, for the time being and as regards the acts which led up to the catastrophe, the representative of the company owning the factory. It was emphatically declared that when minor servants "are children, who can have no access to the great managers, who can receive no instructions from them, but who look alone and must look alone to him unstructions from them, but who look ground that the evidence did not show alone, and must look alone, to him un- that the overseer was in charge of the der whom they particularly work, and factory at the time, or had authority from whose lips alone the orders and to give directions for the removal of behests of the corporation ever reach the children. In this point of view their ears," it is "simply monstrous to the accident was due to the wrongful hold that for the wrongs and negligence act of a mere fellow servant. But even of these lords of theirs they cannot re- assuming that the evidence was suffipremises outside of those which, as respects adults, he has impliedly agreed to keep in reasonably safe condition.11

20. Limits of this obligation. The rationale of the doctrine discussed in the preceding section is that the master is, as a prudent man, bound to regulate his conduct with due reference to the fact that minor servants are, on the average, less capable, not only of understanding the dangers of their employment, but also of avoiding the dangers which they do understand. In other words, it is the fact of immaturity, not of minority, that the master is bound to regard.1 In this point of view, the rule that greater care must be exercised for the protection of minors is not an absolute one. Where, in the case of an injured minor, there is no immaturity of physical and mental faculties, he stands upon the same footing as an adult.<sup>2</sup> Nor does the mere fact that the servant is of immature years involve the conse-

ered that the fact that the accident may safely go, is not negligent in fail-happened because the plaintiff, in playing to anticipate that the operator, a ing the game, stepped outside the room girl of seventeen years of age, will attom which she had been conducted, did tempt to pass her hand underneath the not destroy her right of action. The rod, and to provide for such a continposition was taken that they would natgency by fastening the rod so that it
urally while away the remaining hour cannot be raised. O'Hare v. Keeler
or two before dawn, and that it was (1897) 22 App. Div. 191, 48 N. Y.
gross negligence in those who put them
in the room not to warn them of the enough to know the dangers of his acsuch a note with nothing around it to is not bound to anticipate and provide protect unwary feet. It was therefore against his peril in attempting to held that the question of negligence, couple a train of cars. Kentucky C. R. under all the facts and circumstances, Co. v. Gastineau (1885) 83 Ky. 119. was properly left to the jury, regard being had to contributory negligence used is suitable, in the legal sense, is on the part of the plaintiff, to her age on the part of the plaintiff, to her age not changed by the fact that the inand her entire ignorance of her danger, jured employee is a boy fifteen years of
and the short time (only two weeks)
age. Dingley v. Star Knitting Co.
which she had been connected with the
(1900) 34 N. Y. S. R. 989, 12 N. Y.
factory. Crawford, J., dissented from Supp. 31, Affirmed in (1892) 134 N. Y.
the majority judgment in regard to 552, 32 N. E. 35; but this point was not
this point also, on the ground that the referred to. See also Michael v. Stanfacts brought it within the ordinary
ley (1892) 75 Md. 464, 23 Atl. 1094, rule that a master is responsible for where a youth of eighteen years was the condition only of those parts of his denied recovery for an injury caused premises to which he directs, invites, by a saw, and the cases in chapter

cient to establish these facts, it is clear (1896) 115 Ala. 389, 22 So. 135 (disthat the majority judgment goes much approving charge to contrary effect in that the majority judgment goes much approving charge to contrary effect in further than any court which has not adopted the "superior servant doctrine" (chapter xxvIII., post) would go in the case of an adult employee.

"In Atlanta Cotton Factory Co. v. to being passed through the ironing Speer (1882) 69 Ga. 137, 47 Am. Rep. rollers, a brass rod to serve as a guard 750 (see above), the majority considuent in the fact that the accident may safely on is not realized in the fact that the accident. pitfall just outside the door, to leave tion and guard against it, the company such a hole with nothing around it to is not bound to anticipate and provide or allows his employees to go.

1 Alabama Mineral R. Co. v. Marcus
(1896) 115 Ala. 389, 22 So. 135.

2 Alabama Mineral R. Co. v. Marcus
visks which he understands. XVII., post, in which a minor, no less

quence that the master is an insurer of such servant from injury by machinery in its nature dangerous. 3 See, generally, § 24, post.

21. Employment of minor without his father's consent; effect of .-In actions by an injured minor himself, or by his parent suing as his personal representative, under the damage acts, the general rule enunciated at the beginning of the last section is not changed by the mere fact that the minor was employed without his father's consent,1 nor by the mere fact that he was, without that consent, transferred to new duties.<sup>2</sup> The absence of such consent is sometimes adverted to in cases of this type, but it will be found that the servant's right of recovery is predicated for reasons which are independent of this element.3

boy proper instructions. Swift & Co. services by contracting them to another v. Holoubek (1898) 55 Neb. 228, 75 N. person, yet as between himself and such W. 584.

the deceased not died, but brought this have been." suit to recover damages for the inju-

<sup>3</sup> An instruction that permits the to the case before us. The slave had jury to find for plaintiff, a boy of fourno power whatever to contract, nor in teen years of age, if the machinery was any way to create the relation of masdangerous and the plaintiff not guilty ter and servant between himself and of contributory negligence, is erroneous, where there is no question as to power; and while, as against his father, the failure of the master to give the cannot defeat his right to have his other person, the relation of master <sup>1</sup> Pennsylvania Co. v. Long (1883) and servant may be created by his com-94 Ind. 250; Texus & N. O. R. Co. v. tract; and especially so when such con-tract is made for the purpose of obtain-<sup>2</sup> Trans & P. R. Co. v. Carlton (1883) ing employment necessary to his own 60 Tex. 397. The court said: "Had support, as in this case it appears to

<sup>3</sup> As, where it is laid down that a ries received in the manner shown in railroad company employing a minor, the record, he certainly could not have knowing him to be such, and that he been heard to say that the employment was of such tender years as not to of himself under the circumstances was know the hazards of the service, and such an act of negligence as would that his parents did not consent to it, have entitled him to recover. He will be liable for injuries received by would have had to show such facts as him in such service; but if he was bewould have had to snow such facts as firm in such service; but if he was bewould ordinarily entitle an employee lieved to be twenty-one years of age
of age to recover, unless it appeared when employed the company is not liathat his inexperience and want of ble by reason of his minority, even if
knowledge of the danger of his position the employment was without the conand proper manner of avoiding it were sent of his parents. Goff v. Norfolk &
such as to have made it the duty of the
W. R. Co. (1888) 36 Fed. 299. Here
appellant to warn him upon these matappellant to warn him upon these matthe defendant's knowledge of the servters, and that it had failed in this duty. ant's ignorance of the risks is itself a circumstance warranting the inference that where a master hired to another of negligence. In Stimper v. Fuchs & a slave to work in a given business or L. Mfg. Co. (1900) 161 N. Y. 636, 57 place, and the hirer subsequently, without the consent of the owner, placed Div. 333, 49 N. Y. Supp. 785, a master the slave in a business or place more was held liable for an injury received hazardous than that contemplated in by a minor while he was engaged in duthe original contract of hiring, a re- ties outside the scope of those authorcovery could be had for the value of the ized by his father. But here the act slave lost while engaged in and by rea-which caused the injury was a breach son of the more hazardous business or of a non-delegable duty. So, in Wearplace; but those cases have no analogy er v. Iselin (1894) 161 Pa. 386, 29 Atl.

It is otherwise where the action is brought by a parent for loss of services. The controlling principle then is that a person who hires an unemancipated minor and puts him at hazardous work is accountable to the nonassenting parent for all the consequences following directly from the employment, in so far as they entail a loss of the minor's services by the parent.4 That the employer did not know that the parent objected to his child's rendering the service is no defense, as it is his duty to ascertain whether the parent is willing before the child is hired.<sup>5</sup> Nor is he entitled to rely upon an implied emancipation, predicated upon anterior occurrences, where he or his representative is actually aware of the parent's wishes that the child should not be employed,—especially where the child has previously been discharged on account of his minority. The consent of the parent is not available as a justification, except so far as it has regard to the particular work to which it applies.7 In such cases the wrong consists essentially in the employment of the minor servant without the permission or against the wishes of the parent. The parent is there-

the jury. cited in the following notes. The testimony of the parent that she remonial, are, it is apprehended, precisely strated with her son about his acting the same, whether there has been an acas brakeman is admissible as bearing tive disregard of the wishes of the inas prakeman is admissible as bearing tive disregard of the wishes of the in-upon the question of her consent. jured party, or merely a failure to ob-Hamilton v. Galveston, H. & S. A. R. tain his consent. Co. (1881) 54 Tex. 556. In Toledo, St. L. & K. C. R. Co. v. Trimble (1893) 8 Ind. App. 333, 35 N. E. 716, the dis-tinction is taken that where the party is the party of the party is taken that where the party is taken that the party is taken the party is taken that the party is taken the pa tinction is taken that, where there has been active opposition to the parent's will, he is entitled to recover merely upon proof of that fact, for the reason that the injury must necessarily be the result of the opposition; while, if there has been merely a want of consent, the employment itself may not be wrongful, and it is therefore not a necessary inference from this fact that the injury was a proximate result of the employment. The want of consent might, it was said, give rise to the presumption that the employment was against the will of the parent, but this presumption was not conclusive in such a sense that it could be indulged for the purpose of upholding a judgment entered the son while employed as a brakeman without the parent's consent. Gulf, C. & S. F. R. Co. v. Redeker (1889) 75 Tex. 310, 12 S. W. 855. A widow will not be held to have consented to the employment of her son upon dangerous work at a mill at which he was working, because of her knowledge that he was employed at the mill. Marbury Lumber Co. v. Westbrook (1898) 121 pose of upholding a judgment entered ful, and it is therefore not a necessary

49, the real gravamen of the complaint on a special verdict not specifically was that the minor was exposed to infinding that there had been active opcreased dangers by being required to position to the parent's will. This disperform certain additional duties,—a tinction is not noticed in any other situation which raised a question for case, so far as the writer knows, and e jury. seems to be contrary to the analogies \*Soldanels v. Missouri P. R. Co. supplied by other branches of the law. (1886) 23 Mo. App. 516, and the cases The juridical consequences of a want

(1886) 23 Mo. App. 516.

<sup>7</sup> A general permission of a father to his minor son to follow railroading for a living, and that he may become a fireman, does not deprive the father of the right of specifying how and where he shall work, and does not preclude a re-covery by such father for injuries to the son while employed as a brakeman fore entitled to recover, irrespective of whether the master was negligent or not.<sup>8</sup> And as the contract of employment is made without his consent, he is a stranger to it, and not bound by any of its terms. Not having agreed that his child shall assume the risks incident to the employment, he can recover, although the injury may have been caused by the negligence of the child's fellow servants.<sup>9</sup> Nor is his action barred by the fact that the child was guilty of contributory negligence.<sup>10</sup>

\*Marbury Lumber Co. v. Westbrook & P. R. Co. v. Brick (1892) 83 Tex. 526, (1898) 121 Ala. 179, 25 So. 914; Tol- 18 S. W. 947; Louisville & N. R. Co. v. edo, St. L. & K. C. R. Co. v. Trimble Willis (1885) 83 Ky. 57. In a Mis- (1893) 8 Ind. App. 333, 35 N. E. 716. souri case it was merely said to be Texas & P. R. Co. v. Brick (1892) "very questionable" whether the want 83 Tex. 526, 18 S. W. 947; Hamilton v. of due care and judgment on the part Galveston, H. & S. A. R. Co. (1881) 54 of an injured minor was a defense to Tex. 556.

Marbury Lumber Co. v. Westbrook ice. Soldanels v. Missouri P. R. Co. (1898) 121 Ala. 179, 25 So. 914; Texas (1886) 23 Mo. App. 516.

### CHAPTER III.

### WHAT KIND OF INSTRUMENTALITIES A MASTER IS BOUND TO FUR-NISH. GENERAL PRINCIPLES.

- 22. Total failure to furnish necessary instrumentalities or materials; negligence inferable from.
- 22a. Instrumentalities actually furnished must be reasonably safe.
  - Other forms in which the extent of the master's obligations is expressed.
  - 24. Master not bound to insure his servant's safety.
- 25. Instructions must be in conformity with this principle.
- 26. Master's obligations limited by the uses for which the instrumentalities were designed.
- 27. Rationale of this limitation.
- 28. Diversion to new uses by the master himself, or with his consent.
- 29. Servants engaged in construction, alteration, or repair of instrumentalities; standard of safety lower as regards.
- 22. Total failure to furnish necessary instrumentalities or materials: negligence inferable from.— It is clear that the entire failure to furnish any instrumentalities or materials in a case where they are necessary for the servant's protection is not less a breach of the duty to furnish proper instrumentalities or materials than is the furnishing of instrumentalities or materials which fall below the legal standard of safety.1 A servant who bases his right of action on the total lack of

to the want of any proper appliances solely for the purpose of holding togeth-for loading it on a flat car); Hosic v. er slabs of stone on a truck, and not for Chicago, R. I. & P. R. Co. (1888) 75 the purpose of safeguarding the serv-Iowa, 683, 37 N. W. 963 (no running ant, will not render erroneous an boards furnished to place over the loads instruction to the effect that the mason platform cars). As a railroad com- ter was bound to furnish proper clamps, pany is bound to know that foreign and that the servant might recover cars may often have drawheads of dif- if the master failed to exercise reaferent heights, and to appoint inspecsionable care to furnish reasonably tors to ascertain the existence of this, suitable clamps, and the injury resulted as well as other dangers incident to the from that failure. Morris Bros. v. handling of such cars, it is error to rule Bowers (1900) 105 Tenn. 59, 58 S. W. that the want of the crooked links 328. Numerous cases in which the which are necessary for the safe couplomission to provide materials is asing of such cars is one of the risks assumed to be negligence will be found in sumed by a brakeman. Bennett v. the later chapter (XXXII.) which deals Greenwich & J. R. Co. (1895) 84 Hun, with the nonliability of the master for

\*Southern Kansas R. Co. v. Moore 216, 32 N. Y. Supp. 457. The mere (1892) 49 Kan. 616, 31 Pac. 138 fact that the evidence shows that cer-(servant's foot crushed by rail, owing tain defective clamps were furnished

requisite appliances must show that, under the circumstances, they were reasonably necessary for his protection from a danger which the master knew or ought to have known to be incident to the work,2 and that they were either not obtainable at all, or were not readily accessible.3 When they are not available for use at the actual place of work, it is for the jury to say whether they are reasonably accessible in such a sense as to absolve the master from the charge of negligence.4 It is not sufficient discharge of the master's duty that sufficient good material should be mingled with bad material in a common mass.5

22a. Instrumentalities actually furnished must be reasonably safe.— The general principle laid down in § 14, ante, involves the corollary that the master is in default as respects his servants, unless the appli-

doing.

<sup>2</sup> In Bartolomeo v. McKnight (1901) motive wheel). 178 Mass. 242, 59 N. E. 804, the jury

of sufficient light in an elevator room will not entitle plaintiff to recover, where there was evidence that lanterns where there was evidence that famelins were provided for such workmen as chose to carry them. Browne v. Siegel-practically inaccessible where they were Cooper & Co. (1901) 191 Ill. 226, 60 kept at a place 2 miles away.

N. E. S15, Affirming (1900) 90 Ill. App.

Lafayette Bridge Co. v. Olsen (1901) 54 L. R. A. 33, 47 C. C. A. 367, 100 Feel 335 disapproving of an un-49. See also Stewart v. Collness I. Co. (1877) 4 Sc. Sess. Cas. 4th series, 952 (allegation that mine owner had to have been proved); Manning v. Manchester Mills (1900) 70 N. H. 582, 49 Atl. 91 (plaintiff held not entitled to other nails available); Potter v. Chi- for use, although the plank in quescago, R. I. & P. R. Co. (1877) 46 Iowa, tion was defective.

the negligent manner in which the serv- 399 (ordinary pole, such as is readily ants use the materials provided for the found in railway shops, held not to be preparation of certain instrumentalian appliance which the company was ties, as a part of the work they are negligent in not furnishing, where an employee was assisting to move a loco-

<sup>4</sup> As, where the coupling link of an was held to be warranted in finding engine tender was not on it, but left infor a plaintiff injured by the caving in side, to be picked up as occasion reof a trench, where the evidence was quired (Gravelle v. Minneapolis & St. that the defendant had not furnished L. R. Co. [1882] 3 McCrary, 352, 10 any materials for shoring it up, and Fed. 711 [held to be for the jury to say that he was on the spot and had an op- whether this arrangement was so unportunity to observe that, owing to the usual as to subject a brakeman to an nature of the soil, the depth of the extraordinary risk]); and where the trench, and the manner in which it was materials for shoring up a trench dug, the sides were in a treacherous which caved in were kept at a distance condition. of about  $1\frac{\pi}{4}$  miles from the place of "Scogan v. Burnham" (1900) 175 work (Laporte v. Cook [1901] 22 R. I. Mass. 391, 56 N. E. 585. The absence 554, 48 Atl. 798). In Fitzsimmons v. Taunton (1893) 160 Mass. 223, 35 N. E. 549, it was held that the jury might properly find that the materials sup-

108 Fed. 335, disapproving of an unqualified instruction to the effect that, not provided wood for props, held not if the defendant company had furnished an abundance of suitable material and appliances from which the foreman and other workmen could select such as recover for injuries caused by the fact was needed for the several parts of the that the nails used by his fellow serv-falsework, which gave way, then the ants to fasten a ladder to a roof were defendant was not liable for any mistoo short, his own testimony being that take in judgment by the foreman or there were plenty of nails furnished, other servants in the selection of suitand that he had no doubt there were able material out of the mass provided

ances furnished are such as would commend themselves to a reasonably prudent man. He is bound to furnish such appliances as are reasonably safe and suitable,—such as a prudent man would furnish if his own life were exposed to the danger that would result from unsuitable or unsafe appliances.2 In order to discharge this obligation, he must see that the instrumentalities which he furnishes are in "proper condition," that is to say, in "a condition which shall not endanger the safety of the employed,"4 or in such a condition "that an employee can perform all the duties required of him with reasonable safety;"5 or in such a condition that it shall be "reasonably prob-

McCombs v. Pittsburgh & W. R. Co. adapted to perform the work for which (1889) 130 Pa. 182, 18 Atl. 613, the it is intended." Mangum v. Bullion, defendant requested an instruction B. & C. Min. Co. (1897) 15 Utah, 534, "that an employer does his duty when 50 Pac. 834. he provides for his employees in such manner as he fairly and reasonably deems prudent and safe." The trial judge substituted the words, "is fairly and reasonably prudent and safe," for the words "he fairly and reasonably deems safe," remarking that it was not what he decided might be prudent, but what was, in point of fact, reasonable, prudent, and safe, that he was required to furnish, and with that modification affirmed the point. The supreme court to furnish, and with that modification affirmed the point. The supreme court to furnish, and with that modification asid: "In that he was clearly right. If the doctrine asserted in the point were recognized as correct, we would have as many standards of duty as there are degrees of carelessness among the matter of the work the latter is employed to do." Essex County Electric Co. v. Kelly have to be adjudged guilty of negligence or not, according to his own standard of duty to his employees in provides and application of which the curst refused to instruct to the effect that, if the cars in the counting of which the places. he provides for his employees in such \*Buzzell v. Laconia Mfg. Co. (1861) standard of duty to his employees in instruct to the effect that, if the cars each particular case."

proper for that purpose." Union P. R. acted of the defendant only ordinary Co. v. Daniels (1894) 152 U. S. 685, care, while the law required that proper sub nom. Union P. R. Co. v. Snydcr, care should be exercised. The court of 38 L. ed. 597, 14 Sup. Ct. Rep. 756. appeals, however, said that by the in-Similar phraseology is found in Gibson struction the cars were to be reasonably v. Pacific R. Co. (1870) 46 Mo. 163, 2 as well as ordinarily safe, and that Am. Rep. 497. The master must furclearly implied good repair or proper nish "appliances reasonably well calcondition. Anything less than reasonculated to answer the end proposed." able was not good or proper. The re-Cooper v. Central R. Co. (1876) 44 fusal to give this instruction, or an

Geno v. Fall Mountain Paper Co. Iowa, 134. A master must furnish (1895) 68 Vt. 568, 35 Atl. 475. In "such machinery as is reasonably well

in the coupling of which the plaintiff <sup>2</sup> International & G. N. R. Co. v. Bell was hurt were received by the defend-(1889) 75 Tex. 50, 12 S. W. 321. and from other railroads, and were "or-(1889) 75 Tex. 50, 12 S. W. 321. ant from other railroads, and were "or<sup>3</sup> Smith v. Baker [1891] A. C. 325, dinarily and reasonably safe for the
362, 60 L. J. Q. B. N. S. 683, 65 L. T. purpose for which they were used," the N. S. 467, 55 J. P. 660, 40 Week. Rep. defendant as a common carrier was 392; Williams v. Birmingham Battery bound to receive and transport them & Metal Co. [1899] 2 Q. B. 338, 68 L. J. over its line, and, if the plaintiff was Q. B. N. S. 918. The master "should injured solely on account of the deadadopt such suitable implements and woods on the cars, he could not recover. means to carry on the business as are This, it was objected, would have exproper for that purpose." Union P. R. acted of the defendant only ordinary

able that injury will not occur in the exercise of the employment,"8

Such being the general character of the master's obligations, the doctrine is now regarded as axiomatic that the employer is bound to furnish adequate materials and means and resources suitable to accomplish the work; that is to say, all that is necessary to carry on the business, including premises reasonably safe for that purpose.

equivalent, was therefore error. In R. Co. v. Keenan (1883) 103 Pa. 124; Mackey v. Baltimore & P. R. Co. Whitelaw v. Memphis & C. R. Co. (1890) 8 Mackey, 282, the court sustained instructions to the effect (1) that a railroad company should, "as far 67 Mich. 61, 34 N. W. 659; Smith v. as possible, provide for the protection of employees sufficient machinery in 501, 27 N. W. 662; Wood v. Heiges good order and condition," the words in (1896) 83 Md. 257, 34 Atl. 872; Wilkie italics being held not to extend unduly v. Raleigh & C. F. R. Co. (1900) 127 the master's obligation; (2) that the servant "has a right to expect that the servant "has a right to expect that the River Lumber Co. (1890) 76 Wis. 120, master will, as far as possible, provide 43 N. W. 1135. Fit and safe. Paimsufficient machinery in good order and condition," the words, "as far as possible," being approved for the same reasonible for the same reasonible for the occasion,"— Southern P. Co. (1891) 90 Cal. 496, 27 caused by a brake which was "defective, Atl. 61; Camp Point Mfg. Co. v. Balout of order, not in reasonable repair, low (1874) 71 Ill. 417; Ardesco Oil Co. or not reasonable for the occasion,"— v. Gilson (1869) 63 Pa. 146; Norfolk or not reasonable for the occasion,"— v. Gilson (1869) 63 Pa. 146; Norfolk as, in the case of a severe storm. The & W. R. Co. v. Nuckols (1895) 91 Va. word "occasion" was declared to have 193, 21 S. E. 342; Carpenter v. Mexibeen correctly used, whether it signified can Nat. R. Co. (1889) 39 Fed. 315. "necessity, or need," or "a particular Suitable and sufficient. A verdict for the plaintiff based on a special finding <sup>6</sup> Wonder v. Baltimore & O. R. Co. that the appliance was not "suitable (1870) 32 Md. 411, 3 Am. Rep. 143.

<sup>7</sup> Allen v. New Gas Co. (1876) L. R. which it was used will not be set aside.

1 Exch. Div. 251, 45 L. J. Exch. N. S. Quaid v. Cornwall (1878) 13 Bush, 668, 34 L. T. N. S. 541. The following 601. Sufficient and safe. Erskine v. 1 Exch. Div. 251, 45 L. J. Exch. N. S. Quant v. Cornwalt (1878) 13 Bush, 668, 34 L. T. N. S. 541. The following epithets and phrases have been used by Chino Valley Beet-Sugar Co. (1895) 71 the courts to designate the obligatory quality of the instrumentalities which the master is to furnish:

Proper. Smith v. Baker [1891] A. Corcoran v. Holbrook (1875) 59 N. Y. C. 325, 362, 60 L. J. Q. B. N. S. 683, 517, 17 Am. Rep. 369. Sound and safe. 65 L. T. N. S. 467, 55 J. P. 660, 40 Chesson v. John L. Roper Lumber Co. Week. Rep. 392; Williams v. Birming-(1896) 118 N. C. 59, 23 S. E. 925; ham Battery & Metal Co. [1899] 2 Q. Wonder v. Baltimore & O. R. Co. S. 338, 68 L. J. Q. B. N. S. 918; Union P. R. Co. v. O'Brien (1892) 1 C. C. A. Fit and proper appliances. Weems v. 354, 4 U. S. App. 221, 49 Fed. 538; Baltimore & O. R. Co. v. McKenzie (1885) 215; Kirkpatrick v. New York C. & H. 81 Va. 71. Suitable. Buzzell v. Laconia Mfg. Co. (1861) 48 Me. 113, 77 secure. Ryan v. Fowler (1862) 24 N. Am. Dec. 212; Sullivan v. India Mfg. V. 411, 82 Am. Dec. 315. Safe, sound, Co. (1873) 113 Mass. 396, 398; Rice v. Am. Dec. 315. Safe, sound, Co. (1873) 113 Mass. 396, 398; Rice v. Reasonably safe. Little Rock & Ft. S. Brick v. Rochester, N. Y. & P. R. Co. (1888) 84 Va. 679, 5 S. E. 582. 229, 59 Am. Rep. 80, 11 N. E. 101; Reasonably safe. Little Rock & Ft. S. Brick v. Rochester, N. Y. & P. R. Co. (1888) 84 Va. 679, 5 S. E. 582. 229, 59 Am. Rep. 80, 11 N. E. 101; Reasonably safe. Little Rock & Ft. S. Brick v. Rochester, N. Y. & P. R. Co. (1888) 84 Va. 679, 5 S. E. 582. 229, 59 Am. Rep. 80, 11 N. E. 101; Reasonably safe. Little Rock & Ft. S. Brick v. Rochester, N. Y. & P. R. Co. v. Voss (1892; Ark.) 18 S. W. (1885) 98 N. Y. 211; Cooper v. Central 172; Pioneer Fireproof Constr. Co. v. R. Co. (1876) 44 Iowa, 134 (instruction approved); Philadelphia, W. & B. 535, Affirming (1899) 90 Ill. App. 122;

The suitability of an appliance for the uses which it is to subserve being the criterion by which the employer's performance of his duty is measured, it follows that, if that standard is attained, all inquiry as to the dimensions or other characteristics of the instrumentality which caused the injury becomes immaterial and supererogatory.8

Where an employer is required, either by statute or by the terms of an agreement made with a municipality, to arrange his premises in a certain manner for the benefit or protection of the public, he must comply with this requirement in such a manner that his employees will not be unnecessarily imperiled.9 A similar responsibil-

Ployees will not be unnecessarily imperiled. A similar responsibil-Chicago & G. W. R. Co. v. Armstrong exercised reasonable diligence to pro- (1895) 62 Ill. App. 228; Rogers v. Leycure a reasonably safe appliance? den (1890) 127 Ind. 50, 26 N. E. 210; Reasonably suitable. O'Hare v. Keeler Chicago & E. R. Co. v. Lee (1897) 17 (1897) 22 App. Div. 191, 48 N. Y. Ind. App. 215, 46 N. E. 543; Pennsyl. Supp. 376. Reasonably safe and fit. vania Co. v. Witte (1896) 15 Ind. App. App. 2583, 43 N. E. 319, 44 N. E. 377; Clark Mooney (1895; Ariz.) 42 Pac. 952. County Cement Co. v. Wright (1896) Reasonably safe and adequate. Palmer 16 Ind. App. 630, 45 N. E. 817; Hanni. v. Denver & R. G. R. Co. (1882) 3 Mcbal & St. J. R. Co. v. Kanaley (1888) Crary, 635, 12 Fed. 392; Cameron v. 39 Kan. 1, 17 Pac. 324; Rush v. Mis-Great Northern R. Co. (1898) 8 N. D. souri P. R. Co. (1887) 36 Kan. 129, 124, 77 N. W. 1016. Reasonably safe and 212 Pac. 582; Missouri, K. & T. R. Co. and proper. Lyttle v. Chicago & W. M. v. Young (1896) 4 Kan. App. 219, 45 R. Co. (1890) 84 Mich. 289, 47 N. W. Pac. 963; Pahlan v. Detroit, G. H. & 571. Reasonably safe and secure. Scl. Reasonably safe and secure. Scl. Reasonably safe and Co. (1895) 107 Mich. 591, 65 N. W. suitable. Washington & G. R. Co. v. S65; Gardner v. St. Louis & S. F. R. Co. v. Sansom (1899) 41 Fla. 94, 25 So. (1897) 137 Mo. 240, 37 S. W. 132; 332; Kaye v. Rob Roy Hosiery Co. Plefka v. Knapp-Stont Lumber Co. (1889) 51 Hun, 519, 4 N. Y. Supp. 571; (1897) 72 Mo. App. 309; Multigan v. Spencer v. Worthington (1899) 44 App. Montana Union R. Co. (1897) 19 Mont. Div. 496, 60 N. Y. Supp. 873; Galves-135, 47 Pac. 795; Chicago, B. & Q. R. ton, H. & S. A. R. Co. v. Garrett Co. v. Oyster (1899) 58 Neb. 1, 78 N. (1889) 73 Tex. 262, 13 S. W. 62; W. 369; Ellis v. New York, L. E. & W. Southern R. Co. (1879) 100 U. S. 213, Mfg. Co. (1889) 126 Pa. 387, 17 Atl. 25 L. ed. 612; Chesapeake & O. R. Co. (21; Titus v. Bradford, B. & K. R. Go. v. Lash (1896; Va.) 24 S. E. 385. As to the propriety of these expresertein v erstein v. Jones (1891) 139 Pa. 183, 21 Atl. 24; Knoxville Iron Co. v. Pace see § 1183, post. (1898) 101 Tenn. 476, 48 S. W. 232; \*Smith v. New York C. & H. R. R. Eddy v. Adams (1892; Tex.) 18 S. W. Co. (1890) 118 N. Y. 645, 23 N. E. 900 490; Chapman v. Southern P. Co. (railroad company is not bound to fur-(1895) 12 Utah, 30, 41 Pac. 551. In nish new brake shoes, or those which Chicago & G. W. R. Co. v. Armstrong have been worn away only half an inch proved of the submission to the jury of effectual for the purpose for which they the two questions separately: (1) Was are used). the appliance reasonably safe for the 'Thus, a railroad company, although purpose intended? (2) Had the master required by law to erect and maintain

sions in laying down the law for a jury,

(1895) 62 III. App. 228, the court ap- or an inch, but brake shoes which are

ity accrues where the employer undertakes, proprio motu, to provide for the public any accommodations which may affect the safety of the employees.10

The probability or improbability of the occurrence which caused the injury is sometimes an essential factor in determining the question whether the instrumentalities or arrangements of the defendant satisfied the legal standard of safety. See chapters x., xi., post.

23. Other forms in which the extent of the master's obligations is expressed.— It is frequently said that negligence is imputable to a master whenever an instrumentality is of such a character, or his business is carried on in such a manner, as to subject his servants to dangers which are described as being unnecessary,1 or needless,2 or unreasonable,3 or unnecessary and unreasonable,4 or unreasonable and

a cattle guard at a certain point, must Rush v. Missouri P. R. Co. (1887) 36 make it safe for employees to cross if Kan. 129, 12 Pac. 582; Ashland Coal it so locates its switchyards that they & I. R. Co. v. Wallace (1897) 101 Ky. are constantly required to cross it. 626, 42 S. W. 744, 43 S. W. 207; Buz-Ford v. Chicago, R. I. & P. R. Co. zell v. Laconia Mfg. Co. (1861) 48 Me. (1894) 91 Iowa, 179, 24 L. R. A. 657, 113–117, 77 Am. Dec. 212; Harrison v. 59 N. W. 5. So. a railroad company Central R. Co. (1865) 31 N. J. L. 293; which obtains its right to cross streets Paulmier v. Erie R. Co. (1870) 34 N. in a city upon condition that it will J. L. 151; Abel v. Delaware & H. Canal plank between its rails is under obliga- Co. (1891) 128 N. Y. 664, 28 N. E. tion to do the work, and maintain it, 663; Warn v. New York C. & H. R. R. may be required to pass over it in the (1886) 112 Pa. 91, 56 Am. Rep. 310, 3 owes no duty to them to put down or Co. (1886) 113 Pa. 491, 57 Am. Rep. maintain the planks in the first in-479, 6 Atl. 226; Bonner v. La None stance. Valley R. Co. v. Keegan (1891) 80 Tex. 117, 15 S. W. 803. A (1898) 31 C. C. A. 255, 58 U. S. App. railroad company is liable for injuries 377, 87 Fed. 849.

N. Supp. 888.

N. Supp. 888.

Rmith v. Baker [1891] A. C. 325, 362, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. \*\*Smith v. Baker [1891] A. C. 325, \*\*Weiss v. Bethlehem Iron Co. (1898) 362, 60 L. J. Q. B. N. S. 683, 65 L. T. 31 C. C. A. 363, 59 U. S. App. 627, 88 N. S. 467, 55 J. P. 660, 40 Week. Rep. Fed. 23; Gibson v. Pacific R. Co. 392; Williams v. Birmingham Battery (1870) 46 Mo. 163, 2 Am. Rep. 497. & Metal Co. [1899] 2 Q. B. 338, 68 L. \*Noyes v. Smith (1856) 28 Vt. 59, J. Q. B. N. S. 918; Union P. R. Co. v. 65 Am. Dec. 222; Ryan v. Fowler O'Brien (1892) 1 C. C. A. 354, 4 U. S. (1862) 24 N. Y. 410, 82 Am. Dec. 315. Co. (1885) 66 Iowa, 599, 24 N. W. 231; 39 Minn. 254, 39 N. W. 488.

when done, in such a way that it will Co. (1894) 80 Hun, 71, 29 N. Y. Supp. be reasonably safe to its employees who 897; Tissue v. Baltimore & O. R. Co. discharge of their duties, although it Atl. 667; Brossman v. Lehigh Valley R. to a railroad brakeman ordered by the <sup>10</sup>Thus, a railroad company is negli- conductor to carry goods from a freight gent towards a brakeman engaged in car across a siding to the depot, where coupling cars, in leaving, in a walk be- the conductor also directs that the tween the tracks constructed for people train be cut in two, and a portion of it to walk upon, a rotten plank which backed down against cars standing on springs up and down when stepped such siding, after the brakeman has upon, and a hole in which his foot is listarted to carry the goods across it, able to be caught. Bird v. Long Island where such backing is unnecessary and R. Co. (1896) 11 App. Div. 134, 42 N. saves no time. Richmond & D. R. Co. v. Y. Supp. 888.

Brown (1893) 89 Va. 749, 17 S. E. 132.

<sup>2</sup> Weiss v. Bethlehem Iron Co. (1898)

App. 221, 49 Fed. 538; Recd v. Stock- That defects rendering an appliance more meyer (1896) 20 C. C. A. 381, 34 U. S. "hazardous than reasonable" import App. 727, 74 Fed. 186; Chicago & E. I. negligence, see Taylor, B. & H. R. Co. v. R. Co. v. Driscoll (1897) 70 III. App. Taylor (1890) 79 Tex. 104, 14 S.W. 918. 91; Kearns v. Chicago, M. & St. P. R. Bennett v. Syndicate Ins. Co. (1888)

extraordinary, or extraordinary, or greater than is reasonable and proper. The is manifest that the question, What shall be regarded as a necessity sufficient to justify the master in using any particular instrumentality? is one of fact, and must be decided with reference to the evidence presented in each particular case.8 But a general principle which is often helpful in determining whether or not a defendant is culpable is that a convenience may be so great as to be regarded as a practical necessity.9 The fact that a slight inconvenience or expense may have been saved by the adoption of a certain plan can have no weight in a matter affecting the safety of workmen.<sup>10</sup> The master, therefore, is bound to remedy dangerous conditions whenever that can be done at a comparatively small cost. How far the master is excused by evidence that the removal of the abnormal risk could not have been effected without a relatively large expenditure of money is a question which can scarcely be regarded as definitely settled by

"Marshall v. Widdicomb Furniture sas City, M. & B. R. Co. v. Burton Co. (1887) 67 Mich. 167, 34 N. W. 541.

"Houston & T. R. Co. v. Oram held that leaving a car at a place where (1878) 49 Tex. 341; Southwest Virginia Improv. Co. v. Andrew (1889) 56 Va. 270, 9 S. E. 1015.

"Taylor, B. & H. R. Co. v. Taylor (1890) 79 Tex. 104, 14 S. W. 918.

"In Myers v. Chicago, St. P. M. & O. R. Co. (1890) 137 Pa. 148, 20 Atl. 632.

R. Co. (1899) 37 C. C. A. 137, 95 Fed.

"Kline v. Abrahams (1900) 48 App. 406, the court seems to be of opinion that a railway company is excused from maintaining low overhead bridges where the grade is such that the track cannot be lowered, and the municipal cannot be lowered, and the municipal cannot be lowered and the municipal sufficient to negative liability. It has been held that the negligence of a railway company in placing a "mail crane" S. W. 12 (overhead bridge); Eastman at a certain distance from the track can be a question for the jury only 101 Mich. 597, 60 N. W. 309 (for foets are reasoned). ment. Louisville & N. R. Co. v. Mil-liken (1899) 21 Ky. L. Rep. 489, 51 S.

W. 796.

\*\*Dorsey v. Phillips & C. Constr. Co. (1877) 42 Wis. 583 (p. 597), where it was emphatically declared that "a convenience merely to lessen a little the labor of driving cattle into cars can hardly rank as a necessity, or excuse such proximity of cattle chutes to the track as to jeopardize life and limb of persons operating trains." To same effect as to a similar structure, see Allen best accommodate his interest. Reene v. Burlington, C. R. & N. R. Co. (1882) v. United States Leather Co. (1900) 57 Iowa, 623, 11 N. W. 614. In Kan- 107 Wis. 305, 83 N. W. 473, Vol. I. M. & S.-4.

have been remedied at a small cost, without impairing the efficiency of the instrumentality, is always admissible on the question of the master's negligence. Morris v. Stanfield (1898) 81 Ill. App. 264. Such evidence is not rendered incompetent as a result of the principle (see chapter v., post) that as against the servant the master has the right to construct and place the instrumentality as, in his judgment, would

the cases. No court seems to have gone to the extreme length of holding that the necessity for such expenditure may of itself he regarded as a circumstance which absolves the master from the duty of making a change, and against this view there is at least one decision, which is of the greater weight as it was rendered by a court which is usually by no means favorable to servants. 12 In Alabama the prevailing doctrine seems to be that if it appears, not only that the suggested alterations would have been very costly, but also that they would have caused much inconvenience and financial loss to several members of the public, the master cannot be held negligent in maintaining the conditions complained of.13

The materiality of the fact that a change can or cannot be effected without injuring the efficiency of the instrumentality is discussed in § 36, post.

It is not disputed that risks caused by defects which render instrumentalities less safe than they are when in their normal condition are unnecessary. A large number of cases in which the master's liability was affirmed under such circumstances are collected in chapter VIII., post.

How far injuries caused by instrumentalities in their normal condition are to be deemed unnecessary in such a sense as to import culpability is a much more complicated question, and may be said to depend upon the construction put by the court upon the principles discussed in the following chapters.

24. Master not bound to insure his servant's safety. That the words used in the preceding section to denote the legal standard of safety which the instrumentalities furnished by the master must satisfy also indicate the level above which he is not bound to rise is well settled. "All that can be required of the master . . . is that he shall use due and reasonable diligence in providing safe and sound machinery, and in the selection of fellow servants of competent skill and prudence, so as to make it reasonably probable that injury will not occur in the exercise of the employment."1

<sup>12</sup> An employer is negligent in con-tinuing to operate a blast furnace in the following three excuses for its not such a condition that there is a recur-being raised are reasonably available to such a condition that there is a recurrent danger of a rush of flame from the door, even though there is no way of remedying the defect except by extinguishing the fire, and that would involve considerable expense. Henderson v. Carron Co. (1889) 16 Sc. Sess. Cas. 4th series, 633.

In a case where a train hand was injured by a dangerously low overhead bridge, it was held that the jury should being raised are reasonably available to the railway company: That a higher level would cause too great inconvenience to vehicles crossing it; or that the alteration would be seriously detrimental to adjoining landowners; or that the cost of making the change would be so great that it ought not to be imposed on the company. Louisville & N. R. Co. v. Hall (1890) 91 Ala. 112, 8 So. 371.

1 Wonder v. Baltimore & O. R. Co.

This proposition is also susceptible of expression in the negative form, that, as regards the condition of his instrumentalities, viewed with relation to the safety of his servants, the master is not an insurer, or guarantor, or warrantor, of the safety of his servants.<sup>2</sup>

safe machinery, tools, and appliances is satisfied by the exercise of reasonable ployer and the employee, to be provicare and prudence in the manufacture, dent and regardful of the interest of the selection, and repair of such appliances.

Probst v. Delamater (1885) 100 N. Y. charge his duty to the extent reasonable care and foresight in procuring such appliances and keeping them in repair." plied that there is no warranty implied that the faithfulness of the servantee v. St. Louis Brewing Asso. (1894) 59 Mo. App. 277. See also, as ests of the employer, nor that the imexamples of similar restrictive expres-(1894) 59 Mo. App. 277. See also, as ests of the employer, nor that the imexamples of similar restrictive expressions, Harley v. Buffalo Car Mfg. Co. for the safety and well being of the employer (1894) 142 N. Y. 31, 36 N. E. 813; ployee shall always secure his safety Meany v. Standard Oil Co. (1900; N. and well being. Columbus & X. R. Co. J. L.) 47 Atl. 803; Bertha Zinc Co. v. v. Webb (1861) 12 Ohio St. 475. Martin (1895) 93 Va. 791, 22 S. E. "Safety in the use of machinery is only comparatively so, both to those using it (1892) 83 Tex. 286, 18 S. W. 741; Chiand to those at work in its immediate cago & E. R. Co. v. Lee (1897) 17 Ind. App. 215, 46 N. E. 543; Missouri, K. when in use, to a greater or less exelf T. R. Co. v. Young (1896) 4 Kan. App. 219, 45 Pac. 967; Arizona Lumber ter may become liable for negligence in & Timber Co. v. Mooney (1895; Ariz.) not providing suitable and safe machinery. & Timber Co. v. Mooney (1895; Ariz.) not providing suitable and safe machin-42 Pac. 952. It is error to instruct a ery, it is not meant that the master jury that a master is negligent in using warrants the strength or safety of his defective machinery. Louisville & N. machinery or appliances, but that he is R. Co. v. Orr (1882) 84 Ind. 50. See personally negligent in not taking also § 1051, post.

30 L. J. Q. B. N. S. 333, 7 Jur. N. S. 845, the ground of the decision in the case of Priestley v. Fowler (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur.

(1870) 32 Md. 411, 3 Am. Rep. 143. provident and regardful for the safety The duty of the employer to provide and well being of the servant. While, safe machinery, tools, and appliances is therefore, it is the duty of each, the emproper precautions to see that they are <sup>2</sup>According to Blackburn, J., in Mel-reasonably strong and safe.'" Marlors v. Shaw (1861) 1 Best & S. 437, shall v. Widdicomb Furniture Co. (1887) 67 Mich. 167, 34 N. W. 541.

To cite all the other cases in which the principle stated in the text is recognized would be superfluous. The 987, which laid the foundation of the following list will suffice: Tarrant v. modern law of employers' liability, was Webb (1856) 18 C. B. 797, 25 L. J. C. that there was no warranty on the part P. N. S. 261; Wilson v. Merry (1868) of the master that the carriage should L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. be free from defects, or that no injury N. S. 30, per Lord Colonsay (arg.); should happen to the servant. "There Snedden v. Addie (1849) 11 Dunlop, is no warranty that machinery shall be 1159; Union P. R. Co. v. Fort (1873) 17 Wall. 553, 21 L. ed. 739; Patton v. so complete that no injury shall be in- 17 Wall. 553, 21 L. ed. 739; Patton v. curred by the servant." Weems v. Texas & P. R. Co. (1901) 179 U. S. 658, Mathieson (1861) 4 Macq. H. L. Cas. 45 L. ed. 361, 21 Sup. Ct. Rep. 275, Af-215. A master does not warrant the firming (1899) 95 Fed. 244, 37 C. C. A. soundness of the materials furnished by 56; Reilly v. Campbell (1894) 8 C. C. him. Ormond v. Holland (1858) El. A. 438, 20 U. S. App. 334, 59 Fed. Bl. & El. 102. As there is an implied 990; Little Rock & Ft. S. R. Co. v. agreement on the part of the servant Duffey (1880) 35 Ark. 602; Little that he will faithfully serve and be re-Rock & Ft. S. R. Co. v. Voss (1892; gardful of the interest of his employer Ark.) 18 S. W. 172; Honner v. Illinois during the term of his service, a like C. R. Co. (1854) 15 Ill. 550; Columbus, implied agreement arises on the part of C. & I. C. R. Co. v. Troesch (1873) 68 the master that he will be reasonably III. 545, 18 Am. Rep. 578; Edward

Other virtually equivalent forms in which this rule is expressed are The master is not bound to see that his instrumentalities are "absolutely safe," or "absolutely safe and suitable," 4 or "perfectly safe." Nor is he bound to see that "in every event" his instrumentalities are in safe condition,6 nor to see that they are as safe "as human skill and foresight can make them." So far as there is any guaranty on his part, it is merely that due care shall be exercised in furnishing and maintaining the instrumentalities.8

This limitation upon the liability has been put upon the ground of public policy, the opinion being expressed that a contrary rule would eventually be disastrous to the servants themselves.9 But it is scarcely necessary to sustain the rule by invoking in terrorem arguments based upon speculations in the field of political economy. It is sufficiently supported by the consideration that ordinary care is expressive of the standard of duty which is owed by all the members of the community to each other, and that the law exacts a higher standard only in a few cases, and for reasons which are wholly inapplicable to the relations between a master and his servant.

Hincs Lumber Co. v. Ligas (1898) 172 P. R. Co. v. Taylor (1896; Tex. Civ. III. 315, 50 N. E. 225, Affirming (1896) App.) 35 S. W. 855; Oliver v. Ohio 68 III. App. 523; East St. Louis Pkg. & River R. Co. (1896) 42 W. Va. 703, 26 Provision Co. v. McElroy (1889) 29 III. S. E. 444.

App. 504; McGregor v. Reid, M. & Co. 3Pcxas & P. R. Co. v. Rhodes (1895) (1898) 76 III. App. 610; Indianapolis 18 C. C. A. 9, 30 U. S. App. 561, 71 Fed. & C. R. Co. v. Love (1858) 10 Ind. 554; 145; Erskine v. Chino Valley Beet-Jenney Electric Light & P. Co. v. Mursungar Co. (1895) 71 Fed. 270; Harley phy (1888) 115 Ind. 566, 18 N. E. 30; v. Buffalo Car Mfg. Co. (1894) 142 N. Chicago & E. R. Co. v. Lee (1897) 17 Y. 31, 36 N. E. 813; Camp Point Mfg. Ind. App. 215, 46 N. E. 543; Missouri, Co. v. Ballou (1874) 71 III. 417; Chi-K. & T. R. Co. v. Young (1896) 4 Kan. cago, B. & Q. R. Co. v. Smith (1885) App. 219, 45 Pac. 967; Atchison, T. & 18 III. App. 119; Chicago & E. R. Co. S. F. R. Co. v. Winston (1896) 56 Kan. v. Lee (1897) 17 Ind. App. 215, 46 N. 456, 43 Pac. 777; Porter v. Hannibal & E. 543; Gardner v. St. Louis & S. F. R. St. J. R. Co. (1879) 71 Mo. 66, 36 Am. Co. (1896) 135 Mo. 90, 36 S. W. 214; St. J. R. Co. (1879) 71 Mo. 66, 36 Am. Rep. 454; O'Donnell v. Baum (1889) 38 Mo. App. 245; Krampe v. St. Louis Brewing Asso. (1894) 59 Mo. App. 277; Essex County Electric Co. v. Kelly 277; Essex County Electric Co. v. Kelly (1894) 57 N. J. L. 100, 29 Atl. 427; Baulec v. New York & H. R. Co. (1874) 59 N. Y. 356, 17 Am. Rep. 325; Painton v. Northern C. R. Co. (1880) 83 N. Y. 7; Harley v. Buffalo Car Mfg. Co. (1894) 142 N. Y. 31, 36 N. E. 813; Pleasants v. Ralcigh & A. Air-Line R. Co. (1886) 95 N. C. 195; Mad River & L. E. R. Co. v. Barber (1856) 5 Ohio St. 541, 67 Am. Dec. 312; Ardesco Oil Co. v. Gilson (1869) 63 Pa. 146; Philadelphia, W. & B. R. Co. v. Keenan

Co. v. Ballou (1874) 71 III. 417; Chicago, B. & Q. R. Co. v. Smith (1885) 18 III. App. 119; Chicago & E. R. Co. v. Lee (1897) 17 Ind. App. 215, 46 N. E. 543; Gardner v. St. Louis & S. F. R. Co. (1896) 135 Mo. 90, 36 S. W. 214; Burlington & C. R. Co. v. Liehe (1892) 17 Colo. 280, 29 Pac. 175.

4Nutt v. Southern P. R. Co. (1894) 25 Or. 291, 35 Pac. 653.

Findlay Breving Co. v. Rayer

25 Or. 291, 35 Pac. 653.

<sup>6</sup>Findlay Brewing Co. v. Bauer (1893) 50 Ohio St. 565, 35 N. E. 55.

<sup>6</sup>Southern P. R. Co. v. Aylucard (1891) 79 Tex. 675, 15 S. W. 697.

<sup>7</sup>East Tennessee, V. & G. R. Co. v. Aiken (1890) 89 Tenn. 245, 14 S. W. 1082.

\*Little Rock & Ft. S. R. Co. v. Eubanks (1886) 48 Ark. 460, 3 S. W. 808. ""To hold that the master warrants the safety and proper condition of the delphia, W. & B. R. Co. v. Keenan machine is equally unjust to the mas-(1883) 103 Pa. 124; Faber v. Carlisle ter, for no degree of care can insure Mfg. Co. (1889) 126 Pa. 387, 17 Atl. perfect safety; and it is equally incon-621; Augerstein v. Jones (1891) 139 venient to the public, for who would Pa. 183, 21 Atl. 24; San Antonio & A. employ such machines if he were an in-

In the cases cited in this section, the principle that a master is not an insurer of his servants' safety is treated as a deduction from the conception that he is bound to exercise neither more nor less than ordinary care. But it is also frequently viewed as a corollary of the doctrine discussed in a later chapter, that the unsafe condition of an instrumentality does not import negligence, unless the master knew or ought to have known of that condition. 10 See chapter x., post. In some cases, both conceptions are traceable in the language of the court.11

The master is not bound to guarantee his servants against even extraordinary risks, 12 as, in cases where the servant is ordered to do something outside the scope of his regular employment.13

25. Instructions must be in conformity with this principle.—A jury is correctly instructed that a master does not insure his servants against injury.1 On the other hand, a verdict against the master will not be allowed to stand, where the trial judge has expressly laid it down that an instrumentality must be kept in such repair as to in-

surer?" Clarke v. Holmes (1862) 7 without the fault of the servant, by the Hurlst. & N. 937, 31 L. J. Exch. N. S. breaking of machinery. Compare also 356, 8 Jur. N. S. 992, 10 Week. Rep. the remark that the master does not in-405, per Byles, J. "If capitalists were sure against latent and undiscoverable held to be insurers of the lives of those defects. The Lizzie Frank (1887) 31 who enter their service in the various Fed. 477. industries, whether in operating railroads in constructing buildings, in Andrew (1889) 86 Va. 270, 9 S. E. 1015 various sorts of mining operations, and (arg.); Wonder v. Baltimore & O. R. in all the multifarious ways by which Co. (1870) 32 Md. 411, 3 Am. Rep. 143. money is made, these industries would There is "no general duty thrown by languish, and many more laborers law upon the master" to take due and would be out of employment, and the laboring poor would suffer infinitely more than now." Berns v. Gaston Gas Coal Co. (1885) 27 W. Va. 285, 55 Am. (1857) 26 L. J. Exch. N. S. 221, per Rep. 304.

We for example, it has been held that

as the master does not guarantee that bliss (1892) 97 Ala. 171, 11 So. 897. the appliances shall be free from defects, a complaint allowing and allowing the street of the

liable for every accident occurring, note 4, infra.

<sup>12</sup> Southwest Virginia Improv. Co. v.

<sup>1</sup> Western Screw Co. v. Johnson (1898) 86 Ill. App. 89. It is error to from a defective tool is demurrable, un- refuse the defendant's request for an inless it is also averred that the defend- struction that an employer does not inant knew or ought to have known that it was unsafe.

"See, for example, Jones v. New York C. & H. R. R. Co. (1880) 22 Hun, 284, where the court lays it down that (1894) 54 Ill. App. 586. An instructhe master does not guarantee that the tion that the employer contracts that machinery furnished is perfect, as the his employees are men of ordinary care law only requires him to use due care and prudence is not prejudicial, where and diligence in the selection and use such charge also makes the employer's of the machinery, and also remarks liability dependent on its knowledge that to hold him liable for defects not ascertainable by known tests and by the Hicks v. Southern R. Co. (1901; S. C.) exercise of due care would render him 38 S. E. 725. Contrast cases cited in sure the safety of persons using it, 2 nor where, although he has not used the word "insure" in stating the nature and extent of the master's obligation, he has used language which may have been construed by the jury in such a sense that they supposed him to be absolutely bound to safeguard his servants.3 Hence it is error to use the epithets "safe," "secure," "safe and sound," or the like, for the purpose of describing the instrumentalities which the master is bound to furnish, unless it is also made quite clear to the jury that he is only required to use ordinary care in furnishing instrumentalities answering this description.4

<sup>2</sup> Colorado C. R. Co. v. Ogden (1877) Williams (1891) 82 Tex. 342, 18 S. W.

2 Colorado C. R. Co. v. Ogden (1877)
3 Colo. 499.
3 The following instructions are erroneous: That a railway company is bound to exercise "ordinary care" in seeing that the coupling appliances upon its cars are in such repair that 468, 23 S. W. 1123; Galveston, H. & S. L. Co. v. Davis (1893) 4 Tex. Civ. App. 103, bound to exercise without any of the following appliances upon its cars are in such repair that 468, 23 S. W. 301; Galveston, H. & S. Co. vululing may be made "without any A. R. Co. v. Gorneley (1894; Tex. Civ. App. 1944; Tex. Civ. danger" to the brakeman or switchman App.) 27 S. W. 1051. It is also obmaking the coupling from being jectionable to use without qualification squeezed or compressed. Van Winkle v. Chicago, M. & St. P. R. Co. (1895) phrases: "Good and safe," Texas & P. 28 S. W. 741; "safe and secure," Probst v. Chicago, M. & St. P. R. Co. v. Huffman (1892) 13 Tex. Civ. App. 290, 14 Tex. Civ. App. 194; Tex. Civ. App. 194; Tex. Civ. App. 194; Tex. Civ. App. 195; Tex. Oi. V. Huffman (1892) 14 Tex. Civ. App. 196; Tex. Civ. App. 290, 27 S. W. 34; "safe and secure," Probst v. Civ. App. 196; Tex. Civ. App. 196; Tex. Civ. App. 196; Tex. Civ. App. 197; Texas Mexican R. Co. v. Farrell (1898) 79 Ill. App. 508. That a master is bound "to do everything that can reasonably be chared and the following that the master is required to flability of accident to the minimum." (1891) 25 S. W. 647; "sufficent, safe, adequate, and suitable," Allendor of the safety of his employees." Tex. Civ. App. 292, 29 S. W. 674. able," Bertha Zina Co. v. Martin That an employer is bound to exercise (1895) 93 Va. 791, 22 S. E. 869; "propsuch care as will "reduce questions of liability of accident to the minimum." (1891) 43 Ill. App. 583; "in safe conditurnish such appliances "as combine the greatest safety with practical use." Volkash, St. L. & P. R. Co. v. Johns Co. (1895) 105 Mich. 270, 63 N. W. (1891) 43 Ill. App. 83; Jones v. New 296. That the master is required to furnish such appliances "as combine the greatest safety with The word used in the following a higher degree of duty than is imposed asses of instructions declared to be erropeous was "safe:" Quinlivan v. Buftion, and is therefore contrary to reafalo, R. & P. R. Co. (1900) 52 App. son, as well as to law, for no master Div. 1, 64 N. Y. Supp. 795; Hughley v. can be required to do more for his serv-Wabasha (1897) 69 Minn. 245, 72 N. ant's safety than the servant is re-W. 78; Galveston, C. & S. F. R. Co. v. quired to do for his own safety. Bertha Wells (1891) 81 Tex. 685, 17 S. W. Zinc Co. v. Martin (1895) 93 Va. 791, 511; International & G. N. R. Co. v. 22 S. E. 869. An instruction declaring

Since such words as these are frequently used arguendo, without any qualifying adverb to designate the character and extent of the master's obligation (see § 1045, post), this doctrine virtually amounts to a declaration that language which is sufficiently precise for the purposes of general statement in the opinions of courts of review is misleading when the law is being laid down for a jury.<sup>5</sup> That the correctness of the language used to describe the extent of a master's duty is tested by a different standard of precision, according as it occurs in a judgment or in an instruction to a jury, is shown in a still more remarkable manner by the fact that it has been frequently held that even the addition of some qualifying adverb, like "ordinarily" or "reasonably," to such an epithet as "safe," "competent," etc., will not save an instruction from condemnation, unless it is also explicitly declared that the master is required to exercise only reasonable care in the production of the conditions described by those epithets. rationale of these decisions is that, in order to make good a charge of negligence, the servant must at all events prove that the master ought, as a prudent man, to have known of the existence of the conditions imputed as negligence, and that this essential element of liability is ignored by an instruction which merely adverts to the quality of the

the employer to be liable if the machinery is of "doubtful safety" is erroneous, los Coal R. Co. v. Deserant [1897] 9 N. as that is equivalent to requiring that it shall be perfectly safe. Illinois nary skill and care" (Nashville & D. R. River Paper Co. v. Albert (1893) 49 Co. v. Jones [1871] 9 Heisk. 27); or Ill. App. 363. It is error to charge "competent, skilful, and prudent" men that a railway company is bound to see (Kranz v. White [1881] 8 Ill. App. that the road is in good order and safe, and the engines are perfect, and propand the engines are perfect, and properly constructed according to the present state of the art (Nashville & D. R. Co. v. Jones [1871] 9 Heisk. 27), or that "plaintiff did not undertake to indisapproval of an instruction requiring cur risks arising from defective machincur risks arising from detective machinery or other instruments with which he is to work; his contract implied that had been stated in similar terms in sevin regard to these matters the defendant would make adequate provision, and that no unnecessary danger should ensue to him" (Konold v. Rio Grande non-delegable duties, and there was no W. R. Co. [1900] 21 Utah, 379, 60 Pac. necessity to notice the limitations of 1021). It is error to refuse a charge the rule. It was held that, as the trial to the effect that a master is not liable judge was not requested to qualify the for injuries to an employee from a de-instruction objected to, and insert fective platform which was constructed words expressive of these limitations, with reasonable care and caution. Missand there was no evidence that the desouri, K. & T. R. Co. v. Baker (1896; fendant exercised any care in selecting Tex. Civ. App.) 37 S. W. 94. Simithe appliance, the court of appeals larly, it is improper to charge the jury, could not treat the charge as error rewithout qualification, that the master quiring the reversal of a judgment for is bound to employ "fit, suitable, com- the plaintiff.

the master to furnish a "safe" applito the effect that a master is not liable judge was not requested to qualify the

appliances which the master is bound to furnish.6 Other courts, however, seem to consider that no prejudicial error is committed if it is made clear to the jury that a master is merely required to provide appliances that are reasonably safe. Even an instruction which ex-

court of appeals it has been held a misdirection to tell the jury, without quali- of the defendant to furnish a reason-

The following instructions have fication, that the master is bound to been disapproved: That if a railroad failed to provide a reasonably safe safe" or "reasonably suitable." Belletrack and equipment, and to keep the ville Pump & Skein Works v. Bender same in repair, it would be liable for (1896) 69 III. App. 189; Gormully & the death of an employee due to a defect in the track. Anderson v. Michiget in the death of the provide agencies that are "reasonably safe" or "reasonably suitable." Belleting in the track. Anderson v. Michiget in the track. Anderson v. Michiget in the track. Anderson v. Michiget in <sup>6</sup> The following instructions have fication, that the master is bound to ant, even if it had not been guilty of most of them are based is Camp Point negligence, would have been liable if Mfg. Co. v. Ballou (1874) 71 Ill. 417, the accident had occurred by reason of p. 421. But there the specific ruling the roadbed having recently become un- was simply that it was error to refuse That it is the duty of a railway an instruction to the effect that the company to keep its roadbed in a "rea- master "is not bound to furnish the sonably safe condition." Texas & P. very best or most improved kind of ma-R. Co. v. McCoy (1896) 90 Tex. 264, 38 chinery," and although the court laid S. W. 36 (conclusion put on the ground it down, arguendo, that the master is that a master might use ordinary care charged only with the "obligation to to make its track reasonably safe; use reasonable care and diligence in and yet there might be undiscovered deproviding suitable and safe machin-fects which would render it unsafe). ery," it seems scarcely possible to as-That it is the defendant's duty to fur-nish a reasonably safe place of work. attached to it by the court of appeals, Hughley v. Wabasha (1897) 69 Minn. when we find it followed by the remark 245, 72 N. W. 78. That a railroad that "it was sufficient if the machinery company is bound to furnish safe ma- was reasonably safe." The same critichinery and appliances. Gulf, C. & S. cism is applicable to the citation (in F. R. Co. v. Beall (1898; Tex. Civ. Gormully & J. Mfg. Co. v. Olsen [1897] App.) 43 S. W. 605. The principle 72 Ill. App. 32, supra) of Weber Wagon thus relied on in these decisions—that Co. v. Kehl (1892) 139 Ill. 644, 29 N. a jury should not be left to suppose E. 714, as a precedent for the same thethat a master is required, at his peril, ory. It does not lay the emphasis asto secure even a condition of reasonable serted upon the necessity of combining safety-seems to indicate that the in the instruction terms expressive, not Texas court of appeals has gone too only of reasonable safety, but of reafar, in a recent case, in condemning a sonable care. These authorities, therecharge which conveys the impression fore, cannot fairly be said to afford any that the master is rendered liable direct support for the decisions in quesmerely by proof that an appliance was tion; but this is immaterial, as the not reasonably safe to his knowledge, principle they embody involves, as a The Oriental v. Barclay (1897) 16 Tex. corollary, the doctrine relied upon in Civ. App. 193, 41 S. W. 117.

In several decisions by the Illinois stated above.

<sup>7</sup> An instruction that "it was the duty

plicitly recognizes the duty of the master to use ordinary or reasonable care on the premises is deemed to be correct only when the phraseology used in regard to that duty is such that the jury must have understood that the nonattainment of the obligatory standard of safety which the appliances are to satisfy is not culpable, unless that nonattainment is the result of a failure to exercise ordinary or reasonable care.8

sion, is not ground for reversal, where ery for the use of its employees." Gulf, the charge was given as a whole, and C. & S. F. R. Co. v. Wells (1891) 81 the correct rule was laid down in the Tex. 685, 17 S. W. 511. The court same subdivision of the charge. Atchi-said: "The words 'safe machinery,' in

the absolute safety of the structure, but able if it had used that degree of care they were bound to exercise every rea- in reference to the hand car which the sonable care in selecting the material law required of it." and in putting it up in a proper manplaintiff." The jury, it was said, required in regard to the means for carewould naturally construe this instruction to mean that, while the company is "due and ordinary care," "reasonable was not an insurer of the absolute care," and "ordinary prudence," is not safety of the structure, it was bound to sufficient to cure the error of other porfurnish a safe scaffold, and to exercise tions of the charge to the effect that

ably safe place for this man to work" is not misleading, since the jury must materials and in putting it up in a proper manner, so as to avoid accidents. Safe place" meant such a place as would be reasonably safe with reference to the circumstances and conditions attending the conduct of the business in question. Augusta v. Owens (1900) 111 Ga. 464, safety of its employees" may possibly 36 S. E. 830. The mere fact that the trial court instructed the jury that the master was bound to use such care as reference to the matters referred to, but would maintain his appliances "in safe condition," omitting the word "reasonable care in selecting the materials and in putting it up in a proper manner, so as to avoid accidents. This is certainly a very strong case, to say the least. A charge imposing upon the master the duty "to do everything the master the duty "to do everything the master the duty to use ordinary care in reference to the matters referred to, but would maintain his appliances "in safe care also informed that it was the duty are also informed that it was the duty of the master "to furnish safe machinging in the materials and in putting it up in a proper manner, so as to avoid accidents. This is certainly a very strong case, to say the least. A charge imposing upon the materials and in putting it up in a proper manner, so as to avoid accidents. This is certainly a very strong case, to say the least. A charge imposing upon the master the duty "to do everything the master the duty "to d son, T. & S. F. R. Co. v. McKee (1887) the connection used, would mean ma-37 Kan. 592, 15 Pac. 484. chinery so perfect that it could be used \*In Cleveland, C. C. & St. L. R. Co. without danger resulting from any dev. McClintock (1899) 33 C. C. A. 466, fect in it. . . . If it be contended that 63 U. S. App. 550, 91 Fed. 223, there the word 'reasonably' should be held to was held to be error, where the trial qualify the words under consideration, judge, after telling the jury that the we are of opinion that such was not the railway company in employing the intention, and that the jury could not plaintiff "undertook to use ordinary so have understood the charge. This is diligence in providing safe machinery illustrated by the following part of the and instrumentalities to be handled by charge intended to apply the law to the its employees," added, "and the most facts of the case. That part of the efficient mode of discharging that duty charge in effect informed the jury that in respect to cars used was to maintain they would find for the plaintiff if 'said a careful system of inspection," etc. hand car had a defective wheel; and, a careful system of inspection," etc. hand car had a defective wheel; and, In F. C. Austin Mfg. Co. v. Johnson further, that said defective wheel was (1898) 32 C. C. A. 309, 60 U. S. App. the cause of the injury to plaintiff, un-661, 89 Fed. 677, the following instructions was held to be misleading: "While the injury. The hand car may have the defendant company and its agent, been defective and the injury may have Killifer, under the law were required to resulted from that, without contributurnish the plaintiff a safe scaffold to tory negligence on the part of the plaintiff a safe scaffold to the structure but alled if it had used that degree of care

The fact that the court charges in ner to avoid accident and injury to the general terms that the degree of care

26. Master's obligations limited by the uses for which the instrumentalities were designed.— A general principle which is frequently conclusive against the servant's right to maintain an action is that the master's duty in respect to his instrumentalities is restricted to seeing that they are reasonably safe for the performance of the functions for which they are designed.

In most of the cases in which this principle has been applied, the justice of admitting such a qualification of his liability is too obvious to be open to question. Thus, it would clearly be unfair to require him to answer for an injury, where the emergency which tested the quality or capacity of the instrumentality arose out of an occurrence

railway companies are bound to take might be interpreted by the jury as layare built, and of the storms and floods that annually occur in those localities, if he used due care in employing the deand make all necessary guards against faulting servant. But in another part danger caused by ordinary and severe of the charge he also instructed the storms of the locality and to guard against washouts landslides and obstructions, and to keep their roads in suitable and safe repair. The jury incompetent, but that the defendant's might understand that no amount of foreman had notice of such incompetent and prudence to effect these ends tency. The court thought it improbable that the jury could have been misled, but, as the case was being sent complished. Gates v. Southern Minnel down on other grounds for a new trial. complished. Gates v. Southern Minne-sota R. Co. (1881) 28 Minn. 110, 9 N. W. 579. A jury is correctly instructed

notice of the topography of the country ing down the rule that if the defendant and of the climate in which their roads employed an incompetent servant he are built, and of the storms and floods would be liable to other employees, even down on other grounds for a new trial, suggested that the wording of the charge should be altered so as to re-W. 579. A jury is correctly instructed charge should be altered so as to rethat it is the duty of a master to use move all obscurity. Where negligence ordinary and reasonable care to furnish his servant with a safe place to perform cross-arm on its telegraph pole, and the his labor, and any failure to observe such duty is negligence. Western Screw consisted in failing to do what a reactor. V. Johnson (1898) 86 Ill. App. 89. So anable and prudent person would have Compare the Illinois cases cited supra. done under the same circumstances, and An instruction in an action for personal injuries to an employee by the defect that a reasonable and prudent person could have discovered, and if a building in process of construction defect, existed, obvious to an observer. of a building in process of construction, defect existed, obvious to an observer, that it was the duty of defendant to it was the master's duty to have made use reasonable care to keep the boards the necessary inspection, it was not error to further instruct that the master on the sill "securely fastened," is not objectionable as requiring that the covering should be "absolutely safe." was to furnish a reasonably safe crossarm, since such further instruction was the furnish as reasonably safe crossarm, since such further instruction was arm, since such further instruction was requiralled to saying that the master safety of the appliance, (1896) 68 Ill. App. 487. In Lewis v. but was, in substance, a ruling that a Emery (1896) 108 Mich. 641, 66 N. W. master must use reasonable care to furnish safe appliances. McDonald v. master must use reasonable care to furnish safe appliances. McDonald v. Postal Teleg. Co. (1900) 22 R. I. 131, imposes upon every man that runs a sawmill the duty to employ and use reasonably safe appliances, and to employ reasonably safe appliances, and to employ reasonably safe appliances, and to employees," and in other parts of the same instruction used language which

which implied no culpability on his part. The same may be said of those decisions the essential presented feature of which is that the plaintiff or a coemployee caused the injury by putting some part of the plant to an absolutely improper use. "Although it is a master's duty to use due care to furnish his servants tools and appliances suitable for the purpose for which they are provided, he owes them no such duty when they put his tools to uses for which they were not intended."2 It is "not negligence to omit a precaution applicable only to a situation which did not in fact exist."3 It is universally agreed, therefore, that an employer is not liable where the servant's injury was not caused by any defect in the appliance which affected its safety when it was used in the ordinary manner and for the purposes for which it was intended.4

ground for recovery by a switchman thrown from a car, whose arm was caught and crushed between the guard rail and the main rail; blocking being intended only to prevent feet from being caught. Rutledge v. Missouri P. R. Co. (1892) 110 Mo. 312, 19 S. W. 38. Ties are sufficiently strong if they will support a train as long as it is on the rails. The fact that a train moving at the rate of about 25 miles an hour, runs off the track after derailment, because the ties give way, is not evidence of negligence on the part of the company. Ward v. Bonner (1891) 80 Tex. 168, 15

Co. (1900) 70 N. H. 406, 47 Atl. 412. the master liable?"

In Durgin v. Munson (1864) 9 Allen,
396, 85 Am. Dec. 770, the defect in an engine, which was alleged as the cause

4 York v. Kansas City, C. & S. R. Co.

open to the objection that it requires the employer absolutely to keep its cars in a safe condition. Houston & T. C. gine from running off while it was R. Co. v. Kelley (1896) 13 Tex. Civ. turned on the turntable. It was held App. 1, 34 S. W. 809, 46 S. W. 863. An that the trial court should have perinstruction directing the jury to find instruction directing the jury to find caused by the defective condition of defendant's roadbed," and such condition was known or ought to have been known to the defendant, is not open to the chieatien that it makes the company to obey instrucopen to the objection that it requires of the plaintiff's injury, was the insufknown to the defendant, is not open to the objection that it makes the company an absolute insurer against all possible defects in the roadbed, where the jury are also told in another part of the engine in the abstract were not the gist of the plaintiff's complaint; but of the same instruction that the defendant assumed towards the plaintiff a circ in which the defendant allowed it duty to keep the roadbed "in a reasonably safe condition." Little Rock & tiff. If it were fit and sufficient for It. S. R. Co. v. Voss (1892; Ark.) 18
S. W. 172.

The failure of a railroad company sufficiency for other service, at other times, would not concern the plaintiff. Some accident occurred by failure of some accident occurred by failure of some accident occurred by failure of some servant of the company to obey instructions. Said Hoar, J.: "The defects of the engine in the abstract were not the gist of the plaintiff's complaint; but to be used when it ran on to the plaintiff. If it were fit and sufficient for use in the manner in which the defendant then allowed it to be used, its instructions. Said Hoar, J.: "The defects of the company to obey instructions. Said Hoar, J.: "The defects of the engine in the abstract were not the gist of the plaintiff's complaint; but to be used when it ran on to the plaintiff. If it were fit and sufficient for use in the manner in which the defendant then allowed it to be used, its instructions. Said Hoar, J.: "The defects of the company to the engine in the abstract were not the company to be used when it ran on to the plaintiff's complaint; but to be used when it ran on to the plaintiff's complaint; but of the engine in the abstract were not the company to be used when it ran on to the plaintiff's complaint; but of the engine in the abstract were not the engine in the abstract w times, would not concern the plaintiff. Now, it is plain that a machine may be safe and fit for one use when it is not for another. To put an extreme case, by way of illustration: Suppose the defendant had a worn-out engine, unfit for any service, and he had given orders that it should not be run at all, yet some workman had, without his knowledge, undertaken to run it; could the master be held responsible to the fellow servant? Suppose a car that was not fit to run with steam power was kept for use only when drawn by horses, or an engine which had not the proper appliances for a locomotive was employed S. W. 805.

\*\*Morrison v. Burgess Sulphite Fibre unauthorized change of the use make the master liable?"

The propriety of the limitation, viewed as a rule of law, excluding the intervention of a jury altogether, does not seem to be equally beyond dispute in a third class of cases, viz., those in which the circumstances which eventuated in disaster were brought about by an act of

(1893) 117 Mo. 405, 22 S. W. 1081. ride upon them safely. *Morris* Machinery is not negligently con-*Brown* (1888) 111 N. Y. 318, 18 N. structed when, if properly used in the ordinary manner, it is safe under all conditions which will probably arise in any instance, although it may have a defect which does not interfere with its safe and proper use for the purpose for which it was constructed. Richmond & D. R. Co. v. Dickey (1892) 90 Ga. 491, 16 S. E. 212.

The cases illustrating this rule under its different aspects are very numerous, and for the purpose of convenient reference are classified in the subjoined note under separate headings expressive of the special nature of the misuse in-

volved. (1) Riding on vehicles only intended for freight.—It is not negligent to omit to put safety appliances upon an elevator which never carries passengers, from which and its well the servants are excluded. Kern v. De Castro & D. Sugar Ref. Co. (1890) 125 N. Y. 50, 25 N. E. 1071; Ross v. Cross (1890) 17 Ont. App. Rep. 31 (nonsuit approved). A master is not liable for injuries received by an employee in riding upon a freight elevator which is safe and suitable for the purpose for which it is constructed and of the kind commonly used for the carriage of freight. Riordan v. Ocean S. S. Co. (1890) 32 N. Y. S. R. 328, 11 N. Y. Supp. 57, Affirmed (1891) 124 N. Y. 655, 26 N. E. 1027. To same effect see Felch v. Allen (1868) 98 Mass. 572; Hoehmann v. Moss Engraving Co. (1893) 4 Misc. 160, 23 N. Y. Supp. 787. That a "push car" designed for use by section hands in moving heavy materials short distances, and intended to be pushed, not ridden, the car down a steep grade. York v. was intended, securely fastened so as to Kansas City, C. & S. R. Co. (1893) 117 allow him to use it as a hand-hold in Mo. 405, 22 S. W. 1081. Compare also attempting to alight from the car in the decision that there is no duty on the part of a contractor engaged in the & O. R. Co. (1894) 62 Fed. 896. An excavation of a tunnel to see that the employee hauling buckets of tar up on "dump" cars. provided solely for the a roof lost his balance, and, in falling, conveyance of materials, are in such a grasped a triangular wooden "horse,"

Brown (1888) 111 N. Y. 318, 18 N. E.

(2) Appliances improperly used for the support of a servant's person.-The canvas cover at the top of a sloping elevator shaft in a mill is not intended to support the weight of a servant, and he steps upon it at his peril. Morrison v. Burgess Sulphite Fibre Co. (1900) 70 N. H. 406, 47 Atl. 412. Compare Schmidt v. Leistekow (1889) 6 Dak. 386, 43 N. W. 820 (servant stood on spouting running between the different stories of a flouring mill, for the purpose of passing mill stuffs, and it gave way under him). A master is not bound to furnish a mullion of a window, in a flat roof, strong enough to bear the weight or any part of the weight of a servant directed to go upon the roof and replace a pane of glass in the window. Saunders v. Eastern Hydraulic Pressed Brick Co. (1899) 63 N. J. L. 554, 44 Atl. 630. One employed in shifting and handling cars in a railroad yard, and run over after falling from the pilot of an engine on which he attempted to ride, cannot complain that the slats of the pilot were insufficient to afford a reasonably safe footing, since, if the defect be regarded as not obvious, it is still evident that pilots are not constructed for riding purposes. Young v. Boston & M. R. Co. (1898) 69 N. H. 356, 41 Atl. 268. A railroad is not chargeable with negligence because a number plate on an en-gine, designed merely to identify the engine, was not so securely fastened as to serve as a support for an employee as he passed over the pilot. McCauley and intended to be pushed, not ridden, v. Southern R. Co. (1897) 10 App. D. is not furnished with brakes, is not C. 560. A railroad company is under negligence rendering the railroad com- no duty to a brakeman to have the end pany liable for the death of a section gate of a gondola car, properly conhand killed by jumping off after riding structed for the purpose for which it condition that a civil engineer in the used as an appliance in hauling up the service of the contractor's employer can buckets. The "horse" was insufficient

the injured person which was perfectly proper in itself, and not improbable, or even very probable under the circumstances. It is difficult to admit that the elements thus involved present a situation which, in every instance, will justify a court in declaring that the

him. Held, that a peremptory instruc-opening through which a man's arm tion for defendant was proper, since can be thrust, intended for the use of the fact that the "horse" fell when levers in regulating the tension, is not, was insufficient for the use for which that an employee might thrust his arm it was intended. Bell v. Refuge Oil-through such opening and the sleeve Mill Co. (1899) 77 Miss. 387, 27 So. 5all because of a defective nut, where 382. An employee cannot recover for other openings, known to the employee, an injury caused by the breaking of a switch board upon which he was standing, due to the stepping thereon of a v. George Pankratz Lumber Co. (1897) fellow servant in an attempt to cross 95 Wis. 622, 70 N. W. 677. A railroad from one part of the building to another, where such board was intended for the purposes of a switch board only, sive speed over a short connecting track for the purposes of a switch board only, and not as a part of a passageway. Teetsel v. Simmons (1895) 60 N. Y. S. R. 34, 34 N. Y. Supp. 972. A workman cannot recover against his employer for injuries caused by falling from a scaffold on the giving way of a stay lath to which he was holding while leaning over to catch his tools thrown to him from below, where such stay side Coal & I. Co. (1879) 46 Wis. lething from below, where such stay side Coal & I. Co. (1897) 21 App. Div. lath was intended solely to keep the posts of the scaffold upright. Crebarry v. National Transit Co. (1894) 77 Hun, an act declared unlawful by a Pennsyl-74, 28 N. Y. Supp. 291. A railroad company discharges its duty to an employee in furnishing a brake staff on a strong to hold a heavy casting while ployce in furnishing a brake staff on a strong to hold a heavy casting while car sufficient for the use for which it quiescent, but broke when a servant, in is intended, although it gives way when trying to lift the casting without help, he attempts to use it as a hand-hold in allowed it to roll against the wedge, climbing on the car while moving. Elgin, J. & E. R. Co. v. Docherty (1895) 66 Ill. App. 17. See also, to same effect, Jayne v. Sebewaing Coal Co. (1896) 108 Mich. 242, 65 N. W. 971 fect. Jayne v. Sebewaing Coal Co. ployee cannot recover for injuries re-(1896) 108 Mich. 242, 65 N. W. 971 ceived from operating a saw, with the (miner when about to ascend a shaft in guard thereof placed by himself in a a cage took hold of a loose nut, not intended as a hand-hold, and not affecting the safe operation of the machine, and less, or even dangerous in other ways, had his hand crushed when the cage started); New York & N. J. Teleph. Co. v. Speicher (1896) 59 N. J. L. 23, 39 Atl. 661 (lineman used a cross-bar carrying wires as a support in climbing a juries caused by the breaking of an ap-

(3) Doing work in a manner different from that contemplated by the employer.—If a safe way is provided for K. & T. R. Co. (1896) 14 Tex. Civ. App. doing certain work, the servant adopts 222, 39 S. W. 174. a different way at his own risk. Hence, the owner of a sawmill in which is a designed for such a function.-No liasaw, the upper portion of which is cov- bility, as for defective machinery, is es-

to withstand the strain, and fell with jack screw and levers so as to make an jerked by plaintiff did not show that it as matter of law, required to foresee was insufficient for the use for which that an employee might thrust his arm for the purposes of a switch board only, sive speed over a short connecting track and so caused it to fall on him. Mc-Goldrick v. Metcalf (1891) 37 N. Y. S. R. 611, 14 N. Y. Supp. 269. An emposition different from that intended. The fact that it might have been useif placed where it was intended to be placed, is immaterial. Cluny v. Cornell Mills (1893) 160 Mass. 218, 35 N. E. 772. A master is not liable for inpliance under an excessive strain put upon it by the injured person's fellow servants. Throckmorton v. Missouri,

(4) Doing work with an appliance not ered by a sleeve which is raised by a tablished where carpenters use a team

master was not bound to make such arrangements as would have ob-Such a declaration may be permissible where viated the accident. the servant's act, if not positively negligent, was one which he could not have been reasonably expected to commit, inasmuch as there was an alternative and safe course open to him.<sup>5</sup>

But it is impossible not to feel some doubt as to the correctness of the decisions which virtually amount to an affirmation of the doctrine

to raise a bent for the support of a W. 452. In Cahill v. Hilton (1887) tank, instead of waiting for the engine 106 N. Y. 512, 13 N. E. 339, where the which had usually furnished the power, plaintiff was injured while standing on and, owing to the team's not being a ladder attempting to repair machinstrong enough, the bent falls back upon ery, one of the grounds on which the one of the men. McPherson v. Pacific right to recover was denied was that Bridge Co. (1891) 20 Or. 486, 26 Pac. there was no proof that the ladder had 560. A foreman of a construction been designed for the use to which the train, who uses a stanchion for the pur- plaintiff put it. pose of keeping in position upon a sharp curve the cable by which a plough ises for a purpose for which it was not is dragged over flat cars loaded with intended .- An employee of a coal-minusing, under the direction of the fore-cars from time to time in the process man over him, a tool not furnished for of shifting cars in a yard are not deor safely adapted to the work. Maher signed for the purpose of furnishing v. Thropp (1896) 59 N. J. L. 186, 35 employees with a passage, one of those Atl. 1057. Negligence cannot be imputed to a master where the evidence imployees assumes the risk of such an opening being suddenly closed up withing merely that a ladder gave way when out any notice to him. Plunkett v. spliced to another by the employees for Central of Ga. R. Co. (1898) 105 Ga. the purpose of forming a temporary 203, 30 S. E. 728 (First App. [1897] appliance, and, for aught that appears, it would have been of sufficient \$ 30a, note, 4, post.

strength to be used by itself. McKay
v. Hand. (1897) 168 Mass. 270, 47 N. guilty of negligence toward a workman. strength to be used by itself. McKay

of A street railway company is not

v. Hand (1897) 168 Mass. 270, 47 N. guilty of negligence toward a workman

E. 104. The fact that an engine stands employed upon a temporary track, in loon a trestle when the train halts at a cating such track so close to the girder certain station does not raise a duty to between the pillars of an elevated railsafely,—not, at all events, in the absuch girder, where there is nothing to sence of evidence showing that such examination was required by the regulative of the track upon the apamination was required by the regulations of the company. Chicago, B. & proach of the car. Sullivan v. Third Q. R. Co. v. Abend (1880) 7 III. App. Ave. R. Co. (1897) 19 App. Div. 195, 130. A servant who uses a short stick 45 N. Y. Supp. 1083. The court said: to clean sawdust out of the hopper un"It was not a part of the scheme of derneath a circular saw assumes the construction that a man should stand, risk of doing so. Henry Wrape Co. v. for the purposes of work, between the Huddleston (1899) 66 Ark. 237, 50 S. girder and the car,"

(5) Using a part of the master's premgravel, cannot recover for injuries ing company who, becoming affected by caused by the giving way of the bad air, abandoned work and walked stanchion by reason of the rotten condown an entryway to the first finished dition of a sill, where it appears that cross cut, to obtain a supply of fresh the company has furnished shives or air, cannot recover from his employer ground-wheels, especially adapted to for injuries sustained in using the cross keep the cable in place under such cir- cut as a passageway, knowing it was cumstances, and to support the strain. not designed for that purpose, but was Illinois C. R. Co. v. Daniels (1895) 73 constructed for the circulation of air Miss. 258, 19 So. 830. An employer in the mine. Lenk v. Kansas & T. Coal who supplies safe and proper tools is Co. (1899) 80 Mo. App. 374, 2 Mo. App. not liable to an employee injured by Rep. 589. As the gaps left between using, under the direction of the fore-

lay a platform upon it to enable the road structure that one cannot stand engineer to examine his engine more between a car passing on the track and

that a master's duty is fulfilled if his instrumentalities are reasonably safe for one special and primary purpose, although the work which he assigns to his servants may render it absolutely necessary to use them for other purposes as well,—as, where brakemen and other employees working about trains have been held unable to maintain an action, on the ground that the purpose of a roadbed of a railway is to serve as a track for the running of trains, and not as a path for employees to walk upon.<sup>6</sup> Such decisions, it is submitted, really beg the very question to be determined; that is to say, whether there was really a diversion of the instrumentalities within the meaning of the principle. It seems impossible, without an essential logical inconsistency, to assert, as matter of law, that the master is not liable, and at the same time to lay it down that his liability is for the jury to determine when there is evidence that the use of the instrumentality which caused the injury was in pursuance of a custom acquiesced in by the master. See § 28, post. Acquiescence is not, to say the least, any stronger evidence of the master's authority to make that use of it than is the fact of the servant's being required to do work which cannot be done without putting it to that use. Whether the instrumentality in question was actually designed for the use to which it was put is, in doubtful cases, a question for the jury.7 The mere fact that an appliance happens to be placed where it can be used for the performance of the work which the injured servant undertook to do with it does not warrant the inference that the master intended that he should use it as he did, or the inference that he was in fault in not knowing that he was likely to do so. Any other rule would involve the consequence that every master who leaves any implement

\*Allowing a cross-tie to remain on a trestle, with a bit of decayed sap in it, is not negligence as regards a conductor who has to cross it to flag a train, where there is no evidence that the tie was not otherwise sound and suitable for the use for which it was intended. East Tennessee, V. & G. R. Co. v. Reynolds (1894) 93 Ga. 570, 20 S. C. 70. A switchman who is injured while attempting to couple cars upon a track used for the purpose of making repairs to cars placed thereon, and not for making up trains, cannot recover for such injury, where it was caused by his accidentally stepping upon a car spring to the track. Williams v. St. Louis & S. F. R. Co. (1893) 119 Mo. 316, 24 S.

upon his premises, which his servants cannot safely use for every purpose which suits their convenience, sets a trap for them.8

27. Rationale of this limitation. - The nonliability of the master under the circumstances referred to in the preceding section may be rested upon various grounds.

In one point of view its essential basis is that, if new functions are imposed upon the instrumentalities by the servants themselves, a situation supervenes which the master cannot be held to have anticipated. The necessary inference, therefore, is that he is not bound to provide for the dangers created by it. See chapter x., post.

In another, it may be said that the servant who departs from the directions of the master as to the manner of using the instrumentalities is chargeable with a full comprehension of the conditions, and therefore assumes all the risk incident to his action.<sup>1</sup>

In another, the inability to maintain the action is considered as resulting from the servant's contributory negligence.2

As indicated by such decisions as those cited in subd. 4 of note 4 of the preceding section, the logical situation involved in cases of this type is to some extent analogous to that presented by those in which the master is absolved for the reason that, as respects the time or place of the accident, the injured servant was a mere trespasser, or at most a licensee, because he was not acting within the scope of his employment. See chapter xxxIII., post.

28. Diversion to new uses by the master himself, or with his consent. - If new functions are imposed upon an instrumentality by the

and did not tell him of the fact; for a tonied to use in doing their work." See master sets a trap for his servant only when he invites him into a dangerous

"Illinois C. R. Co. v. Daniels (1895) situation, or creates or suffers one to 73 Miss. 258, 19 So. 830. exist in a place where he knows or ought to know his servant is likely to that the defendants either intended for the plaintiff to use this elevator as he did, or knew, or were in fault for not knowing, that he was likely to do so. A person is not in fault for not knowing particular facts, unless circumstances exist which would put a man of average ther v. Lockhart (1891) 40 N. Y. S. prudence upon inquiry, . . and R. 942, 16 N. Y. Supp. 717. Affirming no such circumstances were shown. (1893) 137 N. Y. 529, 33 N. E. 336,

(1901) 23 Ky. L. Rep. 290, 62 S. W.

\*\*Morrison v. Burgess Sulphite Fibre defendants ought to have known that be would use it, they could then say Co. (1900) 70 N. H. 406, 47 Atl. 412- a trap was set for him when the de-414 (facts stated in note 3, supra). fendants left the gutter as they did; The court said: "There is no force in for that would be finding that they sufter be relatively a claim that the defendants for that would be finding that they sufter the relatively a supra in the second support of the second support the plaintiff's claim that the defendants fered a dangerous situation to exist set a trap for him when they covered upon a part of their premises which this part of their elevator with canvas, they knew their servants were accus-

<sup>1</sup> Illinois C. R. Co. v. Daniels (1895)

2 "If the servants undertake to use machinery or instruments for purposes go. . . The case does not show that the defendants either intended for for which they were not designed, and for which they were not designed, and for which the employer had no reason master himself or his representative, and the servant is thereby exposed to undue risks, the master must answer for any injury resulting from those risks, and cannot excuse himself by showing that the instrumentality was a suitable one for the performance of the work for which it was originally supplied.<sup>1</sup> The master's acquiescence in the use of an appliance for some purpose other than that for which it was intended puts him in the same position as if the appliance had been originally furnished for that purpose.<sup>2</sup> Accordingly, a qualification of this rule, that a servant cannot recover in the absence of evidence showing that the appliance in question was constructed with reference to the use to which it was being put when the accident occurred, is admitted in cases where it appears that it was customary for employees to put it to that use, and that the master knew of this custom.3 But the mere fact that an appliance had been diverted to new uses before the accident in suit will not render the master liable, if that diversion occurred without his knowledge or consent.4 Nor is an occasional

<sup>1</sup> Richards v. Hayes (1897) 17 App.
Div. 422, 45 N. Y. Supp. 234; Bowen v.
Chicago, B. & K. C. R. Co. (1888) 95
Mo. 268, 8 S. W. 230 (holding that, where a temporary bridge designed, among other things, for the support of a pile-driver, gives way owing to the operation of the machine, the fact that it was built on a standard plan found to be safe for the use of any particular one was not the machine, the fact that it was built on a standard plan found to be safe for the use of any particular one was not the machine, the fact that it was built on a standard plan found to be safe for the use of any particular one was not the machine, the fact that it was built on a standard plan found to be safe for the use of any particular one was not the machine, the fact that it was built or the use of any particular one was not the machine, the fact that it was built or the use of any particular one was not the machine, the fact that it was built or the use of any particular one was not the machine, the fact that it was built or the properties of the use of any particular one was not the machine, the fact that it was built or the properties of the use of any particular one was not the machine, the fact that it was built or the properties of the use of any particular one was not the machine, the fact that it was built or the properties of the properties on a standard plan found to be safe for ordinary purposes does not absolve the master). Where an ordinary road engine is used by order of the foreman of a switching crew, a member of that crew who is injured owing to the want of the footboard and hand-holds ordinarily found on engines specially constructed for switching purposes may recover damages. *Illinois C. R. Co.* v. *Johnson* (1900) 95 Ill. App. 54, Affirmed in (1901) 191 Ill. 594, 61 N. E. 334, where only a point of practice was considered. The use of a crane for tearing up rails on a disused track may properly be found to be negligence. Welsh v. Noir (1885) 12 Sc. Sess. Cas. 4th series, 590. On the other hand, it has been held that negligence could not be inferred from the use of a traction engine to pull up an old wreck from the bottom of a harbor. But this case seems to be really based upon the fact that the modus operandi had been carefully explained to the workmen, and that they were quite as competent to judge of the danger of this extemporlized use of the engine as the master himself. Bruce v. Barclay (1890) 17 Sc. Sess. Cas. 4th series, 811.

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the use of any particular one was not forbidden. The brakeman used the fig-ure plate, which was adapted thereto, and was most convenient for a man of his size. Held, that the company owed him the duty of inspecting the plate, commensurate with the purpose for which it must be assumed that it knew it was used. Dunn v. New York, N. H. & H. R. Co. (1901) 46 C. C. A. 546, 107 Fed. 666.

<sup>4</sup> That employees had without permission used an elevator constructed to carry freight only, on the first day it was operated, and before an injury to an employee who was riding thereon at the time it fell, does not change the fact that it was made to carry freight only, or increase the duty of the proprietor with reference to its maintenance. Sievers v. Peters Box & Lumber Co. (1898) 151 Ind. 642, 50 N. E. 877, Rehearing denied in 151 Ind. 662, 52 N. E. 399. In Miller v. Union P. R. Co. (1883) 5 McCrary, 300, 17 Fed. 67, it was left to the jury to say whether the company had acquiesced in the use of push cars for the conveyance of workmen.

improper use of an appliance, not in pursuance of a recognized custom, sufficient to render the master liable on the ground of acquies-Nor will negligence be imputed to an employer of experienced men, so as to render him liable for injuries sustained by them, because he permits them to relax his regulations or disregard his general instructions or advice, when they choose to do so for their own convenience and with knowledge of the risk.6

29. Servants engaged in construction, alteration, or repair of instrumentalities; standard of safety lower as regards.— It is well settled that, where the instrumentality which caused the injury was still incomplete at the time of the accident, and the injured servant was engaged in the work of bringing it to completion, the question whether the master was in the exercise of due care is determined with reference to a lower standard than that which is applied in the case of instrumentalities which have been put into a finished condition and are in regular use in the normal course of the business.<sup>1</sup> A similar qualification of the master's liability is admitted where the injured

(stevedore passed the fall rope of a derrick to a lighter, to haul it alongside a wharf, and the strain broke the guy

reason that the lower court had proceeded on the hypothesis that there was no distinction between the measure of duty in respect to a road under construction and one that is finished and in operation. In Colorado Midland R. Co. v. O'Brien (1891) 16 Colo. 219, 27 Pac. 701, a charge to the effect that the defendant was not bound to have its roadbed in as perfect a condition before

<sup>6</sup> Teetsel v. Simmons (1895) 69 N. Y. gineer employed upon a road which is S. R. 35, 34 N. Y. Supp. 972. under construction cannot recover mere
<sup>6</sup> The Persian Monarch (1893) 5 C. C. ly on the ground that the track is wet A. 117, 14 U. S. App. 158, 55 Fed. 333 and spongy, owing to the fact that the culverts are not yet completed. *Meloy* v. *Chicago & N. W. R. Co.* (1889) 77 Iowa, 744, 4 L. R. A. 287, 42 N. W. 563. rope of the derrick, and the boom struck The failure of a railway company, the plaintiff, who was participating in while constructing its road, to mainthe illegitimate use of the derrick suftain a turntable at each gravel pit and the illegitamate use of the derrick surficiently to make him an actor in the unloading of each car, is not negligence. transaction, and to place him in the Carr v. North River Constr. Co. (1888) position of one who assumed the risk). 48 Hun, 266. In an action for injuries <sup>1</sup> In Walling v. Congaree Constr. Co. received by a switchman while in the (1893) 41 S. C. 388, 19 S. E. 723, where employ of a railroad in the course of the injury was caused by the spreading construction, it is error to refuse an of the rails on a road under construction, a new trial was ordered for the where the injury occurred, or at that reason that the lower court had properiod of construction, was in the usual and customary condition of roads under good management, the plaintiff cannot recover. St. Louis, P. & N. R. Co. v. Cronin (1900) 87 III. App. 524. See also Bedford Belt R. Co. v. Brown (1895) 142 Ind. 659, 42 N. E. 359 (bridge carpenter not entitled to recover for an injury caused by the slip-ping out of a wedge used in the conroaded in as perfect a condition before ping out of a wedge used in the contituous finished as when it was opened struction of a track for the carriage of for public travel was approved. The heavy timbers); Bennett v. Long Isfact that a railway track, owing to its land R. Co. (1900) 163 N. Y. 1, 57 N. having been recently ballasted, is in a E. 79 (use of switch without lock or less secure condition than it will be target, on a road under construction, eventually when the ballasting has sethed not to be negligent); Allen v. Galland to the perfect of the conditions of the condition of the con tled, has been held not to be negligence veston, H. & S. A. R. Co. (1896) 14 per se. Illinois C. R. Co. v. Quirk Tex. Civ. App. 344, 37 S. W. 171 (reper se. Illinois C. R. Co. v. Quirk Tex. Civ. App. 344, 37 S. W. 171 (re-(1893) 51 Ill. App. 607. A civil en-covery denied where the injured servservant was hired for the express purpose of assisting in the repair, demolition, or alteration of some instrumentality, and the unsafe conditions from which the injury resulted arose from or were incidental to the work thus undertaken by him.2

bridge).

<sup>2</sup> A condition of disrepair does not import negligence as regards a servant whose business it is to make repairs.

ant was engaged in constructing a to maintaining their roads in good condition in all cases, it can scarcely be said that they are bound to protect them against obstructions which arise from temporary and extrinsic causes. Whose business it is to make repairs, temporary and extrinsic causes. There Branham v. Camden Cotton Mill (1901) certainly should be great hesitation in 61 S. C. 491, 39 S. E. 708. In Dartecacting the same measure of protection mouth Spinning Co. v. Achord (1889) tion in a case presenting the features 84 Ga. 14, 6 L. R. A. 190, 10 S. E. 449, of the one now considered as would be Bleckley, Ch. J. said: "While it is the demanded where the road was in good duty of a master to furnish his servant repair and in actual use." Where a servent property for use the is under no servent is completed to excite it remains. safe machinery for use, he is under no servant is employed to assist in repairduty to furnish his machinist with safe ing or opening a railroad which is in a machinery to be repaired, or to keep it dilapidated condition and out of repair, safe whilst repairs are in progress. Pre- the master does not owe to him the cisely because it is unsafe for use, re- same duty to furnish a safe roadbed as pairs are often necessary. The physito that portion of the road out of recian might as well insist on having a pair as it does to a servant engaged in well patient to be treated and cured, as the operation of trains upon the road the machinist to have sound and safe in the ordinary course of business, or machinery to be repaired. The plaintiff in riding upon the road in the course of was called to this machinery as infirm, his employment. Carlson v. Oregon not as whole. An important part of Short Line & U. N. R. Co. (1892) 21 his business was to diagnose the case Or. 450, 28 Pac. 497. A railroad comand discover what was the matter." In pany which is constructing newswitches Brick v. Rochester, N. Y. & P. R. Co. does not owe to a brakeman the duty of (1885) 98 N. Y. 211, a laborer on a blocking a frog which is a part of the construction train met his death owing new construction, during the progress to the unsafe condition of a crossing. of the work, since it is impracticable to The court said: "It may be assumed, block it till the tracks are ballasted and we think, that the deceased, in performing the services in which he was ening the services in which he was ening the services in which he was ening the alignment of the rails of the frog ing the services in which he was ening the alignment of the rails of the frog is perfected; and it is enough to give agade, and in traveling on the construction train, understood that he was not put him on his guard against the danworking upon a road which was finished gers from use of the track while the working upon a road which was inisited gers from use of the track while the and in good repair, but upon one which, work is in progress. Hauss v. Lake having been long neglected and but litterie & W. R. Co. (1901) 46 C. C. A. the traveled, and latterly only by construction trains, subjected him to greating taking damaged cars to the repair er risks and perils than would be inshop, a railway company does not owe curred under ordinary circumstances. the same duty to see that they are in the defendent's service be good required in the defendent's service be good required to the repair to the cool repair. In entering the defendant's service he good repair as it owes to men hired to assumed the hazards incident to the handle them in the ordinary course of same. One of these hazards was the its business. Flannagan v. Chicago & condition of this crossing, which was at N. W. R. Co. (1880) 50 Wis. 462, 7 N. this time, in connection with the re- W. 337. The duty of a railroad commainder of the road, out of order, and pany toward its employees, to keep its its liability at that season of the year cars in a reasonably safe condition, to be obstructed in the manner it was. does not apply to a car which is placed The obstruction was not a defect of an upon the repair track for the purpose intrinsic character, and no reported of being repaired. Brown v. Chicago, case holds that, under the circum-R. I. & P. R. Co. (1898) 59 Kan. 70, 52 stances here presented, the master Pac. 65. Where a servant is engaged would be liable. While it is difficult to in pulling down a building, there is no define the exact duty to employees de-obligation to make it or any part of it volving upon corporations in reference secure. On the contrary, the work of

The precise scope of this rule under its various aspects is not quite clear from the decisions as they stand. Language is sometimes used by the courts which, if taken literally, would entirely free the master from liability for failing to supply safe instrumentalities, whenever the work to be done by the servant consists in making safe the instrumentality the condition of which is alleged to import negligence.<sup>3</sup> But it cannot be really intended to concede this unqualified immunity to the master. It has been expressly declared in one of the cases cited in this section, 4 and it is implied in the reasoning of all the

demolition is one by which each part of the structure is, in turn, rendered insecure, and this the workman understands. Clark v. Liston (1894) 54 Ill. of a mass of gouge while he is engaged App. 578. In Wannamaker v. Burke in his regular work of timbering up (1886) 111 Pa. 423, 2 Atl. 500, it was held that it would be unreasonable to Finalyson v. Utica Min. & Mill. Co. hold a master to the same degree of (1895) 14 C. C. A. 492, 32 U. S. App. strictness while a building is being altered as might be required after such alterations were completed. The fact that alterations were being made in the presence of the employees is notice to aware, some time before the accident, that alterations were being made in the presence of the employees is notice to them of the possibility of danger of some sort, and of the necessity of exercising greater caution. To leave a small hole in the floor, useful for the purposes for which the room is used, and not in the ordinary line of travel, and no relation to the gouge.

See, for example, Bedford Belt R. Co. v. Broun (1895) 142 Ind. 659, 42 partially unprotected for a few days while changes and repairs in the room mill. Co. (1895) 14 C. C. A. 492, 32 U. are being made, is not such evidence of negligence as would justify a verdict for an employee who was helping to make the changes and was injured by in referring to the contention of counfalling into the hole. "If the hole," sel that, where servants are employed to put a thing in safe condition and of the room, near a passageway, or good repair, it would be inconsistent a question for the jury whether leaving it uncovered or insufficiently pro-tected, even for a short space of time, ing to do with the thing but to repair was not negligence. But here was a it. was not negligence. But here was a small hole in the floor on the extreme side of the building, within 1 inch of (1898) 59 Kan. 70, 52 Pac. 65. In the wall, outside of the ordinary walks of anyone, which had always been carefully guarded until the alterations renegligence. Which was held that a machinist's

of the room, near a passageway, or good repair, it would be inconsistent where persons were accustomed to pass and absurd to require of the master to and repass in the regular course of have it in safe condition and good rebusiness, it would have been, perhaps, pair for the purpose of such employ-

dered it necessary to take the guards helper was injured by the blowing off of away; which was being used constantly a cap on a locomotive which he was enduring the alterations to get rid of the gaged in tightening, the cause of the sweepings; which was only open for accident being the defective work of a from two to four days while the alteramachinist who had repaired it the day tions were in progress, and only open before. The court based its decision on then when not in actual use; which was the ground that it was not shown to intended to be, and was, permanently have been the duty of the servant to

other cases, that the servant's restricted right of action in this instance is ultimately referable to his presumed knowledge of the condi-This circumstance suggests that the principle under discussion is a protection to the master, only in cases where the risk from which the injury resulted was so far a normal incident of the servant's work that he must be taken to have contemplated the necessity of encountering it when he entered the employment. As a mere matter of principle, it is doubtless possible to reconcile upon this basis the cases already cited with those in which recovery has been allowed for the reason that the instrumentalities by means of which the work of construction, repair, or alteration was being carried out were unnecessarily dangerous.<sup>5</sup> But it must be admitted that to harmonize them with reference to the actual facts involved is a task of great, perhaps insuperable, difficulty.6

The standard of safety required in respect to a portion of a railway already in operation is, of course, the same where employees on construction trains are concerned as it is where members of the regular operating staff are the complaining parties.7

As to the effect of the doctrine discussed in this section upon the

an entire failure to spike the fourth on a curve of five or six degrees, in the construction of a railroad, is negligence exposing an employee engaged in the construction to a hazard not contemplated in his employment. Colorado Midland R. Co. v. Naylon (1892) 17 car); Texas & P. R. Co. v. Hohn Colo. 501, 30 Pac. 249. A complaint which bases the plaintiff's right to recover upon the failure to fence or light a large tank on a ship, near which the employees are obliged to pass after dark, is not rendered demurrable by the fact that the averments show that the ship was in course of construction. Mark is not rendered demurrable by the fact that the averments show that the ship was in course of construction. Mark is not rendered lemistration of the work of construction. Mark is not rendered demurrable by the fact that the averments show that the ship was in course of construction. Mark is not rendered demurrable by the fact that the averments show that the ship was in course of construction. Mark is not rendered demurrable by the fact that the averments show that the ship was in course of construction. Mark is not rendered demurrable by the fact that the averments show that the ship was in course of construction. Mark is not rendered demurrable by the fact that the averments show that the ship was in course of construction. Mark is not rendered demurrable by the fact that the averments show that the ship was in course of construction mal incident of the work of constructions and rendered the fact in the fact was at the fact of the purpose of repairing a tank).

A Pac M. M. M. Co. (1889) 17 Iowa, 743, 4 L. R. A. 287, 42 N. W. 563

(temporary track was in bad repair);

Stackman v. Chicago & N. W. R. Co.

(1891) 80 Wis. 428, 50 N. W. 404

(1892) 1 Tex. Civ. App. 36, 21 S. W.

4 P. R. Co. (1885) 98 N. Y. 211, fact that the averments show that the note 2, supra, should be deemed a normal incident of the work of constructions in course of construction.

The supra fact of the purpose of repairing a tank).

2 P. R. Co. (188 not, as matter of law, exercise reasonable care towards an employee riding on a caboose before the construction of the road is completed, where it omits N. E. 511. The fact that the work in to provide a target for a switch by the opening of which, due to such omission, such employee is injured. Bennett v. repair a railroad track does not dimintong Island R. Co. (1897) 21 App. Div. ish the company's duty to furnish safe

discover and repair the defect, as that 25, 47 N. Y. Supp. 258. See also Van required the skill of a machinist. In Amburg v. Vicksburg, S. & P. R. Co. the last analysis, therefore, the case is evidently to be distinguished from those 517 (temporary bridge on road in cited in note 2, supra, on the ground that the servant was excusably ignorant of the conditions.

The single spiking of three ties, and an entire failure to spike the fourth on a curve of five or six degrees. in the (temporary track was in had repair).

extent of the master's duty to warn a servant of transitory dangers which may supervene while the work is in progress, see § 209d, note 3, post.

and suitable means and instruments to for that purpose. Madden v. Minnedo his work. If it requires him to use apolis & St. L. R. Co. (1884) 32 Minn. the old track in doing the work, it 303, 20 N. W. 317. should make the track reasonably safe

## CHAPTER IV.

OBLIGATIONS OF A MASTER, CONSIDERED WITH REFERENCE TO THE DUTY OF SERVANTS AND THIRD PERSONS TO USE REASONABLE CARE.

30. Generally.

30a. Master entitled to rely on the presmption that due care will be exercised by each servant to avoid injuring himself.

a. Generally.

b. Dangerous structures above or beside railway tracks.

30b.— and by each servant to avoid injuring his fellow servants.

- 31. Negligence inferable where instrumentalities furnished cannot be safely used by servants exercising ordinary care.
- 32. Master entitled to rely on the assumption that due care will be used by strangers with whom he requires his servant to work.
- 30. Generally.— One of the grounds upon which the servant's right to recover was denied in the earliest reported decision in which the liability of employers was discussed was that "the mere relation of the master and the servant can never imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself." This principle involves, as corollaries, the two following propositions:
  - (1) In selecting and continuing to use any particular instrumen-

(per Lord Abinger), quoted in Berns v. standing for what purposes it is de-Gaston Gas Coal Co. (1885) 27 W. Va. signed, employs it for another purpose 285, 55 Am. Rep. 304; Hoffman v. Dickfor his own convenience. Guenther v. inson (1888) 31 W. Va. 142, 6 S. E. 53. Lockhart (1891) 40 N. Y. S. R. 942, 16 A master is not negligent who takes as N. Y. Supp. 717, Affirmed (1893) 137 much care of his servant as he takes N. Y. 529, 33 N. E. 336. In Leak v. for his own safety. Sykes v. Packer Carolina C. R. Co. (1899) 124 N. C. (1882) 99 Pa. 465; Green & C. Streets 455, 32 S. E. 884, the following instructures. R. Co. v. Bresmer (1881) 10 W. tion was held to be erroneous as being N. C. 379. While "the law requires of too general: "The law imposes upon an employer a high degree of care in the employer the duty of exercising furnishing his workmen with safe tools. furnishing his workmen with safe tools, greater care of protecting the employee it will also, in the case of a skilled from injury due to the defective condiworkman operating with a dangerous tion of appliances than is required of tool, require a correspondingly high dethe employee in guarding against accigree of care on his part in its use." dent." It will be shown, however, in Chicago & A. R. Co. v. Mahoney (1879) the chapter dealing with the construct-4 III. App. 262. The duty created by a ive knowledge of the servant (xxi.), statute requiring certain safeguards to that, while the law thus assimilates, in

<sup>1</sup> Priestley v. Fowler (1837) 3 Mees. be added to an instrumentality is not & W. 1, Murph. & H. 305, 1 Jur. 987 owed to a servant who, fully under-(per Lord Abinger), quoted in Berns v. standing for what purposes it is de-

tality, a master is entitled to proceed upon the hypothesis that his servants will use as much care for their own safety as he himself would use for his own safety under similar circumstances, supposing him to act as a prudent man would act.<sup>2</sup>

The logical connection between this rule in one of its phases and the doctrine which is discussed in the next chapter is indicated by the fact that the absence of any obligation to furnish a safer kind of instrumentality may sometimes be a necessary inference from the consideration that, up to a certain point, the master may rely on the servant's avoiding the dangers incident to the use of the inferior instrumentality by the exercise of a degree of care proportioned to the circumstances. Hence, a form of expression sometimes found in cases embodying the doctrine referred to, that it was not negligent to adopt a less safe description of instrumentality, although in the use of it greater care on the servant's part might be required.3

(2) A master is guilty of a breach of duty, if he fails to see that the instrumentalities supplied are of such a character and maintained in such a condition that his servants will be able to carry on their work without the risk of injury as long as they exercise proper care in the use of those instrumentalities.

In the absence of other controlling considerations, therefore, the question whether an injured servant can recover will, in certain states of the evidence, hinge upon the question whether the instrumentality which caused the injury was one which, with reasonable care and caution, could be used by him without danger at the place and in the manner in which it was used.4

It will be observed that this doctrine is closely related to that which rests upon the simpler conception that the existence or absence of a contractual duty on the master's part is determined by the servant's knowledge or ignorance of the risk. See chapter vii. The connecting link between the two doctrines is, of course, this very knowledge or ignorance, which is an element, expressed or understood, in any case which involves the inquiry whether due care was used. chapter x. Under most showings of fact, indeed, it will apparently

a sense, the obligations of the master sumption that another in his conduct and servant in respect to the duty of will act in accordance with the rights exercising care, it also recognizes that, and duties of both." Newson v. New in view of their respective positions, York C. R. Co. (1864) 29 N. Y. 390. the master is bound to be more vigilant than the servant in regard to the inspection of the instrumentalities.

2 The general rule in this connection is that "the law will never hold it imprudent in anyone to act upon the pre-

prudent in anyone to act upon the pre-

make no material difference, so far as regards the practical consequences, whether the servant's right to recover is tested with reference to one of these doctrines or the other. The closeness of the association which exists between them, and the virtual identity of the results produced by their application in particular instances, are indicated by the fact that, in some cases, it is difficult to say with certainty whether the court intended to deduce the servant's inability to maintain the action from the general consideration that the danger in question was known to the servant or from the special consideration that the master was entitled to rely upon the presumption that, as the danger was thus known, the servant would use due care to avoid it.5

30a. Master entitled to rely on the presumption that due care will be exercised by each servant to avoid injuring himself .-- a. Generally. —The most numerous illustrations of the first of the two propositions formulated in the preceding section are to be found in the cases in which the person whose probable course of conduct is the element with reference to which the master is deemed to be justified in transacting his business is the injured servant himself. Recovery is here denied upon the ground that, under the circumstances, the master is within the protection of the rule that the extent of his legal obligation is merely to provide instrumentalities which can be used without any abnormal danger by a servant who uses ordinary care. That is to say, no breach of duty is predicable where the instrumentalities are

<sup>5</sup> See, for example, the opinion in Atchison, T. & S. F. R. Co. v. Plunkett ment of the master's duty to provide (1881) 25 Kan. 188. In Jennings v. safe machinery and a safe place "must Tacoma R. & Motor Co. (1893) 7 be tested by the experience of employees Wash. 275, 34 Pac. 937, we find the court laying it down that the assumption that the employer has furnished a safe place of work cannot be relied on after actual knowledge to the contrary has been brought home to the servant. cidents. . . . No machinery can be The assumption will control only when the danger is not apparent. No sane man is expected to act on an assumption wenturesome." Cunningham v. Bath Iron

the danger is not apparent. No sane less and mattentive, or reckless and man is expected to act on an assumption which he knows to be false. It is the servant's duty to exercise common sense when in the employment of a massense when in the employs a man experienced in the operation of the appliance, or prophas a right to rely upon the servant's early instructed how to handle it, and warned of the danger of improper methods. <sup>1</sup>Payne v. Recse (1882) 100 Pa. 301; ods. Smith v. Foster (1901) 93 Ill. Bemisch v. Roberts (1891) 143 Pa. 1, App. 138. The master is not bound to 21 Atl. 998; Daris v. Augusta Factory protect the servant against his own (1893) 92 Ga. 712, 18 S. E. 974; Gulf, carelessness, neglect, and default. Please C. & S. F. R. Co. v. Wells (1891) 81 ants v. Raleigh & A. Air-Line R. Co. Tex. 685, 17 S. W. 511; and the cases (1886) 95 N. C. 195.

such as can, with reasonable care, be used "without danger except such as may be reasonably incident to the business,"2 or "without more danger than is ordinarily incident to the business."3 ter is under no obligation to provide against any special risks incident to the peculiar manner in which the servant may perform the contract of service. Nor is he required to guard the servant against dangers of which the servant himself is equally or more competent to take notice, and against which he is guarding himself more effectually than could anyone else.<sup>5</sup> "Something," as has been remarked, "may be left to the sense and volition of persons having intelligence." All

26, note 4, subd. 4, ante.

it off the track).

<sup>2</sup> Wormell v. Maine C. R. Co. (1887) it may suffer through the reckless <sup>2</sup> Wormell v. Maine U. R. Co. (1887)

79 Me. 397, 10 Atl. 49.

<sup>3</sup> Chicago & G. W. R. Co. v. Armetrong (1895) 62 Ill. App. 228.

<sup>4</sup> Murphy v. Greeley (1888) 146 Mass.

196, 15 N. E. 654 (servant attempted to go through a dark passage in a building under construction, without a light, and fell into an opening). Compare \$ ger of such a door arises from a cause gesentially the same as that which may essentially the same as that which may \* Texas & P. R. Co. v. Eason (1899) render any instrumentality insecure, 34 C. C. A. 530, 92 Fed. 553 (culpabil-viz., the servant's failure to use ordiity not predicable of the omission of nary precautions in moving from the a section foreman to direct his subordinates to desert a hand car when a train Kupp v. Rummel (1901) 199 Pa. 90, is so close that there is no time to get 48 Atl. 679. There can be no recovery it off the track).

\*\*Couch v. Charlotte, C. & A. R. Co. (1884) 22 S. C. 557 (leaving waterway through a roadbed not negligence as regards a section hand who fell into it after it had been drawn up an inclined while pushing a hand car). Negligence cannot be predicated of the maintenance of a cattle chute in close proximity to the track, unless "it is dangerous to trainmen when they are exercising what is, under the particular circumstances, ordinary care." New York, C. 632, 21 Atl. 733. In a case where it & St. L. R. Co. v. Ostman (1896) 146

Ind. 452, 45 N. E. 651, Reversing on rehearing (1895) 41 N. E. 1037. The snow from a track any special warnfact that a machine may be dangerous ing as to the movements of trains on ing as to the movements of trains on for the death of an old and experienced fact that a machine may be dangerous ing as to the movements of trains on if improperly used, or that it actually the adjoining track, the court said: injures its operator, is not the test of the master's liability. If the machinery is of ordinary character, and such as can, with reasonable care, be used without danger to the servant, it is all that can be required of the master. gued that the storm made the situation  $Smith \ v. \ Foster \ (1901) \ 93 \ III. \ App. \ 138 \ (emery wheel burst), quoting dochis fellows, and the court therefore trine enunciated in Chicago, R. I. & P. could not say, as matter of law, that R. Co. v. Lonergan (1886) 118 III. 48, the railroad owed no unusual duty for 7 N. E. 55. A railway company is not the protection of its employees. But bound to make a door for a freight car so strong and stable as to be capable of dented for one than for the other, and resisting any kind of heavy blow which$ fact that a machine may be dangerous ing as to the movements of trains on resisting any kind of heavy blow which the danger, though greater in degree,

instructions which contravene or ignore this principle are errone-

A proposition of equivalent import, so far as the immunity of the master is concerned, is that a servant "assumes the risk of all dangers,

W. 40 (use of a common passenger engine for switching purposes denied to be negligent because it could be safely handled by men exercising due care);

McCain v. Chicago, B. & Q. R. Co.
(1896) 22 C. C. A. 99, 40 U. S. App.
181, 76 Fed. 125 (verdict for the defendant rightly directed where an engine wiper placed his bare hand upon a splinter attached to the driving wheel of an engine, 6 inches long and projecting from 1/2 to 1 inch beyond the tire, in cleaning the engine, when the smooth engine were open to his use for the purpose).

<sup>7</sup> In Gould v. Chicago, B. & Q. R. Co. (1885) 66 Iowa, 590, 24 N. W. 227, it was held error to charge the jury that, if they found that a water column was come an insurer of their limbs and placed in such close proximity to the lives? We need not say this will not tracks as to be dangerous to the persons operating the trains, they would persons can bear a burden such as this, be justified in finding that the defend neither ought they so to do. When ants were guilty of negligence in the men are hired, something must be prederection and location of the column. icated of their judgment and prudence, The court said: "It is not true that a and hence, when the employer furnishes railroad company is to be regarded as them with tools and appliances which, negligent in erecting or maintaining though not the best possible, may, by contrivances or things for use in the ordinary care, be used without danger,

was no different in kind from that un- operation of their roads, for the reason der ordinary circumstances, and the that they are 'dangerous to the persons more manifest the danger the more the operating the trains.' Indeed, the employer was entitled to rely on the whole business of operating trains is presumption that the employee would 'dangerous.' It is full of perils to not unnecessarily incur it." Nye v. those employed therein. Because there Pennsylvania R. Co. (1896) 178 Pa. is danger, it does not follow that the 134, 35 Atl. 627. In Stringham v. companies are negligent as to the Stewart (1885) 100 N. Y. 516, 3 N. E. things from which the danger springs. 575, one of the facts emphasized was The instruction should have expressed that the elevator in question was safe the thought that if the erease was danthat the elevator in question was safe the thought that, if the crane was danwhen used with ordinary care. See gerous to persons operating trains in also  $Huffer \ v. \ Herman \ (1896) \ 66 \ III.$  the exercise of ordinary care, the de-App. 481 (employer not bound to anfendant was negligent in constructing ticipate that an inexperienced employee it." In  $Pittsburgh \ \& C. \ R. \ Co. \ v. \ Sentwill put his hand under the cap covering the knives of a planing machine); 684, the trial judge told the jury that <math>Young \ v. \ Burlington \ Wire \ Mattress \ Co.$  if they believed that it was required of (1890) 79 Iowa, 415, 44 N. W. 693 (reference) and the property denied for an injury due to unspecified as a Sentweyer the injured of the converse denied for an injury due to unspecified as a Sentweyer the injured of the converse denied for an injury due to unspecified as a Sentweyer the injured to the converse denied for an injury due to unspecified as a Sentweyer the injured to the converse denied for an injury due to unspecified as Sentweyer the injured to the converse of the company of the converse denied as a Sentweyer the injured to the converse of the company of the converse of t (1890) 79 Iowa, 415, 44 N. W. 693 (rethe employees of the company of the covery denied for an injury due to unsame class as Sentmeyer, the injured guarded machinery, partly on the servant, to be on the top of freight cars ground that it could have been used, in while in motion, and the defendant perthe exercise of due care, with reason mitted a bridge to be maintained over able safety); Fowler v. Chicago & N. its track, of a height insufficient to al-W. R. Co. (1884) 61 Wis. 159, 21 N. low the safe passage of persons while on the top of such cars, and that the servant was knocked off, they might find that the injury of Sentmeyer was caused by the negligence of the company. The court said this charge "amounts to an instruction that the defendant was bound to have all the bridges crossing its road of such a height that whether its employees were careful or negligent no damage could result to them therefrom. But what is the logical result of a doctrine such as for the purpose of supporting himself this? Is it not that the company must not only guard its servants from probsurfaces of all the other parts of the able, but also from possible, dangers, and that it must place no dependence on their care and skill, even in the matter of their own preservation and personal safety? That it must provide against their very negligence, and bedo; that neither natural nor artificial

however they may arise, against which he may protect himself by the exercise of ordinary observation and care."8

Two important applications of the principle are that a master is entitled to conduct his business on the assumption that his servants will make use of appliances furnished by the master for the special purpose of preventing accidents like the one which caused the injury in suit,9 and on the assumption that any duty which is legitimately cast upon the servant, and having for its object the maintenance of the place of work or machinery in suitable condition, will be properly performed.10

b. Dangerous structures above or beside railway tracks.—That there is room for a considerable diversity of views in regard to the practical application of the rather vague principle under discussion is indicated by no class of cases in a more striking manner than by those which deal with accidents caused by dangerous structures above or beside railway tracks.

Some courts have concluded that, as to a servant who understands the conditions, negligence cannot be predicated of the maintenance of such structures, for the reason that he is presumably able, under all circumstances, to avoid coming into collision with them

App. 417.

For example, an electric light comfrom that cause. Carr v. Manchester no one else operates it. Johnson v. Electric Co. (1900) 70 N. H. 308, 48 Hovey (1894) 98 Mich. 343, 57 N. W. Atl. 286. So, an electric light company 172. A railroad company is not liable is not liable for an injury received by for injuries to one of its own brakemen, an experienced lineman in handling caused by a defect in the condition of 79, 29 S. W. 988. No fault is imputable the want of proper propping, is not warto a brewer, where he sends some servanted where the evidence is that it was ants to deliver beer barrels to a custom- the duty of the employer to supply

he has discharged his duty, and is not er, furnishing the ordinary appliances, responsible for accidents." It is a mis- and one of them is injured in consedirection to state without qualification quence of their pursuing a method of that, if the unboxed machinery which their own for piling the barrels, for the caused the injury was dangerous under reason that the appliances furnished the circumstances in which the plaintiff were not suitable for the place. It is was operating it, the defendant was neg-their duty to make complaint when they ligent. Meyer v. Meyer (1899) 86 Ill. ascertain the insufficiency of the appliances, and procure new ones. Ramsey <sup>5</sup>Pittsburgh & C. R. Co. v. Sentmeyer v. Robin (1889) 16 Sc. Sess. Cas. 4th (1879) 92 Pa. 276, 37 Am. Rep. 684. series, 6.

10 The owner of a sawmill is not pany which, by means of a cut-off guilty of negligence toward an employee switch, the use of which the plaintiff in charge of a saw, in allowing dirt to knew, had guarded a lineman absolutely accumulate about the saw so as to clog against danger from the wires coming its frame and slides and prevent its in contact with those of other compaworking properly, when it is the duty nies, is not liable for an injury arising of such employee to clean the saw, and live electric wires with his bare hands, the brake under his charge. Illinois & where gloves have been provided which, C. R. Co. v. Jewell (1867) 46 Ill. 99, if used, would have enabled him to do 92 Am. Dec. 240. A verdict for a miner the work in safety. Junior v. Missouri injured by the fall of the roof of a pas-Electric Light & P. Co. (1895) 127 Mo. sage which he was excavating, owing to by keeping a proper lookout.<sup>11</sup> In the New Jersey case cited below, the court expressly rejected the contention that the action was maintainable because the servant was engrossed in his duties and failed to observe his peril.12 Others arrive at what is practically the same result by means of the theory that, even if the maintenance of the structures implies culpability, it must always be inferred that a servant who knew or ought to have known of the risk was able to protect himself, and was therefore negligent if he failed to do so.<sup>13</sup> Under this theory also, the servant's position does not seem to be in any wise improved by the fact that his attention was engrossed by his duties.<sup>14</sup> The same view seems to be taken in Alabama.<sup>15</sup>

The results of a doctrine like that applied in the cases so far cited are manifestly the same as if the servant's duty to exercise care were not taken into account at all, and his inability to maintain the action referred to the theory of an acceptance of the risk. In fact, all the decisions cited are put partially upon that ground. A more merciful and more rational doctrine is that the maintenance of these structures is prima facie a breach of duty, but that, at all times after the

wood for the purpose of propping the roof, and that this duty had been performed, and that it was the duty of the miners themselves to put up the props, and to decide when they should cease extreme case, as the bridge was only 28 excavating and leave the pillars. Cook inches above the top of the car, and the v. Bell (1857) 20 Sc. Sess. Cas. 2d series, 137. An instruction which makes the place of work in a mine an important inquiry, but states that, notwithstanding the accident may have been in an entry, yet the defendant was not liasung the accident may have been in supra. Much of what was said by the 81 N. W. 249.

on the court in the Alabama cases cited he latis to inform nimself as to the point note 4, infra, and seems to express sition of the bridges on the line, after he the point of view in three Virginia has been put on inquiry by his supecases: Clark v. Richmond & D. R. Co. riors, or fails to take the necessary (1884) 78 Va. 709, 49 Am. Rep. 394; steps to avoid being injured.

Sheeler v. Chesapeake & O. R. Co.

an entry, yet the defendant was not lia- supra. Much of what was said by the ble if, by general usage, or for any other court seems to amount to something very reason, it was plaintif's duty to look like a complete retractation of what had after the roof, is not erroneous. Taylor been said in Beard v. Chesapeake & O.R. v. Star Coal Co. (1899) 110 Iowa, 40, Co. (1893) 90 Va. 351, 18 S. E. 559, as to the effect of the diversion of the serv-<sup>11</sup> Baylor v. Delaware, L. & W. R. Co. ant's attention, though the two cases (1878) 40 N. J. L. 25, 29 Am. Rep. 208; may stand together on the ground that,

(1878) 40 N. J. L. 25, 29 Am. Rep. 208; may stand together on the ground that, Baltimore & O. R. Co. v. Stricker in the earlier one, the accident was (1878) 51 Md. 57, 34 Am. Rep. 291; proximately caused by a defective brake. Pittsburgh & C. R. Co. v. Sentmeyer (1879) 92 Pa. 276, 37 Am. Rep. 684.

12 Some remarks on the preposterous standard of vigilance prescribed for the Banks (1894) 104 Ala. 508, 16 So. 547, servant by cases of this type will be the doctrine was laid down that a servant in \$620 meet. found in § 63b, post.

ant is guilty of contributory negligence

13 This is undoubtedly the conception if through inattention or forgetfulness of the court in the Alabama cases cited he fails to inform himself as to the po-

servant has become chargeable with a knowledge of their position and characteristics, he must avoid them at his peril under normal circumstances, when there is nothing to divert his attention. <sup>16</sup> But the applicability of this doctrine has in one case been denied under circumstances which have brought the court very near the position taken in those decisions which have been already referred to.<sup>17</sup> The converse principle deduced from this conception is that a train hand who, at a time when he is not required to do so, either by the orders of his superiors or by the demands of an emergency arising in the management of the train, stands upon a car which, as he knows or ought to know, is too high to leave room to enable him to pass safely a bridge which the train is about to reach, is, as matter of law, guilty of contributory negligence.18

Still another theory is that the maintenance of such structures always warrants the inference of negligence on the company's part, and that the contributory negligence of the servant, if relied upon as a defense, must always be established by specific evidence unaided by any such presumptions, whether absolute or qualified, as those which arise out of the doctrines adverted to in the preceding paragraphs. As adherents of this theory it is probably permissible to cite all the courts whose decisions are cited in §§ 69a and 70a, post. Such a point of view, of course, renders it still more impossible than under the Kentucky doctrine to debar the servant from recovery, as a matter of law, for the reason that he did not remember the precise position of the train with regard to the particular bridge which caused his injury.19

neglect as to a brakeman who failed to tucky.

neglect as to a brakeman who failed to stoop because his attention was diverted by an emergency requiring prompt action. See also Nance v. Newport Derby v. Kentucky C. R. Co. (1887) 9

News & M. V. R. Co. (1891) 13 Ky. L.

Rep. 554, 17 S. W. 570.

Thughes v. Cincinnati, N. O. & T.

R. Co. (1891) 91 Ky. 528, 16 S. W.

275, where, although brakemen were compelled to be on the tops of cars in passing through a certain tunnel, so that they might control the speed of the train, the court laid it down that "if train hand engaged in the performance the deceased. knowing he could not pass of some duty which distracts his attenthe deceased, knowing he could not pass of some duty which distracts his attenthrough these tunnels standing upon the tion cannot be adjudged negligent, as top of the car, neglected to take the a matter of law, because he is, for the

<sup>16</sup> In Cincinnati R. Co. v. Sampson can be no recovery." This decision was (1895) 97 Ky. 71, 30 S. W. 12, and quoted with approval in Southern R. Louisville & N. R. Co. v. Cooley (1898) Co. v. Duvall (1899) 20 Ky. L. Rep. 20 Ky. L. Rep. 1372, 49 S. W. 339, the 1915, 50 S. W. 535, and therefore reprecompany was held to be guilty of wilful sents the views still prevailing in Ken-

usual precaution of sitting down, there time being, unmindful of the proximity

The writer has no hesitation in expressing his opinion that, when the ordinary conditions of traffic and the circumstances under which servants are often obliged to do their work are taken into account, a railway company ought not to be considered free from culpability if the track and its appurtenances are laid out on the assumption that the attention of trainmen will never be diverted at times when they need all their faculties to enable them to avoid danger, or that the want of light or inclement weather may not render the task of selfprotection so unusually difficult as to be impossible. It follows, therefore, that just as an apparatus designed to support a heavy weight is not adequate unless it is strong enough to support the heaviest weight which will be laid upon it in the course of the master's business, a structure above or near the track is not a suitable one unless it is so placed and arranged that a trainman can perform with reasonable safety any rightful function connected with his duties, at any time during the twenty-four hours, and in any weather that is likely to be encountered on the railway in question, even though his attention may be in some measure diverted from the task of self-protection by some special emergency which produces a more or less complete forgetfulness of the perils by which he is surrounded. See, further, § 63, post.

30.b. — and by each servant to avoid injuring his fellow servants.— In another class of cases the theory of the decision in the master's favor is that his duty is fulfilled if the instrumentalities furnished are reasonably safe so long as they are carefully used by the fellowservants of the employee whose security depends upon their quality.1

his peril, take proper precautions to istence of the defect, or be prepared at avoid being injured by it, and cannot re- all times to avoid it. cover for an injury caused by it, on the 154 N. Y. 263, 48 N. E. 514, Reversing the jury to say what switches, what

of a certain structure to the track. [1895] 88 Hun, 359, 34 N. Y. Supp. Benthin v. New York C. & H. R. R. Co. 824), the ground upon which recovery (1897) 24 App. Div. 302, 48 N. Y. was denied was simply that the evidence Supp. 503; Brown v. New York C. & H. was not sufficient to show that the serv-R. R. Co. (1899) 42 App. Div. 548, 59 ant's death was due to the bridge. In N. Y. Supp. 672. The Wallace Case, Greenleaf v. Dubuque & S. C. R. Co. seems to be, upon the facts, inconsistent (1871) 33 Iowa, 52, where a brakeman with an earlier ruling by the supreme was injured by the spout of a water court in *Fitzgerald* v. *New York C. &* tank, the court observed that, if the *H. R. R. Co.* (1891) 59 Hun, 225, 12 N. service to be performed by him was of Y. Supp. 932, where it was laid down a character to require that his exclusive that a brakeman who is aware that attention be fixed on it, and that he there is a low bridge in a certain place, should act with rapidity and promptand that there are no warning signals ness, it could hardly be expected that to remind him of its existence, must, at he should always bear in mind the ex-

<sup>1</sup>Burke v. Witherbee (1885) 98 N. Y. ground that the company is under a 562, followed in Coppins v. New York C. statutory duty to provide the signals. & H. R. R. Co. (1887) 43 Hun, 26, where On the final appeal of this case ([1897] it was said that "it may not be left to

Unless the work is of such a nature that a prudent regard for the safety of the servants indicates that they should receive special instructions, or that, while doing it, they should be placed under the control of a skilled overseer, the master has a right to assume that, where he gives them a task to perform, and leaves the method of performance to their own selection, they will select a reasonable and proper method for the performance of their task.2

In so far as the doctrine now under consideration is applicable to cases of this type, it manifestly overlaps the domain of the familiar principle, to be discussed in the third volume of this treatise,— viz., that a servant cannot recover for injuries proximately caused by a coservant's carelessness in handling the agencies supplied by the master.

31. Negligence inferable where instrumentalities furnished cannot be safely used by servants exercising ordinary care.— The second of the propositions formulated in § 28, ante, carries with it the inference that there is negligence on the master's part if the business, as conducted, will "inflict damage upon those who are guilty of no neglect of prudence." The fact that a dangerous machine could be safely

patented articles, or contrivance shall received an injury through a defective ployee caused by the negligence of a coemployee." Alford v. Melcalf Bros. & means, have prevented the accident. Co. (1889) 74 Mich. 369. 42 N. W. 52 Texas P. R. Co. v. Johnson (1890) 76 (the use of a plank, instead of a skid Tex. 421, 13 S. W. 463. There a train adjoining, is not, in itself, negligence). the point to the main rail and hold it An employer is not negligent, as matther when the lever indicated that the ter of law, because of the fall of a scafrails were in proper position for the pasfold which was adequate to the work sage of cars. The contention of the defor which it was originally erected, but fendant was that some employee might proved inadequate to an extra strain have placed the switch rail in proper which was put upon it by the negligence position by the use of an axe or in some plated when it was built. Chicago therefore proximately due to the negli-Architectural Iron Works v. Nagel gence of a fellow servant. (1898) 80 III. App. 492.

1 Diamond State Iron Co. v. Giles

iniury caused by attempting to lower a

be used by a railroad company in order appliance, the master cannot escape liato escape liability for injury to an em- bility on the ground that another servant might, by the use of some unusual with hooks, on which to unload boxes was derailed because the spring of a of fellow servants, and was not contem- other way, and that the injury was

(1898) 80 III. App. 492.

<sup>1</sup> Diamond State Iron Co. v. Giles

<sup>2</sup> Karr Supply Co. v. Kroenig (1897) (1887) 7 Houst. (Del.) 557, 11 Atl.

167 III. 560, 47 N. E. 1051, Reversing 189; Hannah v. Connecticut River R.

163 III. App. 219 (master not liable for Co. (1891) 154 Mass. 529, 28 N. E. 682 injury caused by attempting to lower a (railway company, although not bound heavy cylindrical tank into a basement to have the distance between a switch by a method which the plaintiff knew rod and the ground the least that will to be dangerous without a larger num- admit of the working of the switch, is ber of hands); Spencer v. Ohio & M. R. required to use reasonable care in seeing Co. (1892) 130 Ind. 181, 29 N. E. 915 that the place is such that employees (no action maintainable where a servence recessarily passing over it can do so ant ordered to clean an engine at a time safely in the exercise of due care); when it is standing still on the track Goodrich v. New York C. & H. R. R. Co. goes under it, and is injured by its being (1889) 116 N. Y. 398, 5 L. R. A. 750, put in motion). When a servant has 22 N. E. 397 (railway company liable worked by a careful man will not remove the liability from the master.<sup>2</sup> In estimating the effect of this doctrine it is important it should be remembered that a master is not entitled to rely upon the assumption that a servant will take precautions to avoid dangers of which he has no knowledge.<sup>3</sup> An inference drawn from this doctrine in some cases is that the master is culpable if the construction of his machinery or the location of dangerous structures is such that the slightest indiscretion on the part of a servant may prove fatal.4 If this conception were consistently carried out, it is clear that servants would be allowed to recover in some large and important classes of cases,—notably those in which the instrumentalities which caused the injuries were uncovered machinery, low overhead bridges on railway lines, structures dangerously near to railway tracks, and unblocked frogs and guard rails. But such cases are controlled, at least in some courts, by other considerations the practical effect of which is to require the servant to exercise at his peril a degree of care which is entirely beyond the capacity of ordinary men. See §§ 30a, 30b, ante, and §§ 54, 63, 69, 70, 72, post.

32. Master entitled to rely on the assumption that due care will be used by strangers with whom he requires his servant to work.—Where an employer's own servants are required, in the course of his business, to work in combination with other parties for the performance of something in which he and those parties have a common interest, it is

for injury caused by bumpers of insuf- the same effect, Shaffer v. Haish (1885) for injury caused by bumpers of insufficient rigidity and strength to sustain, 110 Pa. 575, 1 Atl. 575; Mississippi without yielding, the shock of a car River Logging Co. v. Schneider (1896) backed up, without undue speed, against it to be coupled); Tevas P. R. Co. v. Fed. 195; Chicago Anderson Pressed McAtee (1884) 61 Tex. 695 (car brake so defective as not to operate effectually with proper use). In Norfolk & W. R. 573, 36 N. E. 572, and the cases as to Co. v. Brown (1895) 91 Va. 668, 22 S. low bridges cited in § 30a, b, ante.

E. 496, the court qualified its ruling that the use of cars with couplings of 336. that the use of cars with couplings of 336. unequal height is negligence by the proviso that the difference in height should 29, 55 Am. Rep. 169, 4 N. E. 172. This not be so great as to allow the bumpers to miss each other altogether. "It is a bridge cases cited in § 30a, b, ante. part of the implied contract between "Toledo, W. & W. R. Co. v. Fredermaster and servant (where there is only icks (1874) 71 Ill. 294 (couplings radan implied contract) that the master ically defective where the drawbars are snail provide suitable instruments for so short as to endanger an employee the servant with which to do his work, going between the cars); Chicago, B. & and a suitable place where, when exer-Q. R. Co. v. Gregory (1871) 58 III. 272 cising due care himself, he may perform it with safety, or subject only to such v. White River Lumber Co. (1890) 76 hazards as are necessarily incident to the business." Sullivan v. India Mfg. cog wheels).

Co. (1873) 113 Mass. 396. See also, to Vol I M & S 6 shall provide suitable instruments for so short as to endanger an employee Vol. I. M & S.—6,

<sup>3</sup> Hawkins v. Johnson (1885) 105 Ind. principle is also assumed in the low-

not negligence for him to act on the assumption that they will exercise proper care.1

tion shall be answered in the affirmative, done."

¹ In Foley v. Chicago & N. W. R. Co. the further question will be presented: (1882) 48 Mich. 622, 42 Am. Rep. 481, What measures of protection could the 12 N. W. 879, it was held that the repeteresentatives of a railroad switchman fusal to move the car at all? The who had been sent by the defendant to switchman knew what was to be loaded, switch a car owned by another railroad and had a general knowledge of its company, to be loaded with nitro-glycerine by the consignor of that company, cific information to him on that subject and who was killed by an explosion would have been entirely without value. caused by the negligence of the servants of that consignor, could not recover dame and he could exercise no control over the of that consignor, could not recover damand he could exercise no control over the ages. The court said: "The question, action of those who were. Caution from then, seems to be this: Whether dehim on the subject would not be likely fendant, in complying with a proper re- to receive attention from the men whose quest from another railroad company to business it was and who handled it conrun for it a short distance one of its stantly. The only caution to decedent cars, to be loaded with an article which which could have been of the least servwas safe when properly handled, but ice would be the caution to keep away exceedingly dangerous when carelessly altogether. If he was entitled to this, handled, was bound to assume that negit necessarily follows that defendant ligence on the part of those handling should have refused altogether to move it would occur, and bound to take meas- the car over its track. But it was not ures for the protection of its servants claimed on the argument that this could on that assumption. And if this ques- have been properly and even lawfully

## CHAPTER V.

OBLIGATORY QUALITY OF INSTRUMENTALITIES, CONSIDERED WITH REFERENCE TO THE RIGHT OF A MASTER TO CARRY ON HIS BUSINESS IN HIS OWN WAY.

- 34. Generally.
- 35. Master is not bound to adopt any particular instrumentalities or methods.
  - a. Rule stated and illustrated.
  - b. Instructions required by the rule.
  - c. Immaterial that the instrumentality adopted requires greater care in the handling.
- 36. Rationale of this principle.
  - a. An application of the doctrine of assumption of risks.
  - b. Rendered necessary by the jury system of trials.
  - c. Master not an insurer of the servant's safety.
- 37. Feasibility of the changes suggested; evidential significance of.
- Negligence not inferable from the use of dissimilar appliances for the same purpose.
- 39. Master's duty to introduce new appliances.
- 40. General doctrine not a protection where the instrumentalities are of a pattern that is not reasonably safe.
- 41.- nor where they are specifically defective.
- 42.— nor where the risks incident to using them were not fully understood by the injured person.
- 34. Generally.— The general result of the authorities cited thus far is that the extent of the master's responsibility is measured and defined by these two fundamental principles,—that he is bound to protect his servants from exposure to unnecessary and unreasonable risks, so far as he can do so by the exercise of ordinary care, and that he is bound to provide such instrumentalities and to adopt such methods that servants who exercise ordinary care will be able to perform their duties in reasonable safety. But these principles are, for practical purposes, greatly qualified and restricted by the operation of the doctrines discussed in the three following chapters. It is not too much to say that the actual effect of those doctrines, as applied by the courts to certain states of fact, has been to attach to the terms "unnecessary" and "reasonable safety" an arbitrary, legal signification which is totally different from that which they bear in the language of common life. Judged by the standards which that language naturally sug-

gests, many of the decisions to which we shall have occasion to refer -more especially those which deny the servant's right to recover for injuries caused by low overhead bridges on railways and structures in close proximity to the track—can only be regarded as amounting to a virtual declaration that an employer may, without incurring liability, maintain imminently and inherently dangerous instrumentalities which can be usually altered without serious difficulty or inconvenience, and which, under circumstances which will inevitably supervene with more or less frequency in the course of a servant's employment, render it virtually impossible for him to escape injury by the exercise of any degree of care which can fairly be exacted from

The first of these qualifying and restrictive doctrines which claims our attention is that every one has the legal "right to carry on a business which is dangerous, either in itself or in the manner of conducting it, if it is not unlawful, and interferes with no rights of others, and is not liable to one of his servants, who is capable of contracting for himself and knows the danger attending the business in the manner in which it is conducted, for an injury resulting therefrom."1 The deduction drawn from this doctrine, viz., that "so long as the premises were maintained in a reasonably safe condition the defendants had the right to use their own judgment as to the material and the method of construction employed,"2 is on its face quite unexcep-It has led the courts to harsh conclusions mainly because they have, to a degree which the present writer ventures to think unwarrantable, excluded juries from the function of considering the question of fact involved in the limitation to which (as is shown by the above statement and many others of a similar tenor which occur in the cases cited in this chapter) the doctrine is subject.

35. Master is not bound to adopt any particular instrumentalities or methods.—a. Rule stated and illustrated.—From the above-stated con-

<sup>1</sup> Ladd v. New Bedford R. Co. (1876)
119 Mass. 413, 20 Am. Rep. 331; S. P. v. Ohio Coal Co. (1890) 78 Wis. 127, Coombs v. New Bedford Cordage Co. 9 L. R. A. 861, 47 N. W. 182; The Sarac (1869) 102 Mass. 572, 3 Am. Rep. 506; toga (1898) 87 Fed. 349; Osborne v. Le-Sullivan v. India Mfg. Co. (1873) 113 high Valley Coal Co. (1897) 97 Wis. Mass. 396; Hayden v. Smithville Mfg. 27, 71 N. W. 814; Casey v. Chicago, St. Co. (1861) 29 Conn. 548; Roth v. North-P. M. & O. R. Co. (1895) 90 Wis. 113, ern Pacific Lumbering Co. (1889) 18
Or. 205, 22 Pac. 842; Stone v. Oregon City Mfg. ('o. (1870) 4 Or. 52; Guin-Pacific Mfg. ('o. (1870) 4 Or. 52; Guin-Pacif

ception of the extent of the master's obligations is drawn the very important practical deduction, constantly reiterated and applied, that he cannot be charged with a breach of the duties owed to his servants, simply on the ground that a safer method or a safer instrumentality than that from which the injury resulted was available and might have been adopted by him. In other words, the question whether the particular machinery provided by a master is proper and suitable is to be determined by its actual condition, and not by comparing it with other machinery.2 Or, as the doctrine may also be expressed in more general terms, evidence which merely tends to show that the particular accident which caused the injury might not have happened if a particular precaution had been taken goes for nothing, in considering the question of legal liability on a charge of negligence.3

ering the question of legal liability on a charge of negligence.

1 "That a method is less safe than another does not make it improper to be used." Dynen v. Leach (1857) 26 L. J. follows: "If you believe that the deexch. N. S. 221, per Bramwell, B. A ceased was, under the circumstances of master "is not required to adopt any particular method of construction, or any particular contrivance or device, in order to be in the exercise of ordinary care." Chicago & E. I. R. Co. v. Driss. paying: "We cannot agree that the coll (1898) 176 Ill. 330, 52 N. E. 921, risk to which an employer subjects his Reversing (1897) 70 Ill. App. 91. A employee suffices to impose liability servant cannot recover for an injury received in the discharge of his regular in character merely because the injury duties, when the apparatus which he was required to use was of an approved have been prevented by some different and practical kind, was familiar to him, and was perfect as to each of its parts. Murphy v. Lake Shore & M. S. R. Co. (1896) 67 Ill. App. 527 (coupling devices not similar, and therefore harder (1896) 133 Mo. 292, 34 S. W. 72; Friel to couple). The furnishing or retention of an instrumentality of peculiar construction, however great the resulting danger may be, cannot be imputed as danger may be, cannot be imputed as negligence. See Beaudin v. Central Vermont R. Co. (1891) 38 N. Y. S. R. 473, 14 N. Y. Supp. 700.

2 Wood v. Heiges (1896) 83 Md. 257, N. Whileaukee (1897) 96 Wis. 170.

2 Wood v. Heiges (1896) 83 Md. 257, N. Whileaukee (1897) 96 Wis. 170.

2 Wood v. Heiges (1896) 83 Md. 257, N. Whileaukee (1897) 96 Wis. 170.

2 Wood v. Heiges (1896) 83 Md. 257, N. Whileaukee (1897) 96 Wis. 170.

2 Wood v. Heiges (1896) 83 Md. 257, N. Whileaukee (1897) 96 Wis. 170.

2 Wood v. Heiges (1896) 83 Md. 257, N. Whileaukee (1897) 96 Wis. 170.

2 Wood v. Heiges (1896) 83 Md. 257, N. Whileaukee (1897) 96 Wis. 170.

2 Wood v. Heiges (1896) 83 Md. 257, N. Whileaukee (1897) 96 Wis. 170.

3 Whileaukee (1897) 96 Wis. 170.

3 Whileaukee (1897) 96

"It is not the duty of the master to furnish any particular kind of tools, implements, or appliances."4

"The test is not whether the master omitted to do something he could have done, but whether in selecting tools and machinery for their use, he was reasonably prudent and careful; not whether better machinery might not have been obtained, but whether that provided was in fact adequate and proper for the use to which it was to be applied."5

The true question for the jury is not whether the master could have done something to prevent the injury; but whether he did anything which, under the circumstances, in the exercise of ordinary care and prudence, he ought not to have done, or omitted any precaution which a prudent and careful man would or ought to have taken.<sup>6</sup>

although it might have been more easily into an undisclosed danger); Goldaccomplished by blocks and tackle. Fast thwait v. Haverhill & G. Street R. Co. St. Louis Ice & Cold Storage Co. v. (1894) 160 Mass. 554, 36 N. E. 486 Sculley (1895) 63 Ill. App. 147. Compare M'Gill v. Bowman (1890) 18 Sc. curving in opposite directions that cars Sess. Cas. 4th series, 206, cited in § 38, upon them will come together do not impose the state of the control of the co post. port culpability); Smith v. St. Louis, \*Bohn v. Chicago, R. I. & P. R. Co. K. C. & N. R. Co. (1878) 69 Mo. 32, 33 (1891) 106 Mo. 429, 17 S. W. 580. Am. Rep. 484 (fact that there was an-Stringham v. Hilton (1888) 111 N. other kind of rail of which a guard rail Y. 188, sub nom. Stringham v. Stewart, might have been constructed, which L. R. A. 483, 18 N. E. 870. \*Leonard v. Collins (1877) 70 N. Y. and would equally have answered its 90; Hewitt v. Flint & P. M. R. Co. purpose, held not to be sufficient to ren- (1887) 67 Mich. 61, 34 N. W. 659. For der the company liable for an injury other cases in which the principles caused by its failure to use that other Stated in the text were applied, see kind of rail); Brossman v. Lehigh Val-Southern P. Co. v. Seley (1894) 152 U. ley R. Co. (1886) 113 Pa. 491, 57 Am. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. Rep. 479, 6 Atl. 226 (master not bound 530 (use of unblocked frogs not neglitor raise a low bridge); M'Ghee v. North gence as matter of law); Morris v. Du-British R. Co. (1887) 14 Sc. Sess. Cas. luth, S. S. & A. R. Co. (1901) 47 C. C. 4th series, 499 (railway company which A. 661, 108 Fed. 747 (use of a piece of changes a road line from a single line A. 661, 108 Fed. 747 (use of a piece of changes a road line from a single line lumber 1 inch thicker, 6 inches wider, worked by horses to a double line and 1 foot longer, than the customary worked by locomotives is not bound to blocking, to fill the space between a pull down and rebuild a bridge for the guard rail and a main rail, is no evimere reason that the alteration brings dence of negligence as to a brakeman the stone work of the bridge dangerwho stumbles over it); Reichel v. New ously near the track); Chicago & E. I. York C. & H. R. R. Co. (1892) 130 N. R. Co. v. Driscoll (1898) 176 Ill. 330, Y. 682, 29 N. E. 763 (negligence not inferable from the simple fact that the App. 91 (not negligence to have no butt relative location of a water plug and post at the end of a stub switch). Crat. ferable from the simple fact that the App. 91 (not negligence to have no butt relative location of a water plug and post at the end of a stub switch); Gratan ash pit was such that an engine could tis v. Kansas City, P. & G. R. Co. take water and discharge its ashes simultaneously); Oregon Short Line & U. 55 S. W. 108 (maintenance of stub N. R. Co. v. Tracy (1895) 14 C. C. A. switch not negligence, though a split 199, 29 U. S. App. 529, 66 Fed. 931 switch would probably have prevented a (railway company is not required to derailment); Ladd v. New Bedford R. clear its track of brush. It has the Co. (1876) 119 Mass. 412, 20 Am. Repright to suffer it to grow to any extent, 331 (absence of check chain on railway provided it does not lead the employees cars; negligence, not predicable of). provided it does not lead the employees cars; negligence not predicable of);

The principle thus enunciated is available as a protection to the master, whether the conditions charged as negligence existed in the instrumentality as originally supplied, or were created by some

falling of a plank or iron plate extending between a platform and a car, while assisting to unload the car, although it was not supplied with hooks or fastenings in order to render it impossible to slip from its place); Conway v. Hannibal & St. J. R. Co. (1887) 24 Mo. App. 235 (evidence not admissible to show that a derrick car might have been more safely run with the boom pointing to the rear); Hamilton v. Chicago, R. I. & P. R. Co. (1894) 93 Iowa, 46, 61 N. W. 415 (railway company not bound to supply hand cars of any particular pattern); Hayden v. Smithville Mfg. Co. (1861) 29 Conn. 548 (no obligation to fence machinery); Foley v. Pettee Mach. Works (1889) 149 Mass. 294, 4 L. R. A. 51, 21 N. E. 304 (servant injured by putting his hand into cogwheels uncovered, but in plain sight, not entitled to recover simply because the machinery might have been made less dangerous by Mills (1886) 142 Mass. 522, 8 N. E. 401 (where the question is whether defendant had given a minor servant instructions as to the danger of the machine, it is proper to exclude evidence that a gate might have been put in front of the cotton-winding machine at small expense, or that the machine in question, and another article of machinery standing over 4 feet distant, might as well have been separated further); Plunkett v. Donovan (1891) 36 N. Y. S. R. 91, 12 N. Y. Supp. 454 (held error to submit to the jury the question whether it was negligence not to furnish a guard to a machine); Townsend v. Langles (1890) 41 Fed. 919 (leaving cogwheel uncovered not negligence per se); Kleinest v. Kunhardt (1893) 160 Mass. 230, 35 N. E. 458 (no recovery where servant slipped

Texas & P. R. Co. v. Minnick (1893) ney v. Hannibal & St. J. R. Co. (1379) 6 C. C. A. 387, 13 U. S. App. 520, 57 69 Mo. 416 (railway company not liable Fed. 3C2 (smoke stack on locomotive because it uses a single former in its was of peculiar design and allowed shops, instead of a double one, though sparks to escape);  $D^2Arcy$  v. Long Is-the latter is safer); Jacobson v. Corneland R. Co. (1898) 34 App. Div. 275, lius (1889) 52 Hun, 377, 5 N. Y. Supp. 54 N. Y. Supp. 553 (railroad company 306 (omission of a counter shaft and a not liable for personal injuries sustained fast and loose pulley, which would have by an employee who was injured by the made it safer to connect and disconnect the power from a machine, does not constitute actionable negligence); Joyce v. Worcester (1885) 140 Mass. 245, 4 N. E. 565 (no recovery where servant was injured by the fall of a derrick used for drawing up the shoring planks from a sewer after it had been filled up, the contention being that hand power would have been safer than steam power); Rosa v. Volkening (1901) 64 App. Div. 426, 72 N. Y. Supp. 236 (negligence not inferable from the mere fact that a derrick which fell was not provided with guy ropes, and proved to be too light to accomplish the work for which the plaintiff and his coservants used it); Kemmerer v. Manhattan R. Co. (1894) 81 Hun, 444, 31 N. Y. Supp. 82 (employer not liable for an injury to an employee resulting from a collision between trains during a fog, although a better system for giving signals during fogs is in existence, where the one employed by being covered); Rock v. Indian Orchard it is reasonably safe); Berning v. Medart (1894) 56 Mo. App. 443 (employer is not negligent because guards furnished for emery wheels used for certain work are lighter than those for emery wheels used for other work, where a satisfactory reason for the difference exists, as shown by plaintiff's own evidence); Winkler v. St. Louis Basket & Box R. Co. (1897) 137 Mo. 394, 38 S. W. 921 (no recovery where brake which caused the injury was perfect of its kind, but was alleged to be more dangerous than another pattern); Service v. Shoneman (1900) 196 Pa. 63, 46 Atl. 292 (negligence not inferable simply because a boiler which burst might have been made safer by adding certain attachments); McCarthy v. Shoeman (1901) 198 Pa. 568, 48 Atl. 493 (employer cannot be charged with negligence on a wet and slippery floor and struck because a passageway and steps therein, against an uncovered pulley); Feely v. in the basement of his store, on which Pearson Cordage Co. (1894) 161 Mass. the plaintiff fell, are cut out of the solid 426, 37 N. E. 368 (similar facts); Cag-earth, instead of the walk being made

change in the method of using.<sup>7</sup> A servant, therefore, will not be allowed to retain any verdict in his favor which is based on the hypothesis that negligence is imputable to the master because his instrumentalities or methods do not answer to one or the other of the following descriptive epithets and phrases: "Best;" "best known;" "best possible;"10 "best of known or conceivable;"11 "newest and best;"12 "of the very best and newest device attainable;"13 "safest;"14 "safest known;"15 "safest possible;"16 "in the safest pos-

ders with landing stages should have 57; Burns v. Chicago, M. & St. P. R. been provided. For other cases to same Co. (1886) 69 Iowa, 450, 58 Am. Repeffect, see also §§ 36, 39, post. Those 227, 30 N. W. 25; Wormell v. Maine C. collected in chapter viii., post, declaring the nonliability of railway companies for injuries due to permanent (1894) 142 N. Y. 31, 36 N. E. 813; conditions, such as low bridges, struc-Spencer v. Worthington (1892) 44 App. tures near the track, etc., also should be Div. 496, 60 N. Y. Supp. 873; Walsh compared, though they are not all rev. Commercial Steam Laundry Co. ferred directly to the principle now un-(1895) 11 Misc. 3, 31 N. Y. Supp. 833; der discussion. See also the cases as to Allison Mag. Co. y. McCormick (1888) der discussion. See also the cases as to instructions, in subsec. b, infra.

cept in so far as the decisions might be deemed justifiable on the distinct ground that the risks were known to and assumed by the servants. In Stewart v. Y. 188, sub nom. Stringham v. Hilton (1888) 111 N. sumed by the servants. In Stewart v. Y. 188, sub nom. Stringham v. Stewart, Neuport News & M. Valley Co. (1890) 1 L. R. A. 483, 18 N. E. 870; Thorn 86 Va. 988, 11 S. E. 885, approved in v. New York City Ice Co. (1887) 11 N. Richmond & D. R. Co. v. Risdon (1891) Y. S. R. 845.

87 Va. 335, 12 S. E. 786, it was denied

12 Titus v. Bradford, B. & K. R. Co. to be negligence for a railway company to maintain a coal chute which was a "mantrap," if it is of first-class construction. In Robinson v. Dininny (1898) 96 Va. 41, 30 S. E. 442, it was held that negligence was not predicable of the method of cleaning out an old shaft by excavating the debris from a passage which entered it at the bottom.

Glover v. Meinrath (1896) 133 Mo. 292, 34 S. W. 72. In this case, where Exch. N. S. 221; Wormell v. Maine C. the risks incident to the use of a corn- R. Co. (1887) 79 Me. 397, 10 Atl. 49; meal dryer were altered by the substitution of hot water for steam, it was Diamond State Iron Co. v. Giles (1887) held to be error to give an instruction which allowed the plaintiff to recover unless he knew or ought to have known of the change.

<sup>8</sup> Payne v. Reese (1882) 100 Pa. 301; Kennedy v. Alden Coal Co. (1901) 200

from stone, wood, or cement). A single Pa. 1, 49 Atl. 341; Louisville & N. R. ladder of 120 feet in length, for the purpose of ascending and descending a Electric Light & P. Co. v. Murphy shaft, was held not to be an improper (1888) 115 Ind. 566, 18 N. E. 30; Chiappliance, in O'Neill v. Wilson (1858) cago, B. & Q. R. Co. v. Smith (1885) 18 20 Sc. Sess. Cas. 2d series, 427. Plain-Ill. App. 119; Strattner v. Wilmington tiff contended that several shorter ladders with landing stages should have 57; Burns v. Chicago, M. & St. P. R. been provided. For other cases to same Co. (1886) 69 Lows 450, 58 Am. Rep.

Allison Mfg. Co. v. McCormick (1888) 118 Pa. 519, 12 Atl. 273.

Two Virginia cases carry the application of the general rule further than 26, 12 N. E. 286; Eldridge v. Atlas S. many courts would be willing to go, ex-S. Co. (1890) 58 Hun, 96, 11 N. Y. Supp. 468; O'Hare v. Kecler (1897) 22 App. Div. 191, 48 N. Y. Supp. 376. "Stringham v. Hilton (1888) 111 N.

<sup>12</sup> Titus v. Bradford, B. & K. R. Co. (1890) 136 Pa. 618, 20 Atl. 517 (a master is not bound to adopt every novelty in bridge construction); Illick v. Flint & P. M. R. Co. (1888) 67 Mich. 632, 35 N. W. 708 (not negligence to maintain a bridge with the truss 2 feet 3 inches from the sides of freight cars).

<sup>13</sup> Augerstein v. Jones (1890) Pa. 183, 21 Atl. 24.

<sup>14</sup> Dynen v. Leach (1857) 26 L. J. Payne v. Reese (1882) 100 Pa. 301;

7 Houst. (Del.) 556, 11 Atl. 189.

<sup>15</sup> Shadford v. Ann Arbor Street R. Co. (1897) 111 Mich. 390, 69 N. W. 661. <sup>16</sup> Chicago Anderson Pressed Brick Co.

v. Sobkowiak (1892) 45 Ill. App. 317.

sible condition;"17 "best and safest;"18 "best, safest, or newest;"19 "most expensive;"20 "most approved;"21 "as safe as can be provided;"22 "best and most improved;"23 "best and most approved;"24 "latest, best and most approved."25 A fortiori is a jury not warranted in finding for the plaintiff where there is no evidence that the alternative arrangements suggested would have been safer than those actually adopted, and it is apparent that the latter were reasonably safe.26

As a matter of procedure, the effect of the principle now under discussion is that evidence going to show that some other kind of instrumentality would have been safer and better than that which caused the injury should be excluded.<sup>27</sup>

b. Instructions required by the rule.—The subjoined cases indicate the bearing of the above-stated principle upon the correctness or incorrectness of instructions to juries.<sup>28</sup>

"Diamond State Iron Co. v. Giles they were unloaded. At the time of the (1887) 7 Houst. (Del.) 556, 11 Atl. 189. accident the chain was simply laid in a <sup>18</sup> Porter v. Hannibal & St. J. R. Co. (1879) 71 Mo. 66, 36 Am. Rep. 454.

10 Mississippi River & Logging Co.

v. Schneider (1896) 20 C. C. A. 390, 34

U. S. App. 743, 74 Fed. 195.

20 Berns v. Gaston Gas Coal Co. (1885)

27 W. Va. 285, 55 Am. Rep. 304.

<sup>21</sup> Hewitt v. Flint & P. M. R. Co. (1887) 67 Mich. 61, 34 N. W. 659;

Jenney Electric Light & P. Co. v. Murphy (1888) 115 Ind. 566, 18 N. E. 30.

<sup>22</sup> Hart & C. Mfg. Co. v. Tima (1899) 85 Ill. App. 310.

<sup>28</sup> Camp Point Mfg. Co. v. Ballou (1874) 71 Ill. 417.

<sup>24</sup> Kreider v. Wisconsin River Paper & Pulp Co. (1901) 110 Wis. 645, 86 N.

groove in one of the stake sockets on the side of a car, and thus prevented from being pulled towards the inside of the curve. Compare also McGinnis v. Can-

curve. Compare also McGinnis v. Can-ada Southern Bridge Co. (1882) 49 Mich. 466, 13 N. W. 819. <sup>27</sup> Kent v. Yazoo & M. Valley R. Co. (1899) 77 Miss. 494, 27 So. 620; Grava-dahl v. Chicago Ref. Co. (1899) 85 Ill. App. 342; Chicago & E. I. R. Co. v. Finnan (1899) 84 Ill. App. 383; Con-way v. Hannibal & St. J. R. Co. (1887) 24 Mo. App. 235

24 Mo. App. 235.

<sup>28</sup> Porter v. Hannibal & St. J. R. Co. (1879) 71 Mo. 66, 36 Am. Rep. 454 (approving a charge to the effect that a railway company is not bound to pro-vide the "best and safest track," but W. 662.

\*\*\*Davis v. Augusta Factory (1893) 92 only to use ordinary care in this regard); Kennedy v. Alden Coal Co. been laid down that the employer is not bound "to seek and apply every new invention, but must adopt such as is found, by experience, to combine the greatest safety with practical use." Toledo, W. & W. R. Co. v. Asbury (1877) edo, W. & W. R. Co. v. Asbury (1877) gain instruction that "a railroad 44 Ill. 429. But the standard designated by the last clause of this statement has been explicitly condemned. Sappenfield v. Main Street & Agri. Park R. Co. (1891) 91 Cal. 48, 27 Pac. 590. R. Co. (1891) 91 Cal. 48, 27 Pac. 590.

The jury was told that if the accident own Montana C. R. Co. (1901; could have been prevented by screwing Mont.) 63 Pac. 926. The contention down a heavy iron plate over an emery there was that, while a train of dirt wheel which burst, the plaintiff would cars was on a curve, a block and tackle be entitled to recover); Muirhead v. should have been provided to guide the Hannibal & St. J. R. Co. (1885) 19 Mo. chain which pulled the plough by which App. 634 (instruction held erroneous

c. Immaterial that the instrumentality adopted requires greater care in the handling.—If the facts are such as to bring the case within the operation of the general principle, culpability will not be predicated simply from the fact that the appliances objected to cannot be

which directs the jury to find for the defective machinery is negligence. cially where there is no allegation or is- seems to have confounded the measure (1882) 84 Ind. 50, the trial judge in-S. R. Co. v. McCormick (1881) 74 Ind. structed the jury as follows: "It would 440; Umback v. Lake Shore & M. S. R. be negligence upon the part of the de-Co. (1882) 83 Ind. 191. be negligence upon the part of the defendant to use a crab for hoisting timbers, that was defective in its construc- in the opinion of the jury, the defendtion, when said crab could have been ant, in the use of ordinary care, ought made complete and safe, or there were to have furnished an appliance similar others to be secured that were complete to that used by a specified person who and not dangerous. The defendant was had testified in the case, they should bound to procure the best crab for the find for the plaintiff, is not open to the purposes it was used; otherwise the de-fendant must be held responsible for the struction that it is equivalent to an in-fendant must be held responsible for the

which was based on the theory that evi- the use of such defective crab without dence showing the manner in which a fault or negligence on the part of the derrick car was run in a wrecking train, plaintiff." The supreme court said: viz.—with the boom pointing forwards— "This instruction was erroneous. It is was not the safest way in which to run it, was proof of negligence); Lyttle v. fective machine. The master does not Chicago & W. M. R. Co. (1890) 84 Mich. warrant the strength or safety of his mazes, 47 N. W. 571 (held proper to chinery. He only undertakes to employ charge a jury that a railroad company reasonable care and prudence in selecting is bound to furnish for its employees such as is fit for the purposes intended, and the transaction of its business reasonably safe and proper rolling-stock and is only responsible when he has failed sonably safe and appliances thereto, and accompetent engineer and fireman, considering all the circumstances and nature of the employment, but is not bound to furnish the best machinery or in continuing to use it. The instruction men that can be procured); Tabler v. Hannibal & St. J. R. Co. (1887) 93 Mo. master is liable if the machinery is defective; in other words, that the use of was not the safest way in which to run not negligence necessarily to use a de-79, 5 S. W. 810 (instruction erroneous fective; in other words, that the use of plaintiff if the defendant railway come instruction renders the master liable if pany used a rope, instead of a chain, the machinery is defective, however for a coupling between two of the cars much care and prudence have been exfor a coupling between two of the cars of a wrecking train); Muirhead v. Hannibal & St. J. R. Co. (1890) 103 Mo. withstanding the fact that the master 251, 15 S. W. 530 (involving same facts); Glover v. Meinrath (1896) 133 Mo. 292, 34 S. W. 72 (for instruction held erroneous see note 7, supra). It is error to qualify a requested instruction that it is not negligence for a railroad company to use cars on its railroad company to use cars on its railroads and in its yards, the couplings or deadwoods of which are not of uniform or equal heights, by the condition that secure and dangerous cars and machinesuch deadwoods or couplings are in other respects safe appliances,—espe-lirius (1877) 56 Ind. 511. This ruling cially where there is no allegation or issue that the couplings or deadwoods are of care owed to passengers with that otherwise unsafe. Pennsylvania Co. v. owed to servants. It is evidently in-Ebaugh (1895) 144 Ind. 687, 43 N. E. consistent with the case just cited, and 936. In Louisville & N. R. Co. v. Orr has been condemned in Lake Shore & M.

An instruction to the effect that if, injury resulting to the plaintiff from adopt some particular improvement. It

used without the exercise of greater care than usual on the servant's part.29 See §§ 30 et seq., ante.

36. Rationale of this principle.—(Compare §§ 55-57, post.) a. An application of the doctrine of assumption of risks.—Viewed from one standpoint, this principle is essentially a deduction from the principle, to be developed in a later chapter (xvii.), that a servant as-

opinion, exercised ordinary care. Wheel- ple who should continue the use of a er v. Wason Mfg. Co. (1883) 135 Mass. building which, in the event of a con-294. In Lowrimore v. Palmer Mfg. Co. flagration, would subject his employees (1900) 60 S. C. 153, 38 S. E. 430, it to greater risks than would one of difwas held that a requested instruction ferent construction. Comparisons in that the operation of all machinery is numerable might be made with this case always attended with more or less dan- in all the avocations of life. Now, any ger was properly refused, as such in-rule on this subject must be a general struction was a mere statement of fact. rule, and not one to be applied to rail-But quære, considering that this state- road companies alone. It will be perment was merely introductory to the ceived that the risk in the case was assertion of the doctrine that the ground such as would affect only the person of liability is not danger, but negli- employed, and that whatever duty was

buffers in railway cars); The Serapis divested of any question except such as (1892) 2 C. C. A. 102, 8 U. S. App. 49, would concern the relation of master 51 Fed. 91 Reversing (1891) 49 Fed. and servant, and the same rule would 393 (which required more care to op-govern the case that would govern were erate it than some more modern ma-the question to arise between the farmchines). In Ft. Wayne, J. & S. R. Co. er, the mechanic, or the manufacturer v. Gildersleeve (1876) 33 Mich. 133, and the persons in his employ. And this particular phase of the general treating it as a question of such broad principle was thus lucidly expounded by application, we do not perceive any Judge Cooley, in a case where a train ground upon which the plantiff's case hand was injured owing to the fact that can safely be planted, which comes an old car was much lower than those short of this: That the employer is commonly used by the railway com- under obligation to his servants under pany: "The car which was the cause all circumstances to make use of the of the injury in this case was not in itsafest known appliances and instruself dangerous or unfit for use. In ments, and is responsible for any fail-coupling it with other cars, peculiar ure to discard what is not such, and to caution was requisite, making it more supply its place with something safer. liable to cause injury than would a car Any doctrine so far reaching as this of more modern construction. Its use, would manifestly be destructive of the therefore, made the employment more general rule, and would almost make the dangerous than it otherwise would be. employer the guarantor of his servant's In that particular the case may be comsafety in his employ. But under any pared to that of a farmer who, with less serious responsibility it would be knowledge on the part of himself and impossible to sustain a judgment those in his employ that a horse he has against this defendant upon the sole had in use is disposed to be fractious ground of a failure to discontinue the and unmanageable, continues neverthe- use of this car. In any light in which less to use him in his business. It may the question can be viewed, no breach be compared to that of the merchant of duty can be charged against the dewho continues to make use of a fluid fendant, unless it be the duty to make for light, when something else which is the employment as safe for the persons within his reach has been demonstrated by experience to be safer. So far as we

is still left to the jury to determine can perceive, the case of the manufac-whether the defendant has, in their turer would not be different in princigence. imposed by the circumstances upon any<sup>20</sup> Indianapolis, B. & W. R. Co. v. one could have had reference only to
Flanigan (1875) 77 Ill. 365 (double such persons. The case is consequently sumes all the ordinary and obvious risks of the service. In all, or nearly all, the cases in which the master's exemption from liability has been put upon this ground, the servant's knowledge, actual or constructive, of the risk, has been adverted to as one of the elements involved.<sup>2</sup> The connection between the two principles is indicated by such forms of statement as this: That the servant assumes the risk of injury, not only from the perils ordinarily incident to his service, but also from special hazards existing because of the particular means or method used by the master in the conduct of his business, of which the servant is informed, or which ordinary care would disclose to him.3 Under this aspect of the doctrine its justification is to be de-

who enters the service of another with employer's business in a given condi-tion, with knowledge of such condition, plaintiff, and no question is made but furnish other and greater safeguards." standing and appreciating them; and in Hayden v. Smithville Mfg. Co. (1861) such case the risk was his, whatever it to junge of the risks and hazards, and and apphantes are safe beyond a conboth have equal knowledge of the surroundings, the employer cannot be culpast those of others using the same kind although the work may be dangerous or hazardous, and although it might be risks which perhaps others would guard made safer by the employer if he should against more effectually than it is done that the control of the same kind and although it might be risks which perhaps others would guard against more effectually than it is done made safer by the employer if he should against more effectually than it is done choose to do so." Rush v. Missouri P. by him.' Not only did the injured R. Co. (1887) 36 Kan. 129, 12 Pac. 582. party in the case know all the danger "If a servant, knowing the hazards of there was in using the machine that the his employment as the business is conducted, is injured while engaged there in, he cannot maintain an action against occurred or was made involving an in, he cannot maintain an action against occurred or was made involving an in, he cannot maintain an action against occurred or was made involving an in, he cannot maintain an action against occurred or was made involving an in. ground that there was a safer mode in to see it; and if he continued his serv-

<sup>1</sup> So expressly stated in Renne v. which the business might have been con-<sup>1</sup>So expressly stated in Renne v. which the business might have been con-United States Leather Co. (1900) 107 ducted, the adoption of which would Wis. 305, 83 N. W. 473; Anderson v. have prevented the injury." Simmons Illinois C. R. Co. (1899) 109 Iowa, 524, v. Chicago & T. R. Co. (1884) 110 Ill. 80 N. W. 561; Bonnet v. Galveston, H. 340. In Richards v. Rough (1884) 53 & S. A. R. Co. (1895) 89 Tex. 72, 33 S. Mich. 212, 18 N. W. 785, the court, after asserting the right of the employer 2 See, for example, Ladd v. New Bedford R. Co. (1876) 119 Mass. 412, 20 proceeded thus: "There is no question Am. Rep. 331; Fisk v. Fitchburg R. Co. in this case but that the injured party W. 334.

<sup>2</sup> See, for example, Ladd v. New Bedford R. Co. (1876) 119 Mass. 412, 20 proceeded thus: "There is no question Am. Rep. 331: Fisk v. Fitchburg R. Co. in this case but that the injured party (1893) 158 Mass. 238, 33 N. E. 510; had as much knowledge of the machine Thain v. Old Colony R. Co. (1894) 161 Mass. 353, 37 N. E. 309; Olsen v. Ancurre (1897) 168 Mass. 261, 47 N. E. and appliances used and of all the circle (1897) 168 Mass. 261, 47 N. E. and its safety, as did the defendants or 90; Hewitt v. Flint & P. M. R. Co. their foreman. There is no showing in (1887) 67 Mich. 61, 34 N. W. 659; Ancurrent (1887) 105 N. Y. 591, man did not use ordinary care and prumard of the machine of the safety of the machine of thony v. Lecret (1887) 105 N. Y. 591, man did not use ordinary care and pru-12 N. E. 561; Robinson v. Dininny dence in protecting the plaintiff against (1898) 96 Va. 41, 30 S. E. 442. dangers not within his knowledge or ob-\*\*Burnham v. Concord & M. R. Co. servation and the accident of which he (1896) 68 N. H. 567, 44 Atl. 750. "He complains, and this is all they were required to do. The risks and dangers. the machinery and implements of the whatever they were, so far as the record waives any claim upon the employer to that he was fully capable of under-29 Conn. 548. "Where the employer might be. No employer by an implied and the employee are equally competent contract undertakes that his machinery to judge of the risks and hazards, and and appliances are safe beyond a conthe master for the injury merely on the crease of danger he would be the first

duced, in the last analysis, from considerations referable to that hypothetical condition of social and economic freedom which is assumed to prevail in the countries where the common law is administered.

ice after such change without protest, the situation with regard to one particit would be at his option, and if injured ular class of cases: "It is necessary

he would be remediless."

judgment in Young v. Syracuse, B. & N. Y. R. Co. (1899) 45 App. Div. 296, 61 N. Y. Supp. 208, will be found suggestive: "In the prevailing opinion the general rule is recognized that the employee assumes apparent risks. The learned judge then proceeds to say that this rule has no application where the master has not fulfilled the obligation which rests upon him to exercise a reasonable degree of care in furnishing his servants safe places in which, and suitable appliances and machinery with which, to perform the services required of them. In this, to my mind, is found the fundamental error in this decision. If, before an employee can be held to have assumed the apparent risks of the place provided for him in which to work, the master is bound to use reasonable care to make that place safe, the doctrine of the assumption of apparent risks is stripped of its vitality, and means nothing. The jury may then say whether the master has the right to use machinery and appliances that are not of the latest pattern, and whether his failure to provide the best machinery and latest appliances is not a violation of his duty to use reasonable care. But to provide for just this condition, the doctrine of assumed risks has arisen and found its place in the law of negligence. The master may provide such place to work and such machinery as he shall choose. If the servant undertakes the employment, and continues therein, he assumes such risks as are incident to the situation and obvious." See also the cases cited in §§ 54 et seq.,

In Ragon v. Toledo, A. A. & N. M. R. Co. (1893) 97 Mich. 265, 56 N. W. 612, the decision that the defendant was not bound to ballast a side track was put partly on the ground that it had a right to assume that its employees would observe the conditions, modifying somewhat the effect of what was said on the hands the necessity for assuming such first appeal (1892), 91 Mich. 379, 51 N.

W. 1004.

In one of the Massachusetts decisions already cited, Holmes, J., summed up

for railroad companies to put up struc-The following remarks in a dissenting tures near enough to their tracks for it to be possible for persons on the trains to come in contact with them. There must be some point within the limit which it is possible for a man on a train to reach, at which the railroad company has a right to build without notice, and to assume that those on the trains will keep out of the way. Every-one knows that there is danger as soon as he gets outside of the line of the train." Thain v. Old Colony R. Co. (1894) 161 Mass. 353, 37 N. E. 309. It must be admitted, we think, that the learned judge is not very happy in the choice of the parallel instances adduced to corroborate his conclusions. There is no inconsistency in conceding that parallel tracks may with propriety be built so close to each other that an employee putting his person outside the cars traveling on one of the tracks is in danger of being struck by those traveling on another, and in denying at the same time that a railway company is entitled to build scattered structures dangerously close to its lines. A perfectly satisfactory differentiating element is furnished by the fact that in the one case the danger is created by conditions which, as they subsist along the whole length of the track, the train hands are never permitted for a moment to forget; while in the other, as the servant is required to encounter a number of separate and distinct hazards as these present themselves at irregular intervals along a strip of space elsewhere free from obstructions, he is very apt, at critical conjunctures, to forget the existence of the particular one which it most concerns him to remember. Compare § 63, post. The analogy of the passenger is still more irrelevant, for the obvious reason that it is scarcely possible to conceive of circumstances under which there can be any call of duty which would justify him in being outside a car, while in the case of train a position is constantly arising.

See Bethlehem Iron Co. v. Weiss (1900) 40 C. C. A. 270, 100 Fed. 45,

A doctrine based upon this foundation evidently finds its most appropriate field of action in those conditions which are normal and permanent. An employer, it is laid down, owes a servant no duty to change the construction and arrangement of his plant in those parts which were in good repair and plainly visible when he entered into the contract of employment. It is one of the implied terms of the contract that the work shall be done with the construction and permanent arrangements which then appeared.<sup>5</sup> Numerous exemplifications of this conception will be found in the cases cited in chapter VIII., post.

b. Rendered necessary by the jury system of trials.—In many of the cases the principle now under discussion is referred to another consideration, which places it upon a foundation which is entirely distinct from and independent of that supplied by the theory of an assumption of the risk,—viz., that, under the common-law system of procedure, the effect of adopting a different principle would be to invest the particular jury which might happen to be impaneled with the function of determining absolutely, in each and every instance, whether the instrumentality or method of work which caused the injury was as safe as it ought to have been. It is asserted that, under many circumstances, a jury is not an appropriate body to decide such a question.6 The argument which is supposed to be conclusive in

<sup>6</sup> Lemoinc v. Aldrich (1900) 177 number they require for carrying on the Mass. 89, 58 N. E. 178. Compare the business of the line; and the question language used in Hall v. Wakefield & proposed was not a proper one for the S. Street R. Co. (1901) 178 Mass. 98, jury." It has also been laid down that 59 N. E. 668; Phelps v. Chicago & N. the determination of such engineering W. R. Co. (1899) 122 Mich. 171, 81 N. questions as the propriety of having a very sharp curve in a yard should not be left to the varying and uncertain page of the principle is adverted to opinion of juryers. Text leav Detect C. w. 101, 84 N. W. 66.

The earliest case in which this aspect of the principle is adverted to seems to be Skipp v. Eastern Counties R. Co. (1853) 9 Exch. 223, 3 C. L. d. 1114, 7 Sup. Ct. Rep. 1166. L. Rep. 185, 23 L. J. Exch. N. S. 23, where it was held not to be a question for the jury whether the number of servants employed by the defendant was sufficient for the performance of the work. "As between the public and the company," said Alderson, B., "the former may be the proper judges of the number of servants required; but that is not so between the company and their own servants."

This is an attempt," said Parke, B., "To cast upon the jury the duty of fixing the number of servants which a railway company ought to have; but in a case like the present the company are in Chicago & E. I. R. Co. v. Driscoll themselves the proper judges of the (1898) 176 Ill. 330, 52 N. E. 921, Refavor of denying the servant the privilege of having his rights considered upon this basis is that, if juries were permitted to apply the test of comparison in this manner, the views of different juries in the same jurisdiction as to the significance of facts substantially identical might be entirely antagonistic, the result being that it would be impossible to obtain any fixed standard of adequacy and safety.7

action for injuries to an employee in an of railroads the country over, naturally iron manufactory, that the jury cannot solicitous as they must be, on grounds undertake to say how defendant's rail- of personal interest, if not of humanity, road shall be located, what will answer to diminish the risks to life, had failed its purposes, and what will not, is erro- to be convinced of the expediency of neous, as calculated to unduly restrict making use of the block, this showing the legitimate inquiry of the jury. would have made out a case against the Weiss v. Bethlehem Iron Co. (1898) 31 defendant which could not well have C. C. A. 363, 59 U. S. App. 627, 88 Fed. been answered. The prima facie show-

dence stood, there was no case made for could have been done to the machine by the adoption of the proposed device. the defendants to guard against danger Railroading is at best a business with of accidents more than was done. All tributable to it; how, on the plaintiff's large number of different kinds are theory, would the defendant have ex-made to accomplish the same purpose, cused itself for adopting it? A jury and great difference of opinion exists as verdict in favor of its use in a previous to the kind best adapted to the use incase could be no protection, for a vertended, in the minds of men well skilled dict makes no precedent, and settles in their construction and use. nothing but the immediate controversy comparative merits of the different to which it relates; the next jury on kinds, whether as to safety or utility, precisely similar facts is at liberty to are questions most difficult to solve; find to the contrary. The defendant and to say that it shall be left to a would therefore be compelled to defend court or jury to determine in any given its adoption of the block by showing case which kind a manufacturer shall

versing (1897) 70 III. App. 91 (use of —what fully appears in this case—butt post on stub switch). It has been that, though the device had been known held, however, that an instruction in an for several years, the experts in charge ing that the device had been hastily, if <sup>7</sup> McGinnis v. Canada Southern Bridge not heedlessly, adopted, would certainly Co. (1882) 49 Mich. 466, 13 N. W. 819, have been very strong; and if the two where Cooley, J., said: "The plaintiff cases charging respectively negligence had no right to ask the court and jury in rejecting and then in adopting the to regard a single consequence of the same device could go to successive juadoption of the device, and to condemn ries, we might witness the instructive the management of the railroad com-pany on so narrow a view of its con-duct, but it was his business to show (1884) 53 Mich. 212, 18 N. W. 785, the that, on a survey of the whole field, the court reasoned thus: "The testimony use of the block was prudent, and that does not show or tend to show that the it guarded against dangers in one direc-machinery from the use of which the tion without the introduction of perils injury occurred was defective either in in another. Without that showing it construction or for want of repair; seems very manifest that, as the evi-neither does it appear that anything many dangers, and scarcely any ma- machinery is dangerous to a greater or chine, implement, or expedient made use less extent, and particularly when operof in it but is liable at some times and ated by steam. The defendants had to under some circumstances to imperil select the kind of machinery they human lives. Suppose the block had wished in conducting their business. At been made use of, and an accident had this day, when inventions of machinery occurred which was thought to be at are of daily occurrence, frequently a its adoption of the block by showing case which kind a manufacturer shall that it tended to make the management use in order to avoid liability in case of trains more safe. But if the plain- of an accident to an employee while tiff in the suit were to proceed to show using it would be imposing a duty upon

The ease with which witnesses can be found to testify on either side as to such a matter has also been referred to as an important consideration in this connection.8

ment to be entered herein. It is whethto accommodate its business is to be determined by the railroad company or by

the court and an injustice upon the One jury may hold a given location to be party, alike intolerable. A manufac-safe and proper. The next jury may hold turer must be permitted to choose the it to be unsafe and therefore improper. machinery he desires to use, and to con- There are many such structures necestrol his business in his own way, pro- sary to the operation of a line of railvided he does no unlawful act. He may road. Among the more important of them use new or old machinery, according to may be mentioned the bridges, station his liking, and if it is sound, well made, houses, grain elevators, warehouses, waand kept in repair he will not be liable ter tanks, coal chutes, cattle chutes, sigfor an accident occurring to an em-nal stations, and tool houses. The poployee using it, so long as the only sition of these buildings with reference cause alleged is that there is a better to the track of the railroad, their size, and safer kind of machinery used for and the mode of construction must be the same purpose." So in Harley v. determined with reference to their pur-Buffalo ('ar Mfg. Co. (1894) 142 N. Y. pose and their convenient use as a neces-31, 36 N. E. 813, we find Earl, J., rea-sary part of the physical plant of the soning thus: "Suppose, under the cir- railroad company. Where they shall cumstances which exist here, the de- be placed and how they shall be arfendant had adopted one of the other ranged are questions that belong to the fasteners for this particular belt, and railroad company as truly as the loca-an accident had happened from its tion of the switches and sidings, or of parting; there would have been substanthe track itself; and the discretion of tially the same evidence for the jury its officers is no more under the control and the same claim could have been of a petit jury in the one case than in made which is now made, that there was the other. This discretion is to be exa question of fact for the jury as to its ercised in view of the conformation of negligence in making the selection. This the surface, the character of the busijudgment cannot be affirmed without ness to be accommodated, and the consubjecting the master in such a case as venience of the servants and employees this to the risk of liability for injuries by whom it is to be carried on. It is from the parting of a belt moving ma- part and parcel of the work of construcchinery in his shop, whatever fastener tion, and is governed by the same prin-he may use, because if he uses one kind, ciples." In Bethlehem Iron Co. v. according to the evidence in this case, Wciss (1900) 40 C. C. A. 270, 100 Fed. it is easy to find persons who will tes- 45, the court, after laying down the tify that from their experience and ob-servation some other kind was better." ties of the master and the reciprocal In Boyd v. Harris (1896) 176 Pa. 484, undertakings of the servant, proceeded 35 Atl. 222, the court argued as fol- to explain that these rules, "while they lows: "This case presents a question, limit, do not deprive the master of, the the importance of which extends far be-right to manage and conduct his busiyond the present parties and the judg-ness according to his own judgment; and this is true, even though his mether the location of the permanent struc- ods be more dangerous than others that tures along a line of railroad necessary might be adopted. The so-called rule of a reasonably safe place, in order to be fitted into the structure of the law a petit jury. If by the former, they of master and servant, must be so limmay be located with reference to the ited and qualified by these other rules convenient and economical use of the to which we have been referring as not railroad and the accommodation of its to be inconsistent with them; otherwise, traffic. If by the latter, these consid- it cannot be recognized as a rule of law. erations will be lost sight of, and the It cannot be permitted to sanction the proper location will be a shifting one, to turning over to a jury the determination be settled by each successive jury in ac- in every case of what is 'a reasonably cordance with its own notions and the safe place,' and thus substitute its varypeculiar features of the case on trial. ing judgment as to how a business must

This line of argument is plausible, but scarcely satisfactory. reasons thus adduced are doubtless sufficient to justify an extremely free exercise of the right to control or set aside verdicts, to the end that something like reasonable uniformity in the law may be secured. But they do not, it is submitted, constitute an adequate basis for such a broad generalization as that embodied in a principle which virtually amounts to a declaration that a jury ought never to be permitted to consider the question of a defendant's negligence with reference to the feasibility of procuring a safer kind of instrumentality. In the practical administration of the law, it is always difficult, and often impossible, to disentangle the question of reasonable safety from that of comparative safety, and if the triers of fact are not allowed to consider the latter question, the former one is apt to be thrust into the background and unduly neglected. A more logical as well as a more equitable rule would therefore seem to be this, -that evidence tending to show that a safer instrumentality might have been used has an appreciable bearing upon the question whether the one actually used was reasonably safe, and may or may not be conclusive, according to the other elements presented by the case.

c. Master not an insurer of the servant's safety.—A third consideration which has been adverted to as affording a support for the principle is that a different rule would practically create a requirement that "employers should provide such machinery as would suffice to insure their employees against accidents."9 But this statement is

formed his duty as to furnishing a safe thus be left to the varying and uncerplace for the workmen to work in, even tain opinions of jurors. The only questhough it may be more dangerous than tion proper to submit to a jury in such it might be made to be." In Chicago & cases is whether the premises as they E. I. R. Co. v. Driscoll (1898) 176 Ill. existed at the time of the injury were 330-334, 52 N. F. 921, Reversing (1897) reasonably safe." See also Titus v. 70 Ill. App. 91, the court said: "Pub-Bradford, B. & K. R. Co. (1890) 136 lic policy does not require courts to lay Pa. 618, 20 Atl. 517; Chicago & G. W. down any rule as to the manner of cong. R. Co. v. Armstrong (1896) 62 Ill. App. dowr any rule as to the manner of con- R. Co. v. Armstrong (1896) 62 Ill. App. struction of railroads. The hazardous 228. character of the business of operating a railroad, and the danger to life, body, 36 Kan. 129, 12 Pac. 582. and limb of employees thereon, may well

and limb of employees thereon, may we Vol I. M. & S.-7.

be carried on, for the lawful judgment manner of construction of a railroad is of the owner or manager, who may have proper or not. A verdict is not a preceperformed his duty in the premises, as dent, and is not binding on another prescribed by the well-established rules jury. One jury might find the construc-of law above adverted to. With the tion a proper one, while another jury possible exception of some extreme conmight find it an improper one, and the ceivable cases, the master who has important engineering question of the conformed to these rules of law has per- manner of constructing a railroad would formed his duty as to furnishing a safe thus be left to the varying and uncer-

<sup>8</sup> Rush v. Missouri P. R. Co. (1887)

manifestly founded on a false conception. The proposition that the master is bound to supply a certain instrumentality because it is the best and safest available is not logically equivalent to the proposition that he is bound to insure the servant's safety. Even if the master were compelled, at his peril, to use instrumentalities answering that description, there would still be a greater or less residuum of risks which would not be covered by the obligation thus imposed.

37. Feasibility of the changes suggested; evidential significance of.— (Compare general principle discussed in § 23, ante.) In some cases the fact that the instrumentality which caused the injury would have performed its functions equally well if the suggested improvement had been made is mentioned as one of the elements going to show that it was negligent to maintain the existing arrangements.<sup>1</sup> the court mentions, as one of the reasons for absolving the defendant, the impossibility of doing the required work with the instrumentality if it had been altered in the manner proposed.2 In others the im-

cally when not in use; the evidence being that the cranes with stationary arms are preferable to the others because they permit a greater space between the end of the arm and the side of the car. [1894] 75 Hun, 582, Reversing 27 N. Y. Supp. 671). A railroad company is not guilty of negligence in failing to erect any barriers around the pits used by its employees in its round house, where it would be lend one end of a bar which guarded an entrance to the elevator shaft to become loose, thus allowing a play of the cally when not in use; the evidence be-

master is not an insurer. In Young v. when the pits are used. McDonnell v. Burlington Wire Mattress Co. (1890) Illinois C. R. Co. (1898) 105 Iowa, 459, 79 Iowa, 415, 44 N. W. 693, the court 75 N. W. 336. In a recent case the asserted the principle that a master is not required to use appliances so constructed that no injury can be inflicted by them under any circumstances.

1 See, for example, Renne v. United States Leather Co. (1900) 107 Wis. 305, 83 N. W. 473 (steam pipe above track might have been raised without inpairing its efficiency). impairing its efficiency).

<sup>2</sup> Sisco v. Lehigh & H. R. Co. (1895)

145 N. Y. 296, 41 N. E. 90 (error to that the cistern was as thoroughly procollision with a mail crane having a stationary arm of a pattern similar to that used by extensive lines of railroad, and it could not be placed further from the track and perform the service for which it is designed, although some other railroads use a crane with a movable arm which rises. fect working condition and of a kind in

practicability of employing the suggested device in connection with the instrumentality in question is adverted to.3

But it would seem that the only real significance which can justifiably be ascribed to these circumstances is merely that of corroborative factors. There does not seem to be any logical ground for asserting that, when the suitability of an appliance is being gauged with reference to the safety of a servant, it may be material to ascertain whether the changes indicated were possible, consistently with the continued use of that particular kind of appliance. If the master is not protected, independently of this consideration, by the general principles treated in this and the two ensuing chapters, there is a clear obligation on his part to change the appliance in some way calculated to secure greater safety, and the obvious conclusion is that, if the appliance cannot be operated after the proposed improvements are made, it ought to be discarded altogether.

38. Negligence not inferable from the use of dissimilar appliances for the same purpose.— The mere fact that a master uses simultaneously different types of the same kind of appliance does not import culpabil-The risks arising from this difference are deemed to have been assumed by the servant, provided they are apparent and may be detected without any special skill and knowledge. He acts, therefore, within his rights when he makes a portion of some particular class of his instrumentalities more secure by adopting a new device, while he leaves unchanged the rest of the instrumentalities of that class. The contingency that such a partial alteration may be made is a risk

to pass outside instead of into a hasp on the other side of the entrance, renmechanism." That the impracticability dering it necessary to guide the bar by hand into the hasp, where it was absolutely essential to the use of the bar Maxwell v. Zdarski (1900) 93 Ill. App. that there should be enough play to per- 334. mit it to pass outside of the hasp). In some cases where the absence of a guard gence not to have a "shifter" for the to a machine has been denied to be negpurpose of pulling a belt on to a fixed ligence, the impracticability of operating it with a cover has been emphasized device can only be used in moving belts ing it with a cover has been emphasized arguendo. Palmer v. Harrison (1885) from fixed to loose pulleys. Young v. 57 Mich. 182, 23 N. W. 624; Mackin v. Burlington Wire Mattress Co. (1890) Alaska Refrigerator Co. (1894) 100 79 Iowa, 415, 44 N. W. 693. It is a questions seem to be independent of this factor. The case of Seymour v. Maddow (1851) 16 Q. B. 326, 20 L. J. Q. B. N. bility is conflicting. McDougall v. S. 327, 15 Jur. 723 (see § 2, ante), was Ashland Sulphite-Fibre Co. (1897) 97 explained by Mr. Justice Erle in Roberts v. Smith (1857) 2 Hurlst. & N. 213, 26 L. J. Exch. N. S. 319, 3 Jur. N. 361, 53 U. S. App. 297, 80 Fed. 988. S. 469, as having been decided with ref-S. 469, as having been decided with ref-

bar, which permitted it in its descent erence to the fact that "the arrangement

<sup>8</sup> As, where it was denied to be negli-

incidental to the duties of a servant hired while the original devices were alone in use, and is therefore one of the risks assumed by him.2 A fortiori must the master be regarded as free from culpability where the evidence clearly shows that several methods are in general use, the choice being a matter of judgment, depending on the surrounding conditions. The law then allows him absolute discretion to select according to his own judgment.3 A master is not liable merely because an appliance which he furnishes is novel, and requires a different kind of management on the part of servants using it.4 If, after the introduction of an approved appliance, the master is compelled, owing to its failure to perform its functions properly, to revert for a short time to the use of the appliance formerly furnished for the same purpose, he cannot be held liable for an accident resulting from this resumption of the discarded article, where the temporary substitute is the best of its kind that can be obtained, and, while it was still in general use, was considered adequate and suitable.<sup>5</sup>

39. Master's duty to introduce new appliances.— (See also §§ 43 et seq., post.) What may be regarded either as a corollary from the principles discussed in the preceding sections, or as another mode of stating it from one particular standpoint, is the doctrine that "an employer owes his employee no duty to change a business in order to make it safer, even though in some parts his ways and works would not be deemed reasonably safe and proper if he were starting a new

particular appliance he takes what according to his judgment is the best or most suitable, guided by his experience and observation and those of the skilled men in his employment. . der such circumstances, how can it be were not the best in use for such a belt loading cotton). and such machinery as the defendant

<sup>2</sup> Pittsburgh & L. E. R. Co. v. Henlad at the time and place of the accily (1891) 48 Ohio St. 608, 15 L. R. A. dent. Suppose a master needing fas384, 29 N. E. 575 (couplings of different
teners in his shop makes inquiry among
men of skill and experience as to the
state of skill and experience as to the
best kind of fasteners to use, and he is
348, 13 L. R. A. 374, 22 Atl. 910. "It
informed by some that one kind is the
must always be true," Earl, J., said in best, and by others that another kind is
Harley v. Buffalo Car Mfg. Co. (1894)
the best, and so on, and he finally makes
142 N. Y. 31, 36 N. E. 813, "that where
several appliances are in use, each of
which is regarded by men of skill and
was not the best could be under such which is regarded by men of skill and experience as safe and proper, the mascircumstances, be held liable for an intercannot be made liable for an injury jury received by a person in his service to one of his servants, if in selecting the the insufficiency of the fastener under any particular strain to which the belt had been subjected?"

<sup>4</sup>Gulf, C. & S. F. R. Co. v. Williams (1888) 72 Tex. 159, 12 S. W. 172. <sup>5</sup>Red River Line v. Smith (1900) 39

said that the defendant violated any C. C. A. 620, 99 Fed. 520 (electric duty it owed to the plaintiff? It was lights failed on a Mississippi river impossible from the evidence to deter- steamboat, and lard-oil lanterns were mine whether these fasteners were or supplied to the workmen who were un-

establishment to do the same kind of work under an arrangement with employees to serve in the business afterwards to be established." An employer has a right to arrange his own premises in any way which suits his convenience, and is not bound to change the arrangement to secure greater safety to his employees.<sup>2</sup> He may, if he chooses, carry on his business with an old rather than a new machine, and he cannot be required to keep in his service persons who refuse to operate it.3 In other words, the rule that a master is bound to take certain precautions for the security of his servants does not abridge the liberty of contract between him and them as respects work upon old and well-known machines.4 He is not bound to change his machinery in order to supply every new invention or supposed improvement,5 nor "to employ every new device or improve-

Murch v. Thomas Wilson's Sons & be a shipper on a belt, since, there being Co. (1897) 168 Mass. 408, 47 N. E. 111 no evidence that the machine ever had (shipowner held not liable for the as- a shipper, the master was not bound to phyxiation of a pilot, caused by a fel- change the condition of the machine in low servant's closing the door of a such respect. Cushman v. Cushman room which he was permitted to occupy, (1901) 179 Mass. 601, 61 N. E. 262. An and which was liable, when closed, to employee who is caught by a derrick car be filled with dangerous fumes from the on a bridge which he is crossing in orpatent fuel burnt in the stove). The der to reach his place of work cannot correctness of this particular applica-recover on the theory that his master tion of the principle seems quite ques-was negligent in not providing some tionable, as the decision amounts to say-other mode of going to and from the ing that a master is entitled to supply work, or in failing to furnish a differmaterials which may be converted into ent kind of car, where such car was in imminently dangerous articles by an use when the servant began work, and act of a fellow servant, which is very was suitable for the use for which it likely to occur, and which does not import negligence on his part. See also 168 Mass. 261, 47 N. E. 90.

Gleason v. Smith (1898) 172 Mass. 50, 24 Anthony v. Leeret (1887) 105 N. Y.

N. E. 460 (no obligation to guard more effectually the knives of moulding in a passageway not culpable per se). machinery); Fisk v. Fitchburg R. Co. (1893) 158 Mass. 238, 33 N. E. 510 (no obligation to remove further from a railway track a structure which is dangerously close to it); Ft. Wayne, J. & "We are of opinion that where a works. R. Co. v. Gildersleeve (1876) 33 man is employed to do certain work Mich. 133 (railway company not bound with a machine which he fully underto discontinue using an old car, simply stands, though it may not be of the newbecause it is so much lower than the est pattern, but nevertheless is in perothers that coupling it involves excep- fect order of its kind, and may require tional peril); Botsford v. Michigan more care than those of newer patterns, C. R. Co. (1876) 33 Mich. 256 (same he takes the risk of all accidents which point); Whitwam v. Wisconsin & M. R. may befall him in its use." The Sera-Co. (1883) 58 Wis. 408, 17 N. W. 124 pis (1892) 2 C. C. A. 102, 8 U. S. App. (negligence not inferable from the use 49, 51 Fed. 91. of a drawbar on a locomotive, so short that the operation of coupling it to a car was unsafe). See also cases of dissimilar couplings in § 71, post. It is a means of attaching brakes, though the proper to exclude evidence that plaintiff latter may be superior); Chicago, R. I. had told the master that there ought to & P. R. Co. v. Lonergan (1886) 118 Ill.

<sup>3</sup> Sweeney v. Berlin & J. Envelope Co. (1886) 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358.

ment the moment it is invented,"6 nor "the newest pattern or invention,"7 nor to adopt "all the latest improvements.,"8 nor to adopt "the most approved appliances." Especially is there no such obligation, if in choosing the instrumentality actually put into use he acted on the recommendation of persons of skill and experience, 10 or if there is no evidence to show that the suggested alteration, although it may avert some dangers, will not introduce others equally serious. 11 It is immaterial that the newer machines may have some additional safeguards.<sup>12</sup> The servant having accepted the service subject to risks, with knowledge of the kind of tools and implements used, the master is not required to furnish new appliances, or to elect between the expense of so doing and damages for injuries to servants from the use of an older or a different pattern. 13 The servant is deemed to be suf-

(1877) 84 Ill. 429 (no obligation to introduce the "Miller" self-coupling apparatus); Louisville & N. R. Co. v. Allen and no case of a car of any kind going (1885) 78 Ala. 491; Georgia P. R. Co. v. by force of the wind has ever been v. Propst (1887) 83 Ala. 518, 3 So. known at that station. It also appears 764; Gamp Point Mfg. Co. v. Ballou by the testimony of competent and skill-(1874) 71 Ill. 417; Galveston, H. & S. ful engineers and mechanics and rail-A. R. Co. v. Gormley (1894; Tex. Civ. road men that upon this siding there App.) 27 S. W. 1051 (disapproving instruction that appliances should be "of that their use was accompanied with inconvenience and danger: that good rail-

<sup>6</sup> In Hewitt v. Flint & P. M. R. Co. (1887) 67 Mich. 61, 34 N. W. 659, it was held that the plaintiff had not succeeded in establishing a want of ordinary care on the defendant's part where bridge Co. (1882) 49 Mich. 466, 13 N. the evidence (as stated by the court) W. 819 (blocking of frogs).

was to the following effect: "The platform car which caused the accident had stood upon the track for a month, and during the entire existence of the siding 5 N. E. 358 (master not guilty of negular ceeded in establishing a want of ordinary and continue to the siding of the siding to the control of the siding to the siding to the control of the siding to the control of the siding to the no car was shown ever to have left it before without being moved by the defend-

41, 7 N. E. 55, citing Wharton, Neg. § tons on a grade such as this siding was 213; Toledo, W. & W. R. Co. v. Asbury shown to have been. This side track (1877) 84 Ill. 429 (no obligation to in- had been in constant use for at least modern improvement").

\*\*Faber v. Carlisle Mfg. Co. (1889)

126 Pa. 387, 17 Atl. 621.

\*\*Chicago & G. W. R. Co. v. Armstrong (1895) 62 Ill. App. 228.

\*\*Sappenfield v. Main Street & Agri.

Park R. Co. (1891) 91 Cal. 48, 27 Pac.

\*\*That their use was accompanied with inconvenience and danger; that good rail-road management dispensed with them when not actually necessary; and that no necessity existed for their use upon this siding. There was no pretense but that all of the employees of the defendant wave competent, skilled, and experiment. enced men."

10 M'Gill v. Bowman (1890) 18 Sc. Sess. Cas. 4th series, 206. See also §

ligence in not providing a clutch for an embossing machine, other than the fore without being moved by the defendant's servants. Those connected with the pedal, to prevent motion in the mathematical freight train which backed in upon the chine while the operator's hands were siding just before the accident say it exposed to danger. The court said: "It did not touch the car, and this testisplain that the danger, to the knowlmony is substantially undisputed. The edge of the plaintiff, was inherent in the wind which, it is claimed, moved the car, is shown to have produced a pressure against the end of the car not exceeding 20 pounds, which would hardly could not be discovered by the use of be expected to move a car weighing 7 ficiently protected by the possession of his right to avoid exposure to those risks by quitting the employment.<sup>14</sup> See also chapters xvII. and xx. He is "not bound to risk his safety in the service of the master, and may, if he thinks fit, decline any service in which he reasonably apprehends danger to himself."15

That the employer's privilege in respect to the retention of an inferior type of instrumentality is not entirely unlimited is indicated by the qualificative expressions used in some cases,—as, where it is laid down that to render an employer liable for furnishing an unfit appliance, it is not sufficient that there are better or safer appliances to be had, but that supplied must have some radical fault, or its use have become so generally obsolete or supplanted by others superior thereto that its adoption or retention will itself indicate negligence; 16 or where it is said that a master is not required "to adopt any new device until its utility has been sufficiently tested, and it has been shown to be, as a whole, better than the appliance in use."17 statements seem to recognize, though not very explicitly, the principle that in the process of improvement there may be a stage finally reached at which the disparity in point of safety between the instrumentalities or methods actually adopted and those available becomes so glaring that a verdict for the plaintiff based on the hypothesis that the retention of the old appliance was culpable ought not to be interfered with.<sup>18</sup> Some judges have gone to the length of refusing to

of things different from those existing at the beginning of the service. It was sylvania R. Co. (1887; Pa.) 11 Atl. part of the plaintiff's engagement that 459; Sweeney v. Berlin & J. Envelope the master's work should be performed in the usual course and way of business. 722, 5 N. E. 358; Wonder v. Baltimore The work which the servant was called & O. R. Co. (1870) 32 Md. 411, 3 Am. The work which the servant was called upon to do at the time in question was not of a different character from that which he originally undertook; and the mackine upon which it was to be done was one then in use. No new duty or species of labor was imposed upon him, nor was he required to work a machine with which he was not familiar. He was simply called upon to do that for which formed the consideration of his employment. To say that the master to be predicable merely from the failure case is to say that he shall not have the benefit of the labor for which he conlings, there being nothing to show how tracted"); Arizona Lumber & Timber long it had been in use, and no evidence Co. v. Mooney (Ariz. 1895) 42 Pac. 952 that the single coupling was not still in (no obligation to put a guard on a ciruse). dlar saw to prevent pieces of wood om flying off from it).

18 In Smith v. New York & H. R. Co. (1856) 6 Duer, 225, Affirmed (1859) in 14 Chicago & T. R. Co. v. Simmons 19 N. Y. 127, 75 Am. Dec. 305, a railcular saw to prevent pieces of wood from flying off from it).

employment. To say that the master to be predicable merely from the failure shall be liable to the servant in such a of a railroad company to adopt the of a railroad company to adopt the "Potter" draft iron with three coup-

impute negligence to the master where the alternative methods or appliances available to him were those most usually employed by other persons under like circumstances. 19 But this doctrine is contrary to the weight of modern authority. See § 1076, post.

- 40. General doctrine not a protection where the instrumentalities are of a pattern that is not reasonably safe.— As already stated, in § 33, ante, the doctrine now under discussion is supposed to be applied subject to the qualification that the means and appliances furnished are reasonably safe and suitable for the servant's use. The full effect of this qualification and its operation with reference to the other elements by which, as explained in the next two chapters, the extent of the employer's obligation is tested, can be most clearly shown by collating the decisions with respect to specific instrumentalities. A summary of those decisions will be found in chapter viii., post.
- 41. nor where they are specifically defective.— Another qualification of the doctrine is that it furnishes no protection to a master who furnishes instrumentalities which are defective either in construction or for want of repair. The distinction between the liability incurred by the use of such instrumentalities, and by the use of instrumentalities in their normal condition, is recognized in a large number of

an improved form of switch which bears to the servant, to provide machin-would have materially reduced the risk ery of any particular character or deformation of accident. But this decision is not excription to be operated by the latter; easy to reconcile with the later case of nor is there any implied undertaking on Nicconey v. Berlin & J. Envelope Co. the part of the former, resulting from (1886) 101 N. Y. 520, 54 Am. Rep. the mere relation as employer, that the 722, 5 N. E. 358, cited in note 3, supra. In North Carolina it was remarked ten years ago that "in view of the changes fects such as may expose the servant to incident to new inventions and discoveries, facts which would not have shown ters, and, in contracting for the wages negligence a few years since may now that he is to receive, must be supposed or in the near future be declared in law to take into account the risks to which ample evidence of culpable dereliction the employment may expose him; and

Rep. 143. In the latter case the court

way company over whose lines the said: "It is now settled that there is plaintiff's employer had running powers no contract obligation imposed upon the was held liable for its failure to adopt master, from the mere relation that he an improved form of switch which bears to the servant, to provide machinample evidence of culpable dereliction the employment may expose him; and in duty;" and the opinion was expressed among those risks are the defects and that the time had arrived when rail- accidents of the machinery, and the negroad companies should be required to ligence and want of caution of fellow attach the Janney or similar improved servants in the common employment. coupler, and perhaps air brakes to all To hold the master liable to the serv-passenger cars, though not to freight ant for all the injuries resulting to the cars on account of the great expense in-latter from defects in machinery or mavolved. Mason v. Richmond & D. R. Co. terials upon which he may be em-(1892) 111 N. C. 487, 18 L. R. A. 846, ployed, or from the negligence of fellow 16 S. E. 699.

servants engaged in the common emservants engaged in the common emplymen v. Leuch (1857) 26 L. J. ployment, would go far to impede, if not
Exch. N. S. 221; Wonder v. Baltimore to make it impossible, to carry on many
& O. R. Co. (1870) 32 Md. 411, 3 Am. of the great works of the country." cases. Other decisions in which it is taken for granted that the employer's right to carry on business in his own way is limited to this extent are those cited in chapter VIII., B, requiring him to answer for injuries due to abnormal conditions.

<sup>1</sup> Tuttle v. Detroit, G. H. & M. R. Co. some of the cases dangerous and defect-(1887) 122 U. S. 189, 30 L. ed. 1114, 7 ive machinery and implements are con-Sup. Ct. Rep. 1166, where the perils founded, and proceeded thus: "Machinarising from the sharpness of a curve ery is not necessarily defective because are distinguished from those arising dangerous. The most perfect steam enfrom the defects of unsafe machinery gine requires skill and care in its man-which the employer has neglected to reagement, and is a dangerous agent. Cirpair, and which his employees have rea- cular saws, planing machines, and nearson to suppose is in proper working conly all machines used in wood work are dition. Hunt v. Kane (1900) 40 C. C. dangerous, but not therefore necessarily A. 372, 100 Fed. 256, where it was held defective. This distinction must be A. 372, 100 Fed. 256, where it was held defective. This distinction must be that the rule that a railroad company kept in view in determining all quesis not guilty of negligence in failing to tions which arise in suits for injuries that the rule that a railroad company kept in view in determining all quesis not guilty of negligence in failing to block its frogs, which renders it liable received by employees in using implefor an injury to a switchman working ments and machinery furnished by the in such yards who has knowledge that mo blocking is used, is not applicable to defective. Denver Tramway Co. a particular work with a particular v. Nesbit (1896) 22 Colo. 408, 45 Pac. 405, where one of the grounds for denying the servant's right to recover was ed, but not that it can be used withthat the omission to supply a trail car with a fender was not a defect of construction, though it enhanced the risks App. 49, 51 Fed. 91; Richards v. Rough of the employment. Keenan v. Waters (1897) 181 Pa. 247, 37 Atl. 342, where the fact that the machine which, it was perfect working condition was expressly mentioned among the reasons for negativing negligence in using it. 115 Mo. 503, 22 S. W. 498; Multanbert v. St. Louis & S. F. R. Co. ligan v. Montana Union R. Co. (1897) 187 Mo. 240, 37 S. W. 132, a 19 Mont. 135, 47 Pac. 795; Murphy drawbar was defective, the "lug" or v. Lake Shore & M. S. R. Co. (1891) 164 as a whole, in the same condition in Mass. 257, 41 N. E. 284; Young v. Virwhich it would have been if it had been given to under the puriose of enabling a defective machine to unsafer to use an appliance without a document of seeing that the volud not have been negligent for a master to use an appliance without a document of seeing that the safety device thereon did not relieve pable if the substituted appliance exposhim from the obligation of seeing that the safety device therefore did not relieve pable if the substituted appliance exposhim from the obligation of seeing that the safety device therefore did not relieve pable if the substituted appliance exposhim from the obligation of seeing that safety device thereon did not relieve pable if the substituted appliance exposhim from the obligation of seeing that es his servants to greater danger than a device actually used in connection they would have incurred if the matherewith was in a reasonably safe conchine had been in good condition. Muirdition. In Smith v. St. Louis, K. C. & head v. Hannibal & St. J. R. Co. (1885) N. R. Co. (1878) 69 Mo. 35, 33 Am. 19 Mo. App. 634 (rope used as a coup-Rep. 484, the court remarked that in ling).

A few of the authorities, however, are adverse to the soundness of the distinction thus drawn,2 and it certainly seems to be scarcely sustainable by any train of reasoning which will not lead to conclusions which are essentially irreconcilable with those discussed in the preceding part of this chapter.

It has been shown in § 35, ante, that the right of a master to carry on his business with such instrumentalities and by such methods as he may prefer rests primarily and fundamentally upon the hypothesis that the servant understands and therefore accepts the risks which he will have to encounter by reason of the use of those instrumentalities and methods. If it is shown, as a matter of fact, that he does not understand those risks, and that his want of understanding is not in itself culpable, the doctrine which accords this liberty of action to the master will clearly be no more a protection to him than in cases where the instrumentalities or methods are specifically defective. See chapter vii., post. The inference is that the distinction drawn between comparative inferiority resulting from intrinsic qualities, and unfitness produced by defective condition, has in this point of view no real doctrinal basis, and that, in the last analysis, the question involved is merely one of the incidence of the burden of proof. In the one case the master is given the benefit of the presumption that a servant, at all events when he is of full age and apparently in possession of an average measure of intelligence, appreciates the risks which he will encounter. In the other cases the master, if he seeks exemption from liability on the ground of appreciation of a risk, has the onus of making good that defense by positive evidence. See § 57, post, for some further remarks on this subject.

The inconsistent position in which the courts have placed themselves by propounding this distinction as one based upon doctrinal, instead of merely evidential, considerations, is brought into clear relief by some decisions which have virtually ignored it altogether, and in effect, if not in terms, have affirmed the principle that it is not negligence to suffer an appliance to sink to a lower level of safety which would not imply culpability in the case of an appliance which is being put into use for the first time.3

<sup>&</sup>lt;sup>2</sup> Dynen v. Leach (1857) 26 L. J. v. Silver Spring Bleaching & Dyeing Co. Exch. N. S. 221; Wonder v. Baltimore (1878) 12 R. I. 112, 34 Am. Rep. 615. & O. R. Co. (1870) 32 Md. 411, 3 Am. solution in the string of the sep a machine in use after it was held not to be negligence to use a has become old and defective, unless its car the drawbar of which, owing to the defects expose the operator to some lafact that the spring has grown weaker, tent or extraordinary danger." Kelley has dropped below the normal level.

42.—nor where the risks incident to using them were not fully understood by the injured person. - There is also a third class of cases which is not controlled by the doctrine,-those, namely, in which the servant, from lack of experience or some other cause, was excusably ignorant of the properties of the instrumentality furnished.1 exception is implied in the theory that the doctrine is at least par-

The case was decided on the analogy of assumed, be left out of account, and arthose which permit companies to use gued that, if the accident was due to the cars with couplings which are structufailure of the engine to respond promptrally of different heights. See §§ 39, ly to the reversal of the lever, the case rally of different heights. See §§ 39, by to the reversal of the lever, the case ante, and 71, post. In Bajus v. Syraperesented was one, not of "a mere loss cuse, B. & N. Y. R. Co. (1886) 103 N. of power, but a misapplication of pow-Y. 312, 57 Am. Rep. 723, 8 N. E. 529, er." Flike v. Boston & A. R. Co. (1873) where it was held that a brakeman 53 N. Y. 549, 13 Am. Rep. 545, where caught by the brake beam of a moving the injury resulted from the inability car could not recover on the ground of the trainmen to stop the train that the engine attached to such car promptly, one of the brakemen being was, by reason of a defect in its flue and absent, was cited by the learned judge, who pointed out that this case and the was, by reason of a detect in its five and absent, was cited by the learned judge, main steam valve, not sufficiently powwho pointed out that this case and the erful to stop the car in time to avert one before the court were essentially the injury, the court reasoned thus: similar, since in the latter a sound "The responsibility for the defects is no greater than it would have been if the defendant had furnished a new engine evidence being, in his opinion, sufficient to instift the conclusion of the jury of precisely the same power. . . . to justify the conclusion of the jury Suppose, then, the defendant had furthat the defendant had failed in its duty nished a new engine of 70-horse power, to supply machinery in a condition in —precisely the same power which we which it would not endanger the persons may assume this had at the time of the of the trainmen, he considered that the accident; upon what principle could it verdict for the plaintiff should not be be said that it would be liable for such disturbed. But apart from the objective of the plaintiff of the plaintiff should not be be said that it would be liable for such disturbed. But apart from the objective or considered that the loid down as a time to the mention which are an accident? Can it be laid down as a tions to the majority opinion which are principle of law that it is bound to furthus put forward, it is clearly obnoxnish to its employees engines suitable ious to the still more fatal one that and adequate in power to every emer-whether or not it would have been neg-gency? Who but the employer shall de-termine how powerful an engine shall power, the agreement of the plaintiff be at any place and for any purpose? was to work with one of greater power, Suppose, at this place, the defendant and that it was contrary to one of the had furnished an engine capable of mov- fundamental principles of the law of ing but three cars at a time and running employers' liability to hold that he unbut 10 miles an hour, and the plaintiff dertook the risks arising from a tempohad known it, could he justly complain rary impairment of that power, unless of it? Would such an engine, in any it was shown that he appreciated the legal or proper sense, be dangerous? If effect of the change in his environment an employer should furnish to an em-caused by that impairment. The opin-ployee a horse which, from natural ion of the majority introduces a theory weakness or from disease, should not of vast scope, which, if carried out to have strength for the work in hand, and its logical conclusions, would prevent the employee should, in consequence recovery in a large number of instances thereof, receive some injury, could he in which it is now allowed. If effect is hold the employer responsible for his to be given at all to the distinction bedamages? These inquiries need not be tween mere structural or qualitative invious." Danforth, J., dissented in an an actual deterioration, it should not be elaborate and well-reasoned opinion, in evaded where it happens to operate to which he denied that, on the evidence, the disadvantage of the master. the defective condition of the throttle <sup>1</sup> See, for example, the ruling in valve could, as the majority of the court Louisville & N. R. Co. v. Binion (1894)

The answers to them are ob- feriority and specific defects implying

tially based on the hypothesis of an assumption of known risks (see § 36a, ante), and is merely a particular application of the general principle that it is culpable to expose a servant to any risk which he does not comprehend (see §§ 58, 59, post), or of the correlative and logically equivalent principle that a servant only undertakes such risks as he appreciates. See chapter xvII., post.

107 Ala. 645, 18 So. 75, that a railroad ter of which are inherently dangerous in company which employs hand brakes, the hands of an inexperienced brakesome of which have stiff and others limber staffs, differing only in size, the lat-

## CHAPTER VI.

## COMMON USAGE AS A TEST OF THE PERFORMANCE OF EMPLOYER'S DUTIES.

- 43. Competency of evidence of usage; generally.
- 44. Doctrine that a master who adopts instrumentalities in common use is, as matter of law, free from negligence.
- 45. Applicability of the doctrine where the negligence charged has relation to the employment of servants.
- 45a.— or to the methods of work.
- 46. Doctrine is applicable only to instrumentalities in good repair.
- Doctrine not applicable where the negligence charged is the breach of a statute.
- 48. Relation of the doctrine to that which allows a master to carry on his business in his own way.
- 49. Negligence not inferable simply from the fact that the instrumentality or method adopted was one not in common use.
- 50. Doctrine that conformity to common usage is not conclusive in the master's favor.
- Negligence not predicable of the failure to adopt instrumentalities or methods not in general use.
- Proof of nonconformity to common usage warrants inference of negligence.
- 53. What kind of usage is competent as evidence to be introduced on the question of due care.
  - Competency considered with reference to the similarity of the circumstances.
  - b. The number of the employers following or not following the usage.
  - c. The territorial extent of the usage.
  - · d. The practice of the defendant himself.

As to usage considered as a test of the master's performance of the duty to make suitable rules, see § 211, post. As to the effect of the master's conformity or nonconformity to usage, where the action is brought under statutes modifying the common law, see chapter xxxvii., post.

43. Competency of evidence of usage; generally.—It may be laid down as an undisputed proposition that, where the injury complained of was caused by an instrumentality or method which, at the time of the accident, was in its normal condition, evidence going to show that

such an instrumentality was or was not commonly used under similar circumstances by persons in the same line of business as the defendant is always competent for the purpose of proving that he was or was not in the exercise of due care in adopting or retaining that instrumentality as a part of his plant.1 Nor is it disputed that, if the evidence is conflicting as to whether such machinery is in common and ordinary use, the question of negligence in using the machinery is not one of law, but of fact for the jury.2

There is, however, a remarkable conflict of opinion as to the extent of a court's right to set aside or control verdicts based upon the defendant's conformity or nonconformity to common usage.

44. Doctrine that a master who adopts instrumentalities in common use is, as matter of law, free from negligence.— A doctrine which has been extensively applied may be enunciated thus: Where the only inference that can reasonably be drawn from the evidence is that the master conformed to the general usage of the average member of his trade or profession in respect to the adoption or retention of the instrumentality in question, he may be declared, as a matter of law, to have been in the exercise of due care. The language in which this doctrine is formulated or referred to would, if taken literally, often convey the idea that the generality of the usage and the similarity of the business or establishment of which the usage is adduced as a standard of comparison are the only points to be considered, and that the manner in which that business or establishment is

This doctrine is taken for granted in all the cases cited in the following sections, and is explicitly affirmed in the following sections, and is explicitly affirmed in the following cases, among others: Wabash R. Co. v. McDaniels (1882) 107 U. S. tion); Belleville Stone Co. v. Comben 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; (1898) 61 N. J. L. 353, 39 Atl. 641, Myers v. Hudson Iron Co. (1889) 150 Mass. 130, 22 N. E. 631; Austin v. Chi-cago, R. I. & P. R. Co. (1895) 93 Iowa, 236, 61 N. W. 849; Pennsylvania Co. v. ropes in other quarries were supported so as to what degree of vigilance the servant was bound to exercise. See §§ at seq.ante); Atchison, T. & S. F. ing in of a trench in which the plain-R. Co. v. Alsdurf (1893) 47 III. App. 256, 58 Pac. 200; Indiana, I. & I. I. 554, 48 Atl. 798 (not error, in an action for injuries sustained by the cav-28 of seq.ante); Atchison, T. & S. F. ing in of a trench in which the plain-R. Co. v. Alsdurf (1893) 47 III. App. tiff was at work, to admit evidence as 200; Hennesey v. Bingham (1899) 125 to the custom of shoring up trenches of Cal. 627, 58 Pac. 200; Indiana, I. & I. I. Soundly (1899) 152 Ind. 590, stances); Baird v. Reilly (1899) 35 C. 3 N. E. 175; Richmond & D. R. Co. v. Co. A. 78, 63 U. S. App. 157, 92 Fed. Jones (1890) 92 Ala. 218, 9 So. 276; 884 (similar ruling).

Holland v. Tennessee Coal, I. & R. Co. v. Millane (1898) 55 Neb. 228, 75 N. W. 584).

conducted and the character of the persons engaged in it are not material factors in the question to be determined. But it is clear that, under the general principles of the law of negligence, these latter elements must be material, and that the test really propounded is not usage of any employers, however imprudent and unskilful, or of any concerns, however ill regulated, but the usage prevailing among prudent and skilful employers and in well-regulated concerns. That this is the actual position taken is shown by the following extract from the opinion in a leading decision by a court which has been one of the most uncompromising exponents of the doctrine now under discussion:

"All the cases agree that the master is not bound to use the newest and best appliances. He performs his duty when he furnishes those of ordinary character and reasonable safety, and the former is the test of the latter; for, in regard to the style of implement or nature of the mode of performance of any work, 'reasonably safe' means safe

¹Thus, we find such unqualified statements as the following: "Whatever is, tense that it was customary for rail-according to the general, usual, and ormanies to build bridges spandinary course, adopted by those in the same business, is reasonably safe within sufficient to admit of a man to pass unthe meaning of the law." And, that a jury cannot be permitted to set up its judgment against the general customs of the business. Kehler v. Schwenk (1891) 144 Pa. 348, 13 L. R. A. 374, 22 often be inconvenient, and sometimes, at 1910 "No inference of negligence perhaps, impracticable. It is, there Atl. 910. "No inference of negligence perhaps, impracticable. It is, there can arise from evidence which shows fore, quite plain that the defendant did can arise from evidence which shows fore, quite plain that the defendant did that the implement was such as is ordinarily used for like purposes by persons to subject him to the danger into which engaged in the same kind of business." he fell." It has been held proper to interest to subject him to the danger into which engaged in the same kind of business." he fell." It has been held proper to interest (1891) 106 Mo. 429, 17 S. W. 580. See, charges his duty towards his employees however, Missouri decisions in §§ 50, 51, in that respect, if he furnishes applipost. "A party entering upon a particular employment assumes the risk and perils usual thereto, when the usual and same or similar lines of work." Shadesustomery means to quard against accicustomary means to guard against acciford v. Ann Arbor Street R. Co. (1897) dents are adopted." King v. Ford River 111 Mich. 390, 69 N. W. 661. Language Lumber Co. (1892) 93 Mich. 172, 53 N. of the same unqualified description is W. 10. "It is sufficient if the machin- also found in the following cases, as ery is of a kind in general use." Davis well as others cited in this section: Rogery is of a kind in general use." Davis vell as others cited in this section: Rogv. Augusta Factory (1893) 92 Ga. 712, crs v. Louisville & N. R. Co. (1898) 88 18 S. E. 974. In Baylor v. Delaware, Fed. 462 (the doctrine applied in other L. & W. R. Co. (1878) 40 N. J. L. 23, Federal decisions is less favorable to the 29 Am. Rep. 208, the court, in holding that a brakeman who sued for injuries Asphalt Block & Tile Co. v. Mackey caused by a low overhead bridge should have been nonsuited, said: "He was, according to his own showing, an employee of the defendant, injured by one of the dangers of the business in which cases to the contrary effect, cited in \$8\$ be voluntarily engaged. There was no 50. nost): Camp Point Mfa. Co. v. Bal-

he voluntarily engaged. There was no 50, post); Camp Point Mfg. Co. v. Bal-

according to the usages, habits, and ordinary risks of the business. Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man. The test of negligence in employers is the same, and however strongly they may be convinced that there is a better or less dangerous way, no jury can be permitted to say that the usual and ordinary way, commonly adopted by those in the same business, is a negligent way for which liability shall be imposed. necessarily determine the responsibility of individual conduct, but they cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of the community."2

Several of the courts in their statements of the doctrine give prominence to the fact that the legal standard is the usage of prudent men and well-regulated concerns.<sup>3</sup> But there is no reason for supposing

cases to the contrary effect, as cited in § 50, post); Dingley v. Star Knitting
Co. (1890) 58 Hun, 605, 12 N. Y. Supp.
31, Affirmed (1892) in 134 N. Y. 552, in question was usually guarded, but
32 N. E. 35; Pittsburgh & C. R. Co. v. the guard had been removed on the ocSentmeyer (1879) 92 Pa. 276, 37 Am.
Rep. 684; Payne v. Reese (1882) 100
Pa. 301; Fritz v. Salt Lake & O. Gas
A E. L. Co. (1899) 18 Utah, 493, 56
Pac. 90. An instruction to the effect that an employer has "a right to use and employ such machinery as the experience of trade and manufacture sanctions as reasonably safe" has been held not to impose any additional obligation on the master, but to relax in his favor the rigor of the rule requiring him to ouse ordinary care in the selection of his ordinary care and prudence, engaged in

lou (1874) 71 lll. 417 (but see Illinois ilar machines unguarded was denied to cases to the contrary effect, as cited in be conclusive in the master's favor, but

use ordinary care in the selection of his ordinary care and prudence, engaged in machinery. Washington & G. R. Co. v. a similar business on their own account McDade (1890) 135 U. S. 554, 34 L. ed. and for their own profit and success, 235, 10 Sup. Ct. Rep. 1044 (as to this are in the habit of doing." Kansas & decision, see further, § 50, post). It T. Coal Co. v. Brownlie (1895) 60 Ark. has been laid down that a verdict 582, 31 S. W. 453. "The duty of the against the defendant based on the the- defendant was to furnish a place as safe ory that he was guilty of a want of or- and free from danger as other persons dinary care in furnishing a certain ap- of ordinary care, prudence, and caution, pliance cannot stand, where the jury engaged in like business and in like cirpliance cannot stand, where the jury engaged in like business and in like cirhave also found that such appliance cumstances, ordinarily furnished." Prywas a usual one and usually found safe. bilski v. Northwestern Coal R. Co. Innes v. Milwaukee (1897) 96 Wis. (1898) 98 Wis. 413, 74 N. W. 117. Realto, 70 N. W. 1064. In Reese v. sonable safety is "measured by the Hershey (1894) 163 Pa. 253, 29 Atl. standard of good railroading." Balhoff 907, evidence of a custom to have simver v. Michigan C. R. Co. (1895) 106 Mich.

that these differences of language are indicative of any actual corresponding differences of opinion as to the standards by which the master's exercise of due care is measured. In the subjoined note, therefore, in which are collected the cases in which common usage was held, as a matter of law, to repel the inference of culpability, it has been deemed permissible to group together both the decisions in which it is expressly recognized that it is the usage of the prudent man or the well-regulated concern that is the gauge and standard of the master's liability, and the decisions which seem to lay the whole stress upon the generality of the usage.4 Other decisions to the same effect are collected in § 163, post.

606, 65 N. W. 592. A master "is not bound to possess or exercise unusual foresight, or to discover and adopt unusual expedients,—that is, expedients caution and prevision than is exercised not used by the most careful masters, but which may appear valuable when than that is usually impracticable. Orthe matter is reviewed in the light of subsequent events." Cook v. Bell (1857) 20 Sc. Sess. Cas. 2d series, 137, per McNeill, Ld. Pres.; Finnighan v. Peters (1861) 23 Sc. Sess. Cas. 2d series, 260, per Ld. Inglis. The question is not alone whether the device which, as is alleged, should have been adopted, is serviceable in decreasing the risks of the work, but whether it is so manifestly serviceable as to command the consensus of intelligent men in the same business so generally as 11 C. C. A. 93, 27 U. S. App. 190, 63 (said as to the adoption of whipping-straps to warn trainmen of the proximity of low overhead bridges). In Guin-son 897; Kansas City, M. & B. R. Co. Wis. 482, 70 N. W. 671, it was held to be error to give the following charge: (1887) 112 Ind. 404, 14 N. E. 391; In-"If the defendant furnished plaintiff a diana, I. & I. R. Co. v. Bundy (1899) place which was as safe and free from danger as other persons of ordinary danger as other persons of ordinary care, engaged in like business and under like circumstances, ordinarily furnish, then you will find for the defendance of the players of labor for their workmen or servants are not reasonably safe places

Ala. 218, 9 So. 276; Mary Lee Coal & R. Co. v. Chambliss (1892) 97 Ala. 171, 11 So. 897; Kansas City, M. & B. R. Co. v. Locke (1887) 112 Ind. 404, 14 N. E. 391; In-"If the defendant furnished plaintiff a diana, I. & I. R. Co. v. Bundy (1899) place which was as safe and free from 152 Ind. 590, 53 N. E. 175; Choctau, danger as other persons of ordinary of Co. v. Davis (1891) 90 Tenn. 711, 18 nish, then you will find for the defendance of the provided by such other employers of labor for their workmen or R. I. 789, 38 Atl. 926. servants are not reasonably safe places in which their men are obliged to work." The court said: "Having ob-Vol. I. M. & S.—8.

mand the consensus of intelligent men see Northern P. R. Co. v. Blake (1894) in the same business so generally as 11 C. C. A. 93, 27 U. S. App. 190, 63 that it cannot be reasonably ignored or Fed. 45; Georgia P. R. Co. v. Propst disregarded. Louisville & N. R. Co. v. (1887) 83 Ala. 518, 3 So. 764; Rich-Hall (1890) 91 Ala. 112, 8 So. 371 mond & D. R. Co. v. Jones (1890) 92 (said as to the adoption of whipping-Ala. 218, 9 So. 276; Mary Lee Coal & R.

4 (1) Instrumentalities of railway companies.—Wabash, St. L. & P. R. Co. v. Locke (1887) 112 Ind. 404, 14 N. E. served such degree of care as ordinarily 391 (unusually tall brakeman, standing prudent men engaged in the same busi- on top of a freight car somewhat ness observe, the law is satisfied, and no higher than common, struck a telegraph liability arises from accidents which wire and was dragged down); Baylor may then happen, although they might v. Delaware, L. & W. R. Co. (1878) 40

The qualification of the doctrine, viz., that common usage is a defense, as matter of law, only where the evidence that there is such a

head bridge); Pahlan v. Detroit, G. H. Va. 188, 59 Am. Rep. 654 (sides of & M. R. Co. (1899) 122 Mich. 232, 81 bridge dangerously close to track); N. W. 103 (coal bin close to track in-Scidmore v. Milwaukee, L. S. & W. R. jured plaintiff while he was pushing a Co. (1895) 89 Wis. 188, 61 N. W. 765 car); Sheeler v. Chesapeake & O. R. Co. ("clearing post" near the junction of (1885) 81 Va. 188, 59 Am. Rep. 654 main and side tracks); Randall v. Bal-(fireman while leaning out of his engine timore & O. R. Co. (1883) 109 U. S. was struck by the timbers of a bridge 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322 which was of the same width as several (ground-switch between two tracks.) which was of the same width as several Risdon (1891) 87 Va. 335, 12 S. E. 786, used as a caboose); Richmond & D. R. Lewis, J., dissenting (unblocked frog of Co. v. Jones (1890) 92 Ala. 218, 9 So. standard make); Lake Shore & M. S. 276 (drawhead of a certain pattern); R. Co. v. McCormick (1881) 74 Ind. Georgia P. R. Co. v. Propst (1887) 83 special findings, one of which was to certain pattern; Northern P. R. Co. v. the effect that the frog which caused Blake (1894) 11 C. C. A. 93, 27 U. S. the injury was the same as those used App. 190, 63 Fed. 45 (double deadthe injury was the same as those used by the principal roads in the country); woods; see, however, the Federal decispencer v. New York C. & H. R. R. Co. sions cited in § 50, post); Osborne v. (1893) 67 Hun, 196, 22 N. Y. Supp. Now & L. R. Co. (1877) 68 Me. 49, 28 100 (negligence not inferable from abance of blocking, where there is no evidence that blocking is in general use (1886) 69 Iowa, 450, 58 Am. Rep. 227, on other roads); Rajotte v. Canadian 30 N. W. 25 (failure to adopt "Potter" P. R. Co. (1889) 5 Manitoba L. Rep. draft-irons with three couplings, held 365 (unblocked frogs; no evidence that not to be negligence, as it appeared they had become obsolete); Pennsylthat the simple coupling was still exvania Co. v. Hankey (1879) 93 Ill. 580 tensively used; see, however, Iowa cases (unballasted side track); Atchison, T. in § 50, post); Henry v. Staten Island & S. F. R. Co. v. Alsdurf (1892) 47 Ill. R. Co. (1880) 81 N. Y. 373 (fact that App. 200 (spaces between ties on a side brakes in question were such as were in

N. J. L. 23, 29 Am. Rep. 208 (low over- v. Chesapeake & O. R. Co. (1885) 81 (ground-switch between two tracks; which was of the same with as several (ground-switch between two tracks; others in the same state); Sisco v. Leone of the elements of the decision was high & H. R. Co. (1895) 145 N. Y. 296, that it was of the ordinary pattern; see, 41 N. E. 90 (train hand struck by mail however, Federal cases in § 50, post); catcher); Murray v. New York C. & H. Benson v. New York, N. H. & H. R. Co. R. R. Co. (1900) 55 App. Div. 344, 66 (1901; R. I.) 49 Atl. 689 (brakeman, N. Y. Supp. 856 (engineer struck by when attempting to step from one car water plug between two tracks; no evito another on a dark night, fell through dence that conditions were different on a hole cut in the projecting part of the other roads; plaintiff nonsuited); Ben-roof to admit of trainmen reaching the nett v. Long Island R. Co. (1900) 163 ladder); Baxter v. Chicago & N. W. R. N. Y. 1, 57 N. E. 79, Reversing (1897) Co. (1899) 104 Wis. 307, 80 N. W. 644 21 App. Div. 25, 47 N. Y. Supp. 258 (unsafe locomotive boiler); Davis v. (switch without lock or target on a Baltimore & O. R. Co. (1893) 152 Pa. temporary siding on a new road under 314, 25 Atl. 498 (box car with no platconstruction); Richmond & D. R. Co. v. form or guard rail at either end was 440 (judgment entered for defendant on Ala. 518, 3 So. 764 (drawheads of a App. 200 (spaces between ties on a side brakes in question were such as were in track not completely filled up; see, common use on dirt cars was one of the Harst Not completely lines up, see, common use on anticars was one of the however, Illinois cases in § 50, post); elements mentioned); Carey v. Boston Hurst v. Kansas City, P. & G. R. Co. & M. R. Co. (1893) 158 Mass. 228, 33 (1901) 163 Mo. 309, 63 S. W. 695 (in- N. E. 512 (projecting boit on lever of jury caused by gravel placed in piles in hand car caught a section man's a railway yard for ballasting purclothes); Bohn v. Chicago, R. I. & P. R. poses); Smith v. St. Louis, K. C. & N. Co. (1891) 106 Mo. 429, 17 S. W. 580 R. Co. (1879) 69 Mo. 32, 33 Am. Rep. (use of bridge timber as a lever to raise 484 (U-rail used for a guard rail in- a broken turntable; see, however, Misstead of a T-rail; see, however, Mis-souri case in § 50, post); Bedford Belt souri case cited in § 50, post); Sheeler R. Co. v. Brown (1895) 142 Ind. 659,

usage is clear and undisputed, and that, if the evidence tending to establish the master's claim in this regard is conflicting, or of such a

were run).

duty to box a shaft on which is a pro-Rooney v. Sewall & D. Cordage Co. (1894) 161 Mass. 153, 36 N. E. 789; Hale v. Chcney (1893) 159 Mass. 268, 34 N. E. 255 (boy of sixteen was injured here); Goodnow v. Walpole Emery Mills (1888) 146 Mass. 261, 15 N. E. 576; Demers v. Marshall (1899) 172 Mass. consin River Paper & Pulp Co. (1901) 110 Wis. 645, 86 N. W. 662; Hoffman v. American Foundry Co. (1897) 18 Wash. 287, 51 Pac. 385; Lewis v. Simpson (1892) 3 Wash. 641, 29 Pac. 207 cable of his omission to fence other kinds of dangerous machinery. Wabash Paper Co. v. Webb (1896) 146 Ind. 303, 45 N. E. 474; Mackin v. Alaska Refrigerator Co. (1894) 100 Mich. 276, 58 N. W. 999; King v. Ford River Lumber Co. (1892) 93 Mich. 172. 53 N. W. 10; Schroeder v. Michigan Car Co. (1885) 56 Mich. 132, 22 N. W. 220; Sanborn v. Atchison, T. & S. F. R. Co. (1886) 35 Kan. 292, 10 Pac. 860 (but see Kansas cases cited in § 50, post); Arizona Lumber & Timber Co. v. Mooney (1895; Ariz.) 42 Pac. 952; Townsend v. Langles (1890) 41 Fed. 919 (see, however, Federal decisions in § 50, post); Cagney v. Hannibal & St. J. R. Co. (1879) 69 Mo. 416 (see, howwithin 3 feet of the cogwheels); Young made of the coal from the chutes); v. Burlington Wire Mattress Co. (1890) was customary to cover them; see, how- Pa. 257, 51 L. R. A. 881, 47 Atl. 237

42 N. E. 359 (track formed of boards ever, Iowa cases in § 50, post); Fritz along which push cars loaded with tim- v. Salt Lake & O. Gas & E. L. Co. ber for a bridge under construction (1899) 18 Utah, 493, 56 Pac. 90 (dynamos left unfenced). In the following (2) Instrumentalities in other kinds cases, also, the master was absolved on of business .- A master is not under any the ground of conformity to general usage in respect to the maintenance of jecting set-serew, or to change it for a instrumentalities mentioned: Ross v. safer kind. Keats v. National Heeling Pearson Cordage Co. (1895) 164 Mass. Mach. Co. (1895) 13 C. C. A. 221, 21 U. 257, 41 N. E. 284 (belt shipper used for S. App. 656, 65 Fed. 940. See, however, shifting belt from loose to tight pulley Federal decisions cited in § 50, post. slipped and started a machine); Kaye v. Rob Roy Hosiery Co. (1889) 51 Hun, 519, 4 N. Y. Supp. 571 (verdict for plaintiff set aside, where elevator which fell, owing to the failure of a safety device to operate, was "of a plan and style approved by long and ample use"); Biddiscomb v. Cameron (1898) 35 App. 548, 52 N. E. 1066, S. C. (1901) 178 Div. 561, 55 N. Y. Supp. 127 (elevator Mass. 9, 59 N. E. 454; Kreider v. Wis- which was of a construction in common use and provided with safety appliances such as are ordinarily used for such a structure); Stringham v. Hilton (1888) 111 N. Y. 188, sub nom. Stringham v. Stewart, 1 L. R. A. 483, 18 N. E. (see, however, Washington decisions in 870 (freight elevator without safety § 50, post). Nor is negligence predictutches); Boess v. Clausen & P. Brewclutches); Boess v. Clausen & P. Brewing Co. (1896) 12 App. Div. 366, 42 N. Y. Supp. 848 (similar facts); Allison Mfg. Co. v. McCormick (1888) 118 Pa. 519, 12 Atl. 273 (paint of a well-known and commonly used brand); Service v. Shoneman (1900) 196 Pa. 63, 46 Atl. 292 (type of boiler alleged by its manufacturer to be nonexplosive was widely used, but proved to be dangerous); Schultz v. Bear Creek Ref. Co. (1897) 180 Pa. 272, 36 Atl. 739 (machinery which fell on plaintiff was set up in the usual way); Murray v. Merry (1890) 17 Sc. Sess. Cas. 4th series, 815 (no fence round the lower part of a shaft through which ironstone was raised to а furnace gangway about 50 feet J. R. Co. (1879) 69 Mo. 416 (see, how-above); Lehigh & W. B. Coal Co. v. ever, the Missouri case cited in § 50, Hayes (1889) 128 Pa. 294, 5 L. R. A. post); Higgins v. Fanning (1900) 195 441, 18 Atl. 387 (mine owner not guilty Pa. 599, 46 Atl. 102; Cunningham v. of negligence in failing to provide any Bath Iron Works (1899) 92 Me. 501, appliance, means, or method by which 43 Atl. 106 (plaintiff was a boy who warning can be given to men working was required by his duties to come in a pocket that a draw is about to be Wood v. Heiges (1896) 83 Md. 257, 34 79 Iowa, 415, 44 N. W. 693 (negligence Atl. 872 (appliance for breaking castnot inferable from the fact that the ings, constructed on the plan used in knives of a tenon machine are not covother foundries); Purdy v. Westingered, where there is no evidence that it house Electric & Mfg. Co. (1900) 197

nature that more than one deduction from it may reasonably be drawn, the case is for the jury, has been recognized by one of the group of courts whose decisions have been collected,5 and is assumed as a rule of procedure by all the others.

In some of the cases cited in this section, various circumstances are referred to as additional reasons for refusing to hold the defendant to be culpable,—as, that where the instrumentality complained of was not dangerous at all when used with ordinary care; or that it had been purchased of a reputable maker, and thoroughly tested before it had been sold for use; or that it had been put in operating condition by manufacturers of high reputation; or that it was con-

the falling of materials in a building under erection, held not to be established by testimony which shows that the ladder well-hole, and the elevator well-hole were protected by planking in the manner which is customary where such work is in pregress); The Louisiana (1896) 21 C. C. A. 60, 41 U. S. App. 324, 74 Fed. 748 (not negligence, as regards stevedores, to leave hatchways unguarded, where it is usual to leave them open until the hold is fully stored); The Lizzie Frank (1887) 31 Fed. 477 (recovery denied by a judge

(explosion ensued when employee was sitting as a jury, where the "chock" of inspecting with a lighted match a bar- a tugboat was constructed and secured which castings were packed, but in the usual and customary manner at which had originally contained oil, alcohol, turpentine, benzine, whisky, and cases in § 50, post); McCampbell v. other things, and had been bought from Cunard S. S. Co. (1891) 36 N. Y. S. R. a secondhand dealer; liability denied 852, 13 N. Y. Supp. 288 (truck and partly on the ground that there was no chock on which heavy barrels were evidence that such barrels were not transferred from a steamer to the wharf commonly used for such purposes at gave way); Rosa v. Volkening (1901) manufactories); Glover v. Meinrath 64 App. Div. 426, 72 N. Y. Supp. 236 (1896) 133 Mo. 292, 34 S. W. 72 (use (derrick used for raising materials for of hot water, instead of steam, for heatability and the steam of the steam, for heatability and the steam of t buildings so close to the entrance of the Hall v. Johnson (1865) 3 Hurlst. & C. passage which served as the intake air 589, 34 L. J. Exch. N. S. 222, 11 Jur. way that, in a case where they were set N. S. 180, 11 L. T. N. S. 779, 13 Week. on fire, the passage was filled with Rep. 411, personal negligence on the smoke and suffocated an employee); part of a mine owner in respect to the Choctaw, O. & G. R. Co. v. Nicholas methods adopted for securing the roofs (1899; Ind. Terr.) 53 S. W. 475 (failure to scaffold a part of a mine); that "the mine had been worked on the Moore v. Ross (1890) 17 Sc. Sess. Cas. ordinary course for the last six years."

4th series, 796 (trap door in a laundry If this implies that the defendant was for passing goods from one floor to an- absolved on the ground of conformity other); Van Orden v. Acken (1898) to common usage, the decision is in con-28 App. Div. 160, 50 N. Y. Supp. 843 flict with the other English ones cited (negligence in respect to the failure to in § 50, post. The language is, however, somewhat obscure.

<sup>5</sup> Shadford v. Ann Arbor Street R. Co.

(1899) 121 Mich. 224, 80 N. W. 30.

Melchert v. Robert Smith India Pale
Ale Brewing Co. (1891) 140 Pa. 448,
21 Atl. 755; Stringham v. Hilton
(1888) 111 N. Y. 188, sub nom. Stringham v. Stewart, 1 L. R. A. 483, 18 N.

E. 870.

Fuller v. New York, N. H. & H. R. Co. (1900) 175 Mass. 424, 56 N. E. 574.

Sce, generally, § 153, post.

<sup>8</sup> Kaye v. Rob Roy Hosiery Co.
(1889) 51 Hun, 519, 4 N. Y. Supp. 571.

structed in the manner approved by competent judges and by previous experience;9 or that it had been used by the public and by the master himself without any accident during a period of ten or twelve years;10 or that it had usually been found safe;11 or that no previous injury had resulted from its use;12 or that it was absolutely preferable to any known device; 13 or that it was reasonably safe and suitable. 14 But, so far as regards the group of courts with which we are now concerned, the quality of such evidence is, it is manifest, merely corroborative. Compare § 57, post.

On general principles, it is clear that the doctrine as to the conclusive effect to be ascribed to conformity to usage is conditional upon its being established or conceded that the servant was or ought to have been aware of the risks created by such conformity. The obvious character of the risk in question is not unfrequently adverted to.<sup>15</sup> This limitation of the doctrine should always be brought to the attention of the jury when the facts are such as to render it a material element.16

Other cases embodying the theory that conformity to common usage is conclusive in the master's favor will be found in § 163, post.

45. Applicability of the doctrine where the negligence charged has relation to the employment of servants.— The courts belonging to the group by which common usage is regarded as a conclusive test of negligence are not entirely in agreement as regards the question whether this doctrine is applicable in cases where the employment of persons of a certain class is alleged to have been culpable. In some decisions on the subject, servants are placed upon the same footing as the other

Supp. 288.

<sup>o</sup> The Lizzie Frank (1887) 31 Fed. switching apparatus is possibly dangerous to employees working about it, an <sup>10</sup> Allison Mfg. Co. v. McCormick instruction that the company is not li-(1888) 118 Pa. 519, 12 Atl. 273. able if that construction is similar to 11 Innes v. Milwaukee (1897) 96 Wis. like devices maintained upon another 170, 70 N. W. 1064.

12 McCampbell v. Cunard S. S. Co. without a proviso making the immunity (1891) 36 N. Y. S. R. 852, 13 N. Y. dependent upon proof that the company had given the employee injured thereby 13 Hale v. Cheney (1893) 159 Mass. notice of the attendant danger, or that 268, 34 N. E. 255. 14 Fritz v. Salt Lake & O. Gas & E. L. ing it as would have put a reasonably Co. (1899) 18 Utah, 493, 56 Pac. 90. prudent person on guard. Indiana, I. Co. (1899) 18 Utah, 493, 56 Pac. 90.

See, for example, Osborne v. Know

L. R. Co. (1877) 68 Me. 49, 28 Am.

Rep. 16; Cagney v. Hannibal & St. J.

R. Co. (1879) 69 Mo. 416.

Thus, if the construction of a erated).

instrumentalities of the business. But in Wisconsin a different rule has been laid down.<sup>2</sup>

It is not easy to see why the rule applied in the case of servants should not be the same as that applied in the case of other instrumentalities. Nor has any logical basis for such a differentiation ever been suggested. See, further, § 50, post.

45a.—or to the methods of work.—There is also a conflict between the authorities upon the question whether this doctrine is available as a protection to the master where the method or manner of doing the work, and not the quality or arrangement of the instrumentalities themselves, is the efficient cause of the injury. A Federal court of appeals has rendered a decision which proceeds upon the principle that usage is the proper standard of due care in the one case no less than in the other.1 Nor does any distinction seem to be recognized in at least three other states.<sup>2</sup> The point, however, was not directly raised in any of the cases cited.

<sup>1</sup>In Holland v. Tennessee Coal, I. & line of business furnish no watchman. R. Co. (1890) 91 Ala. 444, 12 L. R. A. This case was affirmed (1891) in 124 N. 232, 8 So. 524, the court said with re- Y. 655, 26 N. E. 1027, but the above spect to "well-regulated" concerns of point was not referred to. employ a particular class of men for a held that the duty of giving a signal to particular purpose, the further prethe engineer of a hoisting apparatus by sumption is that that class of men are which coal buckets are hoisted at the competent for the work in hand; and their competency may be the result were filled and ready to be raised, is one either of a special knowledge or experience with respect to the particular discretion and constant care and watchthing to be done, or from the work befulness that, if it is intrusted to a boy of twelve or thirteen years of age, and edge or experience." But it should be an injury to one of the workmen reobserved that the precise point in dissults from his prematurely giving a size. as trappers. In Riordan v. Ocean S. S. fect has been ascribed to evidence of Co. (1890) 32 N. Y. S. R. 328, 11 N. common usage. Whether, in view of Y. Supp. 56, it was laid down that the those decisions, it still embodies the acduty of a master to a servant does not cepted law in that state, is somewhat require him to furnish a watchman to doubtful. look after the servant to see that, with a safe appliance, he does not put himself in a place of danger, where it appears that other masters in the same in Lehigh & W. B. Coal Co. v. Hayes

the kind operated by the defendant, "if it is customary for them to Wis. 220, 56 N. W. 475, where it was employ a particular class of men for a held that the duty of giving a signal to observed that the precise point in dispute here was merely whether evidence nal, the master has the burden of provof the usage was admissible. In Kaning that he was competent for his posisas & T. Coal Co. v. Brownke (1895) tion (decided both upon the analogy of 60 Ark. 582, 31 S. W. 453, it was held the rule as to the rebuttable presumpthat employing a boy fourteen and a tion of the incapacity of a child under half years old as trapper to give signals fourteen to commit a crime, and upon to drivers in a mine is not negligence considerations of public policy). which will render the company liable to Strangely enough, the decision to this another employee for his failure to give effect has not been commented upon or a signal at a proper time, if it is a uni- distinguished in any of the later Wisversal custom of miners to employ boys consin cases, in which a conclusive ef-

On the other hand, it was laid down broadly by the supreme court of Alabama that the doctrine has never been supposed to cover the manner in which the means are made to accomplish the end,-the precise way of using machinery or directing the servants,—so that a result which is negligent in itself should be shorn of its negligent quality, not because it was not negligence in others to so act, but simply because, whether negligence or not, they did so act.3

These antagonistic views may possibly be reconciled on the basis of a distinction between methods for which the master is personally responsible for the reason that he or his representative has either prescribed them or has acquiesced in their adoption and continuance, and methods which the servants themselves have pursued in carrying out the details of the work. But this explanation is not altogether satisfactory in view of the fact that the negligent employees in the Alabama cases were vice principals by virtue of the statute under which the action was brought.

46. Doctrine is applicable only to instrumentalities in good repair.— (Compare § 41, ante.)—That the exculpatory quality ascribed to the master's compliance with common usage is conceded only on the condition that the instrumentality is in good repair is clear both on principle and authority. If he uses a certain kind of appliance, he cannot escape liability for an injury caused by its defective condition, on the ground that this defect simply amounted to the absence of one of its parts, and that this part was not found in similar appliances commonly used by other employers. Having adopted that particular kind of appliance, he is subject to the duty of seeing that it is kept in reasonably safe condition.1

(1889) 128 Pa. 294, 5 L. R. A. 441, 18
Atl. 387 (§ 44, note 4, subd. 2, ante);
Hennesey v. Bingham (1899) 125 Cal.
Etnuk by another, where the two hand cars were running very rapidly on a cars were running very rapidly on a high trestle, one very close behind the note 4, subd. 2, ante).

\*\*Kansas City, M. & B. R. Co. v. Burton (1892) 97 Ala. 240, 12 So. 88, holding that if a car is left on one track too near another, it is negligence for which there is no justifying necessity,—a wrong, pure and simple,—and none the less a wrong because it is committed by other railroad companies, whether they are, in a general sense, well-regulated or not. Compare the decision that it is for the jury to say whether the usual and customary way of applying the brake to a hand car was guen before signaling the second cars were running very rapidly on a high trestle, one very close behind the other, and a signal to stop the first car was given before signaling the second (1894) 107 Ala. 400, 18 So. 30.

\*\*Bender v. St. Louis & S. F. R. Co. (1897) 137 Mo. 240, 37 S. W. 132 (drawbar from which a safety lug had been broken off. "Ordinarily, a master will not be permitted to show, as a defense... that it was the general or universal custom of other masters to furnish defective implements or an unsafe place to work"); Lake Erie & W. Co. v. Muyg (1892) 132 Ind. 168, 31 N. E. 564 (sliver of old rail caught

- 47. Doctrine not applicable where the negligence charged is the breach of a statute.— However rigidly a court may uphold the right of a master to follow general usage, it is clear that evidence of a custom to disregard a law requiring employers to use an appliance calculated to preserve their servants from some particular danger can never be admissible where the question of the exercise of due care on the employer's part is raised.1
- 48. Relation of the doctrine to that which allows a master to carry on his business in his own way.— The general effect of the doctrine that a master is allowed to carry on his business in his own way (see §§ 34 et seq., ante) is that he cannot be found culpable merely on the ground that he did not furnish the best, safest, and newest instrumen-The general effect of the doctrine now under discussion is that he is not bound to furnish instrumentalities of that description, because common usage is the criterion of reasonable safety. As regards the limits of liability in this respect, therefore, the broad results to which the two doctrines lead are essentially identical, and, in view of this circumstance, it is only to be expected that the courts should, in some of the cases where the defendant's right to conduct his business in his own way is the essential basis of the decision, have adverted to the fact that the instrumentality actually employed was one of an approved kind or in common use.2 There does not, however, seem to be any reason why the two doctrines should not occa-

plaintiff's foot). In this case defendant's counsel cited Doyle v. St. Paul, M. appliance was in the same condition at & M. R. Co. (1889) 42 Minn. 82, 43 N. the time of the accident as when the W. 787, a case involving similar facts. The court considered that it was not in point, as it was based on the peculiar wording of the complaint. This seems to be a mistaken view. The actual ruling was that it is error to exclude evidence of a general usage to use old rails for sidings. The decision was there are the fact is emphasized that the appliance was in the same condition at appliance was in the same condition at a c for sidings. The decision was, there- <sup>2</sup> Murphy v. Lake Shore & M. S. R. fore, really an authority against the Co. (1896) 67 Ill. App. 527; Muirhead those rails when they had become abnormally unsafe as compared with the proximity to the track as would best average rail of that sort. See also subserve the purposes of its business. Kaye v. Rob Roy Hosiery Co. (1889) 51 On the second appeal (1884) 64 Iowa, Hun, 519, 4 N. Y. Supp. 571, where the 94, 19 N. W. 807, the ground on which court adverts, arguendo, to the proviso the company sought to excuse itself was that the appliance must be in good reconformity to custom. Neither contenpair; and Ross v. Pearson Cordage Co. tion succeeded. (1895) 164 Mass. 257, 41 N. E. 284,

right of the plaintiff to recover in the v. Hannibal & St. J. R. Co. (1885) 19 Indiana case. But it was plainly er- Mo. App. 634. It is worthy of observaroneous, for it does not follow that, be- tion that, on the first appeal of Allen use the old rails in the siding, the company was not culpable in maintaining ant relied on the theory that it had the those rails when they had become abright to construct a cattle chute in such sionally clash in their operation, when applied to particular sets of Which of them should be treated as the dominating element when such a conflict arises is a question which, so far as the writer knows, has never been thoroughly discussed in the courts.<sup>3</sup>

It is observable that the logical order and relation of the conceptions involved will be somewhat different, according as the one or the other of these doctrines supplies the standpoint from which the evidence is considered. In the one case, the limitation of the master's obligation is viewed as the consequence of his right to manage his affairs as he pleases; in the other, the existence of that limitation seems to be rather an hypothesis from which a further limitation is deduced. But this distinction is of little or no practical moment. The doctrine as to common usage has become a substantive and independent one to such an extent that in many of the decisions the master is said to be free from liability on this ground, although he might have supplied a safer or newer instrumentality.4

The absence of evidence going to show either that the instrumentality suggested as a substitute was in general use, or that the instrumentality actually employed was not in general use, plainly leaves the case in the same condition as if the only element involved were the master's right to carry on business in his own way. In default of such evidence, therefore, the plaintiff will ordinarily be unable to maintain his action, a result indicated by the form in which some of the rulings cited in § 44, note 4, ante, are couched.5

"In one instance, evidence of usage was held to be properly excluded for the reason that the case was controlled by the rule which permits the master of an obligation on the employer's part to abandon the use of an appliance which has become generally to conduct his business in his own way.

Chicago & E. I. R. Co. v. Driscoll (1898) 176 III. 330, 52 N. E. 921, Reversing (1897) 70 III. App. 91. But this ruling was made in a state in which structured in a state in which structured in the evidence so excluded would not, as a matter of law, have negatived negligence if it had been admitted. See \$ 51, post. Such light, therefore, as it throws upon the comparative weight which should be ascribed to such evidence, considered as warranting a legal inference, is merely incidental. If it is to be taken as embodying the doctrine that the rule thus invoked is the controlling factor in cases where its application.

The state of the waster ware the series of an obligation on the existence of an obligation on the existence of an obligation on the existence of an obligation on the employer's part to abandon the use of an appliance which has become generally based on the rule case where its appliance which has become generally that a master is not liable simply because there are better and safer appliances to be had. Sappenfield v. Main Street & Agri. Park R. Co. (1891) 91 Cal. 48, 27 Pac. 590.

(al. 48, 27 Pac. 590.

(1897) 191 Mich. 390, 69 N. W. 661; Rosa v. Volkening (1901) 64 App. Div. 426, 72 N. Y. Supp. 236; Dooner v. Delaward of the rule of the existence of an obligation on the existence of an obligation on the employer's part to abandon the use of an appliance which has become generally that a master is not liable simply because there are better and safer appliance to a matter of base and exception to the rule cause there are better and safer appliance of the rule cause there are better and safer appliance that a master is not liable simply because there are better and safer appliance of the rule cause there are better cation will not yield the same results as 462. if the liability of the master were referred to the standard of common usnote 4, § 44, ante, to Purdy v. Westingage, it would seem to be scarcely sushouse Electric & Mfg. Co. (1900) 197 tainable. A more correct view seems Pa. 257, 51 L. R. A. 881, 47 Atl. 237;

<sup>5</sup> See memoranda of facts appended in

- 49. Negligence not inferable simply from the fact that the instrumentality or method adopted was one not in common use.—In a recent Pennsylvania case it was pointed out that common usage is the test to disprove negligence, not to prove it, and that the party charged with negligence disproves it by showing that his instrumentalities were those in general use in the business, but that the converse does not follow. The party charging negligence, therefore, does not establish it by showing that the instrumentalities were not in common use. The result of a different rule would be that the use of the newest and best machinery, if it was not yet generally adopted, could be adduced as evidence of negligence.1
- 50. Doctrine that conformity to common usage is not conclusive in the master's favor.— The principle upon which a large number of decisions are based, some of which emanate from the courts whose rulings are reviewed in the preceding sections, is that embodied in the remark of Willes, J., with reference to the plea put forward by the defendant in a well-known case, that "no usage could establish that what is in fact unnecessarily dangerous, was in law reasonably safe as against persons towards whom there was a duty to be reasonably That is to say, the position is taken, that custom fur-

courts. In the present case the learned be admitted on behalf of the plaintif, judge below, in a very clear and excellent charge, stated the true rule in behalf of defendant, that it 'cannot be dangerous in itself than the ordinary held responsible if something happens to an employee in its employment, and an employee in its employment, Indermaur v. Dames (1866) L. R. where the manner and machinery and 1 C. P. 274, 35 L. J. C. P. N. S. 184, 12

Spencer v. New York C. & H. R. R. Co. methods and appliances are alleged to (1893) 67 Hun, 196, 22 N. Y. Supp. have been defective, when it is shown 100; Murray v. New York C. & H. R. they are the ordinary methods, machin-R. Co. (1900) 55 App. Div. 344, 66 N. ery, and appliances used in that kind Y. Supp. 586; Rajotte v. Canadian P. of work and business.' But he un-R. Co. (1889) 5 Manitoba L. Rep. 365; guardedly follows this by summing up Young v. Burlington Wire Mattress Co. (1890) 79 Iowa, 415, 44 N. W. 693. all the evidence in the case . . . See also Whatley v. Block (1894) 95 whether the method of handling the Ga. 15, 21 S. E. 985; Hale v. New York of N. E. R. Co. (1899) 174 Mass. 317, band in the way it was shifted, was the false of the case, and whether Dooner v. Delaware & H. Canal Co. all the machinery and methods and appliances connected with the moving of v. Georgia R. & Bleg. Co. (1901) 112 these iron beams were such as were ordinaryly used in the business generally for such work.' This might easily be construed by the jury as authorizing Works (1901) 197 Pa. 625-630, 47 Atl. them to find negligence from the bare fact that the method was not in general use. There should always be a caution to this misapplication of the principle on the part of counsel, and even the judge below, in a very clear and excellent charge, stated the true rule in be-

nishes no excuse, if the custom itself is negligent.<sup>2</sup> In this point of view, the master's conformity to general usage is regarded merely as evidence tending more or less strongly to exculpate him from the charge of negligence. After it has been shown that the defendant had complied with the usage of other employers in the same line of business, the question whether the particular instrumentality or method was reasonably safe still remains open, and, unless it is decided in the master's favor, he must indemnify the servant.

This principle has been applied in one decision of the Supreme Court of the United States, and in two of the lower Federal courts.3

Jur. N. S. 432, 14 L. T. N. S. 484, 14
Week. Rep. 586, 1 Harr. & R. 243 (action here was by a workman not in the employ of defendant). In another action by a third person, Cockburn, Ch. Sup. Ct. Rep. 932, it was argued by de-J., charged the jury: "It is not enough fendant's counsel that "ordinary care in the ordinary care J., charged the jury: "It is not enough that they (the defendants) do what is the employment and retention of railusual, if the course ordinarily pursued is imprudent and careless," adding, and reasonable, it is important to consider what is usually done by persons acting trusted with the management and conin a similar business." Blenkiron v. Great Central Gas Consumers Co. (1860) 2 Fost. & F. 437, 3 L. T. N. S. prevail. Harlan, J., said: "There are 317. In Mellors v. Shaw (1861) 1 Best & S. 437, 30 L. J. Q. B. N. S. 333, [these are not cited by name] which apparently sustain the position taken by fendants exercised the same care and vigilance as was used in other collieries

vigilance as was used in other collieries those cases are based is not satisfactory, in the neighborhood did not prevent nor, as we think, consistent with that them from being held responsible for an good faith which at all times should accident to a miner, caused by the want characterize the intercourse between of-of a lining to the shaft and the want of ficers of railroad corporations and their a "bonnet" on the hoisting cage. But employees. It should not be presumed the precise effect to be ascribed to such that the employee sought or accepted evidence was not discussed in the opinions of the judges. Compare the remarks of Lord Esher in Walsh v. Whiteley (1888) L. R. 21 Q. B. Div. 371, 57 agers of railroads ought to observe. To L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 58 J. P. 38 (a case under the employeers' liability act of 1880). "No custom, however uniform or universal, ly or usually observed by agents of which unnecessarily exposes railroad railroad company, with nowledges to loss of life or limb, would seem to satisfy a duty which may be regarded as an implied condition of their charters." Ryan, Ch. J., in Dorsey v. phillips & C. Constr. Co. (1877) 42 Wis. 597 (cattle chute near track). In years of the wisconsin decision cited in \$44, it is somewhat singular to find this passage cited with approval in the very recent case of Renne v. United States Leather Co. (1900) 107 Wis. 305, 83 N. ployee in respect of the fitness of comployees whose negligence has caused evidence was not discussed in the opin- service upon the implied understanding

But, in view of other Federal decisions to the contrary (see § 44, ante), and the doubt which may be entertained as to the actual scope of the judgment rendered by the Supreme Court (see subjoined note) it seems to be still an open question whether the doctrine that conformity to usage is conclusive in the master's favor, or the doctrine now under discussion, is to be regarded as the one accepted by these courts.

The principle has been also applied in the following states: Cali-

him to be injured, by exercising, not that degree of care which ought to have been observed, but only such as like corporations are accustomed to observe, would go far towards relieving them of all responsibility whatever for negligence in the selection and retention of incompetent servants. If the general practice of such corporations in the appointment of servants is evidence which a jury may consider in determining whether, in the particular case, the requisite degree of care was observed, such practice cannot be taken as conclusive upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be due, or reasonable, or proper him to be injured, by exercising, not that struction assuming that negligence was

may not be due, or reasonable, or proper promise was, not to repair an existing care, and therefore not ordinary care, defect in the machinery, but to supply within the meaning of the law." It is a new or additional appliance, which not easy to say upon what footing, if the employer is under no obligation to at all, this decision is to be reconciled furnish, and held that the doctrine that with the later one in Washington & G. a master is not bound to abandon the R. Co. v. McDade (1890) 135 U. S. 554, use of a particular machine which is in 34 L. ed. 235, 10 Sup. Ct. Rep. 1044. common use, because there are other See § 44, note 1, ante. One way of harbetter and safer machines to be had, See § 44, note 1, ante. One way of harmonizing them is to regard the earlier could not be successfully invoked for ruling as being applicable only to servible purpose of excusing him for his ants. This explanation, however, is failure to place a suitable guard around not satisfactory, when the very general language of the court in the earlier case is adverted to. Nor has the McDaniels ace to the safety of those who, in the Case been so understood by the lower discharge of their duties, were confederal courts, which, in deference to it, have declined to consider conformity the obligation to place a suitable guard favor. In Bean v. Oceanic Steam Nav. around the machinery is no less imperafavor. In Bean v. Oceanic Steam Nav. around the machinery is no less impera-Co. (1385) 24 Fed. 124 (appliance for tive than his duty to remedy a defect unloading cargo), in discussing an in- in the machine itself. Another alterstruction asked for by the defendant, native is to view the later case as being the court said: "The defendant would merely expressive of the narrow conmake the employer's liability hinge clusion that the instruction objected to upon the question whether the appli- was not prejudicial, and not as anances were the approved or customary nouncing the doctrine that conformity ones; and if they had received the genturn the same of the same answered the purposes which they were designed to accomplish, the duty of originary care is complied with. The requisites of ordinary care are not satisated by such a rule." So, also, an inwhich it is scarcely possible to estimate

fornia; Illinois; Iowa; Maine; Minnesota; Missouri; South Carolina; <sup>10</sup> Texas; <sup>11</sup> Vermont; <sup>12</sup> Washington. <sup>13</sup>

the precise significance in the present of sufficient height to enable trainmen connection is Randall v. Baltimore & O. to pass through it in safety. If it was, R. Co. (1883) 109 U. S. 478, 27 L. ed. it makes no difference whether it was 1003, 3 Sup. Ct. Rep. 322. There a higher or lower than other bridges. servant injured by a passing engine on Cleveland, C. C. & St. L. R. Co. v. Walone track, while he was shifting the ter (1893) 147 Ill. 60, 35 N. E. 529. switch rail of an adjoining track by These cases seem to show that the pomeans of a ground-switch of the ordi- sition taken in Camp Point Mfg. Co. nary pattern, was held unable to re- v. Ballou (1874) 71 Ill. 417, where it cover. But the naked question whether was held error to refuse an instruction conformity to common usage was con- that ordinary use in similar establishclusive in the master's favor was not ments "is the standard of safety," no presented here, as the court was of opinion that the switch was, to say the least, quite as fit for its place and purpose as an upright switch would have been, and it was shown that it could have been safely and effectually operated if the plaintiff had stood midway between the tracks.

<sup>4</sup> In Martin v. California C. R. Co. (1892) 94 Cal. 326, 29 Pac. 645 (use of two patterns of couplings), it was held that an instruction to the effect that general usage conclusively negatived negligence was properly refused. See also, to the same effect, Redfield v. Oakland Consol. Street R. Co. (1896) 112 Cal. 220, 43 Pac. 1117. These decisions supersede the statement in Sappenfield v. Main Street & Agri. Park R. Co. (1891) 91 Cal. 48, 27 Pac. 590, referred

to in § 44, ante. <sup>5</sup> McCormick Harvesting Mach. Co. v. Burandt (1891) 136 Ill. 170, 26 N. E. 588, Affirming (1890) 37 Ill. App. 165 (plaintiff fell into unguarded trough; fact that no other person in a similar business had used a railing not conclusive that master was not negligent). In Lake Erie & W. R. Co. v. Morrissey (1898) 177 Ill. 376, 52 N. E. 299, Affirming (1897) 75 Ill. App. 466, it was held that an instruction asked for by the defendant, to the effect that they were not liable to an employee who caught his foot under a rail and was run over, if it was customary for rail- should be declared or imposed." In anways to ballast their tracks so as to swer to which the trial judge said to the leave a space of about an inch under the jury: "Not if they (the jury) believe rails, was properly modified by the adat the same time that it dition of the proviso that such a sufficient themselves. method of ballasting in yards was rea- use will not, of course, prove its useful-sonably safe. An instruction that, if ness. That is evidence of its usefulthe top of a covered bridge was lower ness, but not conclusive." Whereupon than is usual in such bridges, the rail- defendant's counsel asked the court:

longer represents the doctrine accepted in Illinois.

<sup>6</sup> Hosic v. Chicago, R. I. & P. R. Co. (1888) 75 Iowa, 683, 37 N. W. 963 (railroad company not excused for negligence in loading its cars, for the reason that the manner of loading is customary with other railroad companies); Austin v. Chicago, R. I. & P. R. Co. (1895) 93 Iowa, 236, 61 N. W. 849 (brakeman's foot caught in space left unfilled between the ties on each side of the bars of a switch). An instruction is correct which states that a defendant cannot be found free from negligence simply for the reason that the distance of a cattle chute from the track was the same as that which is usual in the case of such structures. Allen v. Burling-ton, C. R. & N. R. Co. (1884) 64 Iowa, 94, 19 N. W. 807 (first appeal [1882] 57 Iowa, 623, 11 N. W. 614, but this point was not mentioned). Other Iowa cases are to a contrary effect. See § 44, ante.

<sup>7</sup> Sawyer v. J. M. Arnold Shoe Co. (1897) 90 Me. 369, 38 Atl. 333. There counsel for defendant requested this instruction: "However strongly the jury may be convinced that there may be better or less dangerous appliances or machinery, it should not say that the use of appliances or machinery commonly adopted by those in the same business is a negligent use for which liability should be declared or imposed." In anat the same time that it was reasonably The common way company is negligent, is erroneous. "Would it not be due care to use as is The real question for the jury is ordinarily used by persons in the same whether the bridge, as constructed, was line of business?" To which the court

In spite of the imposing array of authorities which have adopted the doctrine explained in §§ 44 el seq., the present writer has no hesitation in saying that, in his opinion, the cases just cited embody the correct principle. The essential meaning of the theory that the case ceases to be one for the jury when conformity to common usage is once established is that employers ought to receive the benefit of a presumption which may be thus expressed: The persons who pursue a particular line of business at any given time are reasonably prudent, and the majority of a reasonably prudent body of persons will not use unsuitable instrumentalities or methods when suitable ones

replied: "Yes, but that must be reasonably safe and sound; or he should use due care to have it reasonably safe and sound." Defendant's counsel then requested this instruction: "That he does use reasonable care when he uses to be properly refused). the same sort of machinery that is in use in the same sort of business." To House Co. (1897; Tex. Civ. App.) 40 which the court replied: "Though the S. W. 326. jury should find that it was actually ally defective and insufficient, it would effect. be any better because others used it." excuse for a want of ordinary care that carelessness was universal about the matter involved, or at the place of the accident, or in the business generally."

Mayhew v. Sullivan Min. Co. (1884)
76 Me. 100. The earlier rulings of this court to the contrary effect (see § 44, ante) are apparently overruled, though,

8 Craver v. Christian (1887) 36 Minn. 413, 31 N. W. 457 (master not absolved from duty of fencing machinery found 19 Wash. 473, 53 Pac. 725. The auto be dangerous, by the mere fact that thority cited was the decision of the similar machinery is ordinarily left un-

employee was scalded, held not to be state (see § 44. ante), as there is conclusive that the failure to do so is in reconciling the Federal decisions. not negligence). Other Missouri deci- See note 2, supra. sions are to a contrary effect. See § 44, ante.

<sup>10</sup> Lowrimore v. Palmer Mfg. Co. (1900) 60 S. C. 153, 38 S. E. 430 (instruction declaring usage of well-regulated companies in the same business to be conclusive in defendant's favor, held

But the case of International & G. N. defective? I should not say to the jury R. Co. v. Bell (1889) 75 Tex. 50, 12 S. that if they found that machinery actu- W. 321, seems to be to the contrary

12 To exonerate a master from the It was held that the defendant had no charge of negligence in furnishing his cause of complaint in regard to any of employee unsafe appliances with which the rulings of the justice presiding, to work, it is not sufficient that the apupon the point involved in these repliances furnished were such as were in quests. The court quoted the language common use for similar purposes, but of an earlier case, that "it would be no they must have been such as would have commended themselves to a reasonably prudent man. Geno v. Fall Mountain Paper Co. (1895) 68 Vt. 568, 35 Atl. 475 (disapproving of the rulings of the Pennsylvania courts referred to in § 44, ante).

12 Proof that it is customary in other mines to employ boys to open doors set strange to say, they are not referred to in the gangway, when an engine signals its approach, does not establish the competency of a boy so employed. Carlson v. Wilkeson Coal & Coke Co. (1898) covered by other masters).

\*\*Reichia v. Gruensfelder (1892) 52

Mo. App. 43 (fact that other similar establishments do not put guards around a hot-water tank like that in which an case with the earlier one from the same are available. As a basis for the doctrine founded upon it, however, this presumption seems to be extremely unsatisfactory.

Whether motives of self-interest will, in most instances, be adequate to induce men to adopt instrumentalities and methods which are suitable in the sense that they are effective for the performance of the work to be done is a point which does not seem to be by any means beyond controversy. But, waiving this question as being one with which we are not now concerned, it is at all events abundantly clear from the records of industrial development in all ages and countries that motives of this description cannot, except to a very limited extent, be relied upon as a practical influence determining employers to adopt instrumentalities and methods which are suitable in the sense that they may be used with reasonable safety by servants. conclusive effect ascribed to common usage as a criterion of the exercise of due care could only be justifiable upon the assumption that the considerations which induce the majority of a given class of employers to carry on their business in a certain manner are entirely, or at all events, mainly, identical with those which would be kept in view if the security of the employees should be the object to which the regulation of the business were directed. Manifestly, such an assumption cannot be entertained. How little confidence is placed by the most enlightened nations of modern times in the comfortable theory that a regard for their own financial interests will lead employers to provide properly for the safety of their employees is shown, in a manner not to be misunderstood, by the long list of statutes enacted for the protection of persons engaged in mines, factories, and specially dangerous kinds of work. That this distrust is fully justified by the condition of things which existed before the date of the earliest of these statutes will hardly be disputed by a student of economic history.

But apart from this legislative condemnation of the theory, its weakness may be readily demonstrated by a very simple process of reasoning. Considered as a means of accomplishing work, the instrumentalities or methods used by any employer at a certain time must, when compared with others which would be superior in point of safety, be either less effective, or equally effective, or more effective. In the first alone of these three cases is there any real inducement of self-interest to substitute the safer for the more dangerous instrumentalities or methods, and the strength of that inducement will depend entirely upon whether the increase of effectiveness obtained by making a change will be sufficient to compensate him for

his outlay. In the second case the cost of the change still remains a dissuasive consideration, and it is not counterbalanced by any corresponding increase of effective power. In the third case the employer cannot give the servant a safer environment, unless he not only spends money, but diminishes the productive capacity of his plant. In the two latter cases, therefore, it cannot be said that there is any motive whatever working in favor of the change, except such as may be created by his apprehension of a possible difficulty in obtaining workmen, or of being compelled to indemnify such servants as may be injured. But it will scarcely be argued seriously that such extremely remote contingencies are likely to be taken into account by the average business man in countries where the labor market is normally overstocked, and a servant's knowledge of the risk is ordinarily treated as a complete bar to his action.

In its essential characteristics, therefore, the situation is not that which is taken for granted by the courts whose views are being criticised. The conception of an employer as a person acted upon by certain motives springing out of a regard for his financial interests, and leading him to see that his servants are not exposed to unnecessary risks, is not in harmony with or borne out by the real facts of the case. Suitability from the standpoint of effectiveness may or may not be associated with suitability from the standpoint of safety, and it is only the former kind of suitability that the employer usually takes into account. Under such circumstances, it is submitted, there is no sufficient basis upon which to found an inference of law that an employer fulfils his duty when he adopts instrumentalities and methods which are in common use.14

51. Negligence not predicable of the failure to adopt instrumentalities or methods not in general use. In a considerable number of cases the doctrine has been applied that a jury cannot be permitted to find an employer guilty of negligence on the ground that a suggested instrumentality or method of work was better and safer than the one adopted by him, if there is no evidence, or insufficient evidence, that the utility of that instrumentality or method has received the stamp of a practical recognition from a considerable proportion,

<sup>14</sup> The gist of the whole matter is well C. C. A. 632, 109 Fed. 732. "Custom summed up in the two following remarks extracted from recent cases: or the stress of pecuniary affairs, or in "Common sense and reason do not lose recklessness, and not from consideratheir sway because, through ignorance, tions based upon the proper discharge" inattention, or selfishness, unreasonable of the master's duty. Redfield v. Oakcustoms may have prevailed." Nyback land Consol. Street R. Co. (1896) 112 v. Champagne Lumber Co. (1901) 48 Cal. 220, 43 Pac. 1117.

at least, of the persons in his own line of business. As was laid down in one case, the action cannot be maintained unless the suggested device, the nonadoption of which is alleged to be negligence, is "so manifestly serviceable as to command the consensus of intelligent . . men [in the same business] so generally as that it cannot be reasonably ignored or disregarded." The decisions to this effect proceed from courts which unquestionably hold conformity to usage to be conclusive in the master's favor;2 from courts whose views

if it had been on the other side of the such an attachment was not in general track); Banks v. Georgia R. & Bkg. Co. use, and that there was no general (1901) 112 Ga. 655, 37 S. E. 992 (complaint failing to allege any defect other tical sawyers that it was a desirable or than an unblocked frog, held insufficient on the ground that it might be the Northwestern Coal R. Co. (1898) 98 general custom not to block frogs); Wis. 413, 74 N. W. 117 (no covering to McNeil v. New York, L. E. & W. R. Co. protect workmen on a coal dock from (1893) 71 Hun, 24, 24 N. Y. Supp. 616 coal which fell when a bucket was unfailure to block the space between latched; defendant absolved on the guard rails and main rails, held not to ground that there was no evidence to be negligence, the usage of railways in show that this device was used in simithis regard being conflicting); Omaha lar docks on the lake ports). Where

<sup>1</sup>Louisville & N. R. Co. v. Hall (1899) 174 Mass. 317, 54 N. E. 844 (no (1899) 91 Ala. 112, 8 So. 371 (said of evidence as to what method of fastening "Molphing straps" as a means of warning brakemen of the proximity of low bridges).

"Faber v. Carlisle Mfg. Co. (1889)
126 Pa. 387, 17 Atl. 621; Dingley v. Star Knitting Co. (1892) 134 N. Y. 552, 555, 32 N. E. 35; Dooner v. Delaware & H. Canal Co. (1895) 171 Pa. 581, 33 Atl. 415 (plaintiff asserted that a foreign railway car should have been provided with an additional handhold); Grattis v. Kansas City, P. & G. R. Co. (1900) 153 Mo. 380, 48 L. R. A. 399, 55 S. W. 108 (fact that defendant had placed its switch-signal target on the same side of the main track on which engligence, where the evidence showed that there was no uniform rule as to what method of fastening the evidence as to what method of fastening the arch pipe of a locomotive was in use elsewhere); Corcoran v. Wanamaker (1898) 185 Pa. 496, 39 Atl. 1108 (judgment for defendant based partly on the ground that there was no proof that it was not customary for employers in the same business to use certain acids which gave off poisonous fumes); Ross v. Pearson Cordage Co. (1895) 164 Mass. 257, 41 N. E. 284 (use of a machine, with belt-shipper made in the ordinary way held not to be negligence rendering master liable for accident aused by its slipping and so starting a machine, though the accident might have been prevented by certain contrivance of the track it should be placed; train ranthrough a switch which the engineer would have seen to be open merit, as the testimony showed that if thad been on the other side of the track); Banks v. Georgia R. & Bkg. Co. (1901) 112 Ga 655 37 S. E. 992 (combe negligence, the usage of railways in show that this device was used in simithis regard being conflicting); Omaha lar docks on the lake ports). Where Bottling Co. v. Theiler (1899) 59 Neb. there is no proof that the manner in 257, 80 N. W. 821 (failure to provide screens to protect employees from fragments of exploding bottles in a bottling that ordinarily adopted in the case of establishment); Whatley v. Block (1894) 95 Ga. 15, 21 S. E. 985 (employer held not negligent in not having been prevented by a certain precaution, a railing round a freight elevator, there the plaintiff would be entitled to rebeing no evidence that a general custom cover. Augerstein v. Jones (1891) 139 to take this precaution prevails in regard to elevators of the same class); dence does not show that any particularly vol. I. M. & S.—9.

on this point are not precisely defined; and from courts which consider conformity to usage to be merely evidence of due care.4

In a logical point of view the theory of the last-mentioned group of courts seems to be decidedly faulty. The position that the employer's culpability still remains a question for the jury after he has shown that he has done as much for the protection of the servant as other persons in the same line of business is, it is submitted, essentially inconsistent with the position that the absence of such culpability is inferable, as a matter of law, wherever the servant is unable to prove that the particular instrumentality or method which, according to his contention, should have been adopted, was in common use. The necessary complement of the doctrine that the question of negligence vel non is still an open one after conformity to common usage has been shown is that this question is also an open one after it has been ascertained that there is no common usage with reference to which the quality of the master's acts can be gauged.<sup>5</sup>

(1900) 39 C. C. A. 620, 99 Fed. 520, where the evidence shows that un(no staging or connecting planks furnished for transferring cotton from a roads all over the country for years,
barge to a steamboat); Mississippi and it is a fair inference that the blockRiver Logging Co. v. Schneider (1896)
ing of switches is as yet but an experi20 C. C. A. 390, 34 U. S. App. 743, 74
Fed. 195 (no guard provided to prevent (1885) 18 Ill. App. 119 (same point).

a plank forced over the "dead" rollers

Stop Empare Rayling for a contest. erally, see § 50, ante.

wheels of locomotives is generally Co. (1890) 79 Iowa, 415, 44 N. W. 693 known and practised in machine shops, (no evidence that a guard to the maor known to the defendant himself, it chinery was usual or even practicable); is error to leave it to the jury to say Bryant v. Burlington, C. R. & N. R. Co. whether the defendant was negligent in (1885) 66 Iowa, 305, 55 Am. Rep. 275, not instructing the plaintiff how such 23 N. W. 678 ("bucking snow" by a wheel could be moved with safety. means of a train with two engines and Richmond Locomotive & Mach. Works without a snow-plough, not shown to Richmond Locomotive & Mach. Works vi. Ford (1897) 94 Va. 627, 27 S. E. be an unusual method); Lorimer v. St. 509.

\*\*Southern P. Co. v. Seley (1894) 152 51 N. W. 125 (street-railway company U. S. 145, 38 L. ed. 391, 14 Sup. Ct. held not to be negligent in not providing Rep. 530 (charge approved by which in its electric cars a resistance coil for the jury were told that the use of an the purpose of making the starting of unblocked frog was not negligence if its cars more gradual, there being no evidence that it had become known, approved, and recognized as a useful apand the unblocked frog, and that it was pliance); Chicago, R. I. & P. R. Co. v. questionable which was the safer or more suitable for the business of the roads); Red River Line v. Smith failure to use a new device for blocking, (1900) 39 C. C. A. 620, 99 Fed. 520, where the evidence shows that unlocked frogs had been in use on railblocked frogs had been in use on rail-

in a sawmill from coming into contact See Empson Packing Co. v. Vaughn with a slab saw); Grant v. Union P. R. (1899) 27 Colo. 66, 59 Pac. 749, holding in a sawmin from contain into contact See Empson Facking Co. v. Vaugan with a slab saw); Grant v. Union P. R. (1899) 27 Colo. 66, 59 Pac. 749, holding Co. (1891) 45 Fed. 673 (no lights on that the master's nonliability could not switches in railway yards); Lloyd v. be affirmed, as a matter of law, where Hanes (1900) 126 N. C. 359, 35 S. E. the evidence was that a steam cooker 611. As to the Federal decisions gening a calming factory exploded owing to a sudden inrush of steam from the boil-Young v. Burlington Wire Mattress er by which it was supplied, and the

As additional reasons for denying recovery in some of the cases which exemplify this principle, we find the courts adverting to the facts that the suggested change was not necessary for the safety of the servant, or was not a practical one, or was not reasonably feasible under the circumstances,8 or would render the appliance in question impossible to operate.9 But such elements must be regarded as merely cumulative in their significance, as the principle itself was sufficient to negative liability under the circumstances involved. Compare the similar enumeration of corroborative facts at the end of § 44, antc.

52. Proof of nonconformity to common usage warrants inference of negligence.— The courts not infrequently employ language which, if taken literally, would seem to embody the doctrine that nonconformity to common usage implies negligence, as a matter of law.1 an examination of the cases in which expressions of this sort occur will show that they merely amount to somewhat loose statements of a rule which may be enunciated more accurately as follows: The master's negligence is a question for the jury whenever it is warrantable to infer from the evidence that the injury would not have been re-

testimony was that some canning fac- ment, is bound "to discontinue old

C. C. A. 620, 99 Fed. 520.

general rule requires of the master that cars without them. Greenlee v. Southhe provide materials and implements ern R. ('o. (1898) 122 N. C. 977, 41 L. for the use of his servant such as are R. A. 399, 30 S. E. 115; Troxler v. ordinarily used by persons in the same Southern R. Co. (1899) 124 N. C. 189, business." Allison Mfg. Co. v. McCor-44 L. R. A. 313, 32 S. E. 550. In the mick (1888) 118 Pa. 519, 12 Atl. 273. former of these cases it was declared That the master "is bound to furnish that 'an extension of time procured machinery and appliances that are of from the Interstate Commerce Commission of the procured machinery character and reasonable seefs. ordinary character and reasonable safe- sion by railroad companies for placing ty, and the former is the conclusive test self-couplers upon freight cars merely ty, and the former is the conclusive test self-couplers upon freight cars merely of the latter," was laid down by the relieved the companies from the penalty same court in Kehler v. Schwenk provided in the Act to Regulate Com- (1891) 144 Pa. 348, 13 L. R. A. 374, merce, but did not relieve them from 22 Atl. 910. In Richmond & D. R. Co. the legal liability to employees for fail- v. Jones (1890) 92 Ala. 218, 9 So. 276, ure to provide suitable appliances in it was said that a master, although not general use. required to adopt every new improve-

testimony was that some canning fac-ment, is bound "to discontinue old methods that are insecure," and keep methods that are insecure," and keep methods that are insecure," and keep himself reasonably abreast with im-proved methods, "so far as general usage demands." In M'Gill v. Bouman (1890) 18 Sc. Sess. Cas. 4th series, 206, the court said, arguendo, that the mas-Red River Line v. Smith (1900) 39 ter is bound to abandon a system given up by most persons. In Hart & C. Mfg. Co. v. Tima (1898) 85 Ill. App. 310, it \*Prybilski v. Northwestern Coal R. Co. v. Tima (1898) 85 Ill. App. 310, it Co. (1898) 98 Wis. 413, 74 N. W. 117. was laid down that a master must pro
\*Keenan v. Waters (1897) 181 Pa. vide appliances which are in "ordinary 247, 37 Atl. 342 (no guard rails on a laundry machine of the pattern ordinary and common use." In North Carolina it has lately been held that automatic car couplings are now so generally used that it is negligence per se to operate that it is negligence per se to operate Thus, it has been declared that "the that it is negligence per se to operate

ceived if a certain instrumentality or method had been substituted for that actually adopted by the defendant, and that this alternative instrumentality or method was one commonly used by other employers in the same line of business under similar circumstances. rule is applied both by the courts which do, and by the courts which do not, accept the doctrine that conformity to common usage is a conclusive defense.<sup>2</sup> An instruction is erroneous or correct according

<sup>2</sup> See Eastman v. Lake Shore & M. S. cally removed all danger); Bonner v. R. Co. (1894) 101 Mich. 597, 60 N. W. Pittsburg Bridge Co. (1897) 183 Pa. 309 (statutory duty to block switches 278, 38 Atl. 896 (case for jury where not discharged by adopting a method the evidence was that an injury caused which the operation of the road renders by an accidental change in the gear of ineffectual in a few days, where a sim- a crane could have been prevented by a neffectual in a few days, where a simple, inexpensive, and common method
is in common use); Smizel v. Odanah
the testimony was conflicting as to the
Iron Co. (1898) 116 Mich. 149, 74 N.
general use of such a device in similar
W. 488 (platform in a mine only one
plank thick, contrary to the usage of
the locality); Littlefield v. Edvard P.
175 (case held to be for jury, where the
Allis Co. (1900) 177 Mass. 151, 58 N.
E. 692 (master's negligence in failing as was usual in first-class roads, cover
to provide proper material is for the
jury, where plaintiff, while holding a
piece of iron pipe over the head of a
piece of iron pipe over the head of a
Affirmed in (1899; Tex.) 54 S. W. 240
jured by a chip flying from the pipe,
and it appeared that the bolts were
usually protected by holding some such
metal over them, but that copper hammers had been made for a number of
years for such work, and that piping
was the least desirable of the metals
ton, H. & S. A. R. Co. v. Slinkard
used, because of its brittleness); Cosselmon v. Dunfee (1901) 59 App. Div. 467,
99 N. Y. Supp. 271 (master's negligence
a question for the jury where plaintiff,
whose duty it was to hook and unhook
buckets from a derrick used in cleaning a capal was injuvad by the heading
a frame could have been prevented by
safety lock, a well-known device, but
the testimony was conflicting as to the
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the testimony was conflicted in similar
to the verdence was that the derical to be or jury, where the
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the Lice in similar
t ple, inexpensive, and common method safety lock, a well-known device, but whose duty it was to hook and unhook 392 (jury may infer negligence where buckets from a derrick used in cleaning a canal, was injured by the bending used); Jensen v. Hudson Saumill Co. of the hook, allowing a bucket to fall (1897) 98 Wis. 73, 73 N. W. 434 (failon him, and where there was also some ure to guard machinery in sawmill); evidence that the hook was smaller than Lemser v. St. Joseph Furniture Mfg. those ordinarily used); Flaherty v. Nor-Co. (1897) 70 Mo. App. 209 (master wood Engineering Co. (1898) 172 Mass. held to be negligent in failing to guard 134, 51 N. E. 463 (held to be for the a circular saw in the usual manner, jury to say whether a common round where he knows, or ought to know, that stick without holes in it, to use as a it is dangerous unless so gnarded). stick without holes in it, to use as a it is dangerous unless so guarded); lever for tipping a large ladle of nol- Ross v. Shanley (1900) 185 Iil. 390, 56 ten metal, was a defective appliance, N. E. 1105, Affirming (1899) 86 Ill. the evidence being that it was not safe App. 144 (negligence not to shore and that another kind of device was trench in usual manner); Schmit v. Giland that another kind of device was trench in usual manner); Schmit v. Gilcustomary in large foundries); Kehler len (1899) 41 App. Div. 302, 58 N. Y. v. Schwenk (1892) 151 Pa. 505, 25 Atl. Supp. 458 (sheathing of trench set much 130 (finding that master was negligent further apart than usual; defendant held to be justifiable where the appliance which caused the injury was only feet see Gulf, C. & S. F. R. Co. v. Warin partial use, and the testimony dispersion of the partial use, and the testimony dispersion of the partial use, which would have practitated as practice or custom resorted to

as it ignores or is in harmony with this principle.3 No declaration which shows a prima facie case of noncompliance with general usage is demurrable.4

A few cases embody a principle slightly different from that applied

Vt. 612.

any exceptions which may be indicated that, if there were in general use tools by circumstances warranting the appliand machinery that were safer and bet-cation of the doctrine of assumption of ter than those used, they would be jus-risks. Thus, where a brakeman has tified in finding that, if the master did been sufficiently long in the service to not provide the safer machinery in become acquainted with the low bridges general use, but used machinery that along the track, the fact that the road was not safe,—not reasonably safe,—he on which he is employed does not use did not use reasonable care. Two the danger signal common on other judges dissented from the construction roads is immaterial, for the absence of thus put upon the words of this state-the signals does not deceive him as to ment, and considered that the charge the degree of danger incurred. Bross- was uncertain and indefinite to such a man v. Lehigh Valley R. Co. (1886) degree as to be misleading. With this 113 Pa. 491, 57 Am. Rep. 479, 6 Atl. view the present writer ventures to

In one of the earlier English cases, thority.

<sup>3</sup> An instruction which is susceptible generally used. of being understood as laying down the

in similar mines, to render safe the rule that it was the duty of the master, places where miners have to work, will in providing reasonably safe machinery, v. Chandler Iron Co. (1892) 49 Minn. better, if such was in general use, is 511, 52 N. W. 136. The same principle erroneous. Stiller v. Bohn Mfg. Co. is applicable where the plaintiff is a (1900) 80 Minn. 1, 82 N. W. 981. stranger. Vinton v. Schwab (1860) 32 There the majority of the court held that this was not the effect of an in-The principle is, of course, subject to struction by which the jury were told

agree.

4 As, where it sets forth the omission Bramwell, B., expressed the opinion of the defendant to light properly a that negligence on the master's part is place in a sawmill where his servants not a warrantable inference from the are required to work in close proximity not a warrantable interence from the are required to work in close proximity fact that the master uses machinery to unguarded machinery, and alleges less safe than some other kind in genthat at a small cost the machinery cral use. Dynen v. Leach (1857) 26 L. might have been guarded, as was cus-J. Exch. N. S. 221. But even in Engtonary in that part of the country. land this dictum would now hardly be Jensen v. Hudson Saumill Co. (1897) accepted as good law. See cases cited 98 Wis. 73, 73 N. W. 434. Or where it is a second to the country of the country. accepted as good law. See cases cited so wis. 15, 15 N. W. 454. Or where it in § 50, ante. In Illinois it was held alleges facts showing that, if a prevail-lately that expert testimony to the efing custom had been followed in the feet that the hook which broke was not management of the business, the injury constructed on the principle of standard would not have occurred. Joliet Steel constructed on the principle of standard hooks was not evidence from which negligence could be inferred. Hart & C. N. E. 1108 (partially filled mold not Mfg. Co. v. Tima (1899) 85 III. App. 310. But here the principle relied upon was that the master is not bound to furnish the best appliances, and the attention of the court does not seem to have been directed to the possibility that the rule as to general usage may sometimes operate so as to qualify this principle. See § 48, ante. If, as may be assumed, the expression "standard hook" implies would not have occurred. Joliet Šteel Co. v. Shields (1893) 146 III. 603, 34 N. E. 1108 (partially filled mold not ation its side, as was usual in such a case, at the end of the day's work, thereby leading one who was repairing a track close to it to suppose it was long from the declaration of the case operate so as to qualify this principle. See § 48, ante. If, as may be assumed, the expression "standard hook" implies the expression "standard hook" implies pinch bars had been furnished as implethat it was in general use, the case is ments with which to handle piles, and plainly contrary to the weight of au-averred that cant hooks would have been the proper appliances, and were

in the cases so far cited, viz., that the servant cannot recover unless he not only proves that the master did not conform to usage, but that ordinary care and prudence required that the suggested precautions should be taken.<sup>5</sup>

But it would seem that this principle cannot be consistently adopted by any court which regards conformity to usage as a circumstance which, as matter of law, negatives culpability. The logical situation is precisely the converse, in this respect, of that commented upon in § 57, post. For this reason the two decisions cited are, it is submitted, erroneous so far as regards the particular jurisdictions from which they emanate. See §§ 44, 50, ante.

53. What kind of usage is competent as evidence to be introduced on the question of due care.— a. Competency considered with reference to the similarity of the circumstances.—For the purpose of a comparison of usages, it is not necessary that the establishment which is adduced by the servant as furnishing the proper standard of safety and suitability should be precisely similar to that of the defendant. A reasonable similarity is sufficient. But evidence of usage should be rejected unless there is a fairly close parallelism between the conditions to which the evidence relates, and those which existed at the time and place with which the action is concerned.2

b. The number of employers following or not following the usage.—To justify a court in declaring, as matter of law, that the master was not negligent, for the reason that he conformed to common usage, it is not necessary that the usage shown should be a uni-

<sup>6</sup> Huhn v. Missouri P. R. Co. (1887) 
<sup>2</sup> In an action by an employee injured 92 Mo. 440, 4 S. W. 937 (question of by a saw, evidence of a custom in fac-

negligence in case of injuries caused by tories to screen saws to protect those an unblocked guard rail cannot be re- operating them, but not showing that solved alone upon evidence showing how such screens were used on machines simmany roads block guard rails); Sincere ilar to the one by which the employee v. Union Compress & Ware-House Co. was injured, or that they were designed many roads block guard rails); Sincere has the one by which the employee v. Union Compress & Ware-House Co. (1897; Tex. Civ. App.) 40 S. W. 326 to protect employees engaged in the (custom alleged was that owners of cotton compresses in the vicinity employed men to perform certain functions in to sustain a claim that such devices connection with the unloading of the vice in common use within the meaning of the vice Incommon use within the unloading of the vice Incommon use within the vice Incommon use within the vice Incommon use within the vice Incommon use Vice Incommon us bales). of the rule. Journeaux v. E. H. Staf
Expert testimony as to the manner ford Co. (1899) 122 Mich. 396, 81 N.

of lacing belts in a mill of a different W. 259. In an action based upon the character from the one in which the ac- theory that an employer is bound to cident occurred is competent, since there protect men engaged in digging a trench is no such essential difference between by stationing a watchman to prevent the conditions to which belts are exposed in different kinds of factories as cars across such trench, evidence of preto render such testimony entirely irrel-caution usually taken at other places evant. McGar v. National & P. Wors- and under different circumstances is ted Mills (1901) 22 R. I. 347, 47 Atl. rightly excluded. Craven v. Mayers 1192. (1896) 165 Mass. 271, 42 N. E. 1131.

versal one.3 But it is improper to take as a standard the usage of a few out of a large number of employers whose business is presumably conducted on the same lines.4

If it is a question of the master's duty to introduce a particular kind of appliance, the fact that a relatively large number of employers, as compared with the whole number, abstain from using that appliance, is a sufficient reason for declaring him to be, as matter of law, free from negligence. It is not necessary to show such abstinence on the part of an absolute majority of the employers.<sup>5</sup> Still less can culpability be inferred from the fact that a single member of the class of employers to which he belongs had adopted the instrumentality or method which, as the plaintiff asserts, ought to have been adopted.6

(1901; Ala.) 30 So. 586, where the question was whether the ratchet jacks for holding up the body of a derailed car by many prudent persons. See also were suitable appliances, it was held to be erroneous for by many prudent persons. See also kilpatrick v. Choctav., O. & G. R. Co. (1901; Ind. Terr.) 64 S. W. 560 (dilute test of their fitness, the usage of rection of verdict for defendant held proprince of the jury, and were properly refused. In another case a charge which proposed as a standard test of duty the usage of five railway companies was also held to be erroneous for blocked frog have changed to the united to the control of the proper where the larger number of witnesses testify that the unblocked frog is not more dangerous than the blocked which proposed as a standard test of duty the usage of five railway companies was also held to be erroneous for blocked frog have changed to the united to the control of the proper, where the larger number of witnesses testify that the unblocked frog and that some roads using the blocked frog have changed to the united to the control of the proper, where the larger number of witnesses testify that the unblocked frog and that some roads using the blocked frog have changed to the united to the control of the proper, where the larger number of witnesses testify that the unblocked frog and the proper was also held to be erroneous for blocked frog have changed to the united to the control of the proper was also held to be erroneous for blocked. which proposed as a standard test of duty the usage of five railway companies was also held to be erroneous for the same reason. Richmond & D. R. Co. v. Weems (1892) 97 Ala. 270, 12 So. 186. In Apati v. Delaware, L. & W. R. Co. (1901) 64 App. Div. 515, 72 N. Y. Supp. 322, it was held that the mere fact that some railway companies use fact that some railway companies use a saw, instead of a hammer and chisel, account of its greater safety.

Louisville & N. R. Co. v. Hall (1888) other

\*In Georgia P. R. Co. v. Propst 87 Ala. 708, 4 L. R. A. 710, 6 So. 277. (1887) 83 Ala. 518, 3 So. 764, the fact In Chicago & G. W. R. Co. v. Armstrong that drawheads used were such as were employed on "many" well-conducted offered that hand-holds on railway cars roads was held to repel all imputation were usually placed crosswise, instead of registering and the state of the state roads was held to repel all imputation of negligence, even though it did not appear that they were used on the majority of such roads. S. P. in Richmond to is whether a certain recognized degree by the following part of the safety of the servals, 9 So. 276. The course pursued by "most persons" was mentioned as the standard in McGill v. Bouman (1890) than another, the fact that the majority of masters in the same business arranged in McGill v. Bouman (1890) it in a different manner from the defendant is not conclusive against him, (1901; Ala.) 30 So. 586, where the question was whether the ratchet jacks for ment had been abandoned as dancerous

<sup>6</sup> In Breig v. Chicago & W. M. R. Co. (1893) 98 Mich. 222, 57 N. W. 118, evidence that one manufactory in making emery wheels had adopted the method of filling them with copper wire was held insufficient to show that the master a saw, instead of a nammer and chisel, neld insufficient to show that the master to cut rails, did not justify the trial was negligent in not using a wheel so court in submitting to the jury the filled. In a case where an employee question whether the defendant was was injured while loading car wheels negligent in using a hammer and chisel, on a flat car, it was error to permit there being no evidence to show whether the saw was used on account of its such wheels were loaded by another greater economy and efficiency, or on railroad company, though the skid used in such work was horrowed from such in such work was borrowed from such railroad. Southern R. Co. v.

A usage may be general in the legal sense, although, owing to the fact that the arrangements which caused the injury are very rarely met with, the number of employers whose methods are available for the purposes of comparison is very limited.7

- c. The territorial extent of the usage.—Ordinarily a usage is appealed to as one which prevails over the whole of the country to which the plaintiff and defendant belong. But evidence of a usage covering any well-defined local area, whether a state, a district of a state, a group of states, or a single city, is always admissible, provided there are reasonably adequate grounds for treating that area as a distinct entity for this purpose.8 Such evidence has even been deemed conclusive in the master's favor.9
- d. The practice of the defendant himself.—(Compare § 16a, ante.)—The fact that a certain instrumentality has always been in use by the defendant himself, as well as by other employers, is some-

gauge roads.

\*In Benson v. New York, N. H. & H. 
\*In Prybilski v. Northwestern Coul. R. Co. (1901; R. I.) 49 Atl. 689, it was R. Co. (1898) 98 Wis. 413, 74 N. W. he was stowing it away, and the issue sive.

Mauzy (1900) 98 Va. 692, 37 S. E. 285. was whether there was a sufficient warn-Here the special contention was that, ing, and whether he had assumed the inasmuch as the defendant borrowed the risk of the way in which it was lowered, skids from the other company, it was evidence was admissible which tended its duty to get all the appliances used to show what was customary among by the latter, and not take a part there- stevedores at that port in handling such of.

'In Titus v. Bradford, B. & K. R. Co.
lumber, and what the respective duties

'In Titus v. Bradford, B. & K. R. Co.
lumber, and what the respective duties
were of the workingmen engaged in the
work,—especially of the hatchman and
others engaged in lowering the lumber.
for the reason that it had adopted the
same method of loading standard-gauge
cars on its own narrow-gauge trucks as

'In Titus v. Bradford, B. & K. R. Co.
were of the workingmen engaged in the
others engaged in lowering the lumber.
Hennesey v. Bingham (1899) 125 Cal.
627, 58 Pac. 200. In Smizel v. Odanah
lin Co.

'In Titus v. Bradford, B. & K. R. Co.
were of the workingmen engaged in the
others engaged in lowering the lumber.
Hennesey v. Bingham (1899) 125 Cal. had been adopted by two other narrow- W. 488, the usage of a mining district was taken as a standard.

held that, in an action by a brakeman 117, the usage to which this effect was for injuries received on a car of pecu-attributed was that of the ports on the liar construction, an instruction that, Great Lakes. Proof of a usage comif cars constructed in the manner in monly prevailing in a district of Pennwhich the car occasioning the injury sylvania in which numerous coal mines was constructed were in common use by were worked was treated as conclusive well-managed railroads, the plaintiff assumed the risk, was properly refused, as it expressed no limitation as to the place where such cars were in common v. Chesapeake & O. R. Co. (1885) 81 use, but that it was improper to reject evidence that cars constructed like that seems to rely on the usage of railway which caused the injury were in common use in New England. In a California case it was held that, where an such a matter, involving an industry experienced stevedore who had long been employed as such at a certain port the same lines all over the country, it was injured by the falling of lumber seems very questionable whether the custom in such a limited region as a hatchway to the hold of a vessel where single state should be deemed concluwas constructed were in common use by were worked was treated as conclusive hatchway to the hold of a vessel where single state should be deemed conclutimes mentioned in cases where common usage has been held to negative negligence.10 But the immunity of the master in such cases is, of course, not predicated upon this circumstance, except in so far as it may tend to prove the servant's knowledge of the risk. Unless such knowledge is established, the servant does not assume the risk attending the work as conducted in accordance with his employer's individual methods.11

On the other hand, the fact that the defendant himself has put a certain device into partial use is not sufficient to establish its suitability and show that he is negligent in so far as he adheres to the old system. 12

10 Osborne v. Knox & L. R. Co. (1877) gan (1886) 118 Ill. 41, 7 N. E. 55. In 68 Me. 49, 28 Am. Rep. 16; Belleville Fuller v. New York, N. H. & H. R. Co. Stone Co. v. Comben (1898) 61 N. J. L. (1900) 175 Mass. 424, 56 N. E. 574, one 353, 39 Atl. 641, Affirmed in 62 N. J. L. (1900) 175 Mass. 424, 56 N. E. 574, one of the elements which was held insufficient to show negligence was that the suggested arrangement had in rare instances been used by the defendant.

## CHAPTER VII.

THEORY THAT THE SERVANT'S KNOWLEDGE OR IGNORANCE OF THE RISKS INVOLVED IN THE EMPLOYMENT DETERMINES THE EXISTENCE OR ADSENCE OF CULPABILITY ON THE MASTER'S PART.

## A. THEORY STATED AND EXEMPLIFIED.

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- 60. Master no longer liable after he has given the servant notice of the existence of a risk previously unknown to the latter.
- B. THEORY DISCUSSED AND CRITICISED.
  - 61. Extent of the immunity which the master secures by the theory.
  - 62. Ultimate basis of theory is economic rather than juristic.
  - Suggested exception in cases of a temporary forgetfulness of a known danger.
  - 64. Theory inconsistent with a true conception of public policy.
  - 65. Servant not really a voluntary agent.
  - 66. Alternative theory suggested as being the correct one.

## A. THEORY STATED AND EXEMPLIFIED.

54. General principles.— Under the theory which is commonly entertained as to the nature of a master's liability, he is viewed as a person charged by his contract with a definite and absolute obligation to see that the instrumentalities and methods adopted by him satisfy a certain assumed standard of safety, so far as that can be achieved by the exercise of ordinary care; and the nonperformance of that obligation is regarded as creating, in favor of any servant who is injured thereby, a complete right of action which can be defeated only by proof of circumstances which let in one or other of the specific defenses based upon the servant's knowledge of the risks to which the master's breach of contract exposed him. The essential effect of this conception is that the servant's knowledge of the risks to be encoun-

tered merely introduces into the situation an independent factor which raises, either for the court or the jury, according to the circumstances in evidence and the doctrine prevailing in the particular jurisdiction where the accident occurs, the question whether the servant is not precluded by his own conduct from enforcing the incheate right of action which he acquired by the master's breach of contract. But many eminent authorities prefer to treat the master's duty from a different standpoint.

This alternative theory may be regarded as a special application of the general principle that "there is no absolute or intrinsic negligence; it is always relative to some circumstance of time, place, or The inference drawn from this principle in the present connection will be that the servant's knowledge or ignorance of the risk, instead of being a factor to be separately considered, as a more or less conclusive defense, after the master's negligence has been established, constitutes the essential element upon which the existence or absence of his culpability depends. The doctrine founded on this inference may be stated in the two following propositions, the constituents of which are nearly, but not quite, correlative and complementary: (1) As regards a servant who fully understands the perils to which an instrumentality exposes him, it is not negligence to furnish or continue to use that instrumentality, however defective and dangerous it may be. (2) As regards a servant who is actually and excusably ignorant of the risks to which an instrumentality exposes him, it is negligence to furnish or continue to use that instrumentality, irrespective of whether it is suitable or unsuitable, safe or unsafe, in good or in bad repair. The authorities for these two propositions will be separately considered.

55. No negligence predicable where servant appreciates the risks to which he is exposed.— That the servant's knowledge of the risk conclusively negatives the inference that the master was under any duty to protect him has often been asserted in explicit terms.<sup>1</sup>

Bramwell, B., in Degg v. Midland servant did voluntarily undertake the R. Co. (1857) 1 Hurlst. & N. 773, 781, risk from which he suffered, there could, 26 L. J. Exch. N. S. 171, 3 Jur. N. S. as a matter of course, be no negligence 395.

"The duty which a master owes to one servant may be quite different to that which he owes to another; it may vary with the knowledge, the experience, the skill, and the powers of the workman." Thomas v. Quartermaine (1887) L. R. 18 Q. B. Div. 685, 56 L. was, therefore, no negligence on the 35 Week. Rep. 555, 51 J. P. 516. If a part of the defendant in exposing imputable to the master. Smith v. Bak-

passage is quoted merely as an example of a formal enunciation of the doctrine, not as embodying the accepted rule in Missouri, where, as we shall see in a later chapter (XVIII.), the current of authority runs in favor of the view that the only defense open to the master is that the servant was negligent, and that his knowledge of the risk is not conclusive against him.

This view of the relations of the master and his servants involves the consequence that the mere omission of the master to take certain suggested precautions does not, as a matter of law, make him liable for an injury occasioned by the want of such precautions, where the servant has consented to work in a position in which he is exposed to peril from this source. Under such circumstances he still has the burden of proving that there is some additional reason for holding

him to it." Goodnow v. Walpole Emservant's] knowledge, and, unless a ery Mills (1888) 146 Mass. 261, 15 N. duty is shown, of course there can be no E. 576. "Employers have a right to actionable negligence, since a duty lies decide how their work shall be performed, and may employ men to work tion grounded on the negligence of a dewith dangerous implements, and in unsafe places, without incurring liability Co. v. Sandford (1889) 117 Ind. 267, for injuries sustained by workmen who is a contributory negligence upon the part of the service which they have 786, it was argued that the negation of chosen to enter." McGortu v. Southern contributory negligence upon the part consented to, by the person injured, with pellee, but of the failure to make a case full knowledge of the peril, the question of actionable negligence against appelong the master's liability does not arise." lants. It is not, accurately speaking, Hammond v. Chicago & G. T. R. Co. contributory negligence for an employee (1890) 83 Mich. 334, 47 N. W. 965. knowingly to work with defective matrices are subject to the ordinary risks of the employment, if the servant sumption becomes part of the terms of himself is aware of the risks and consents to encounter them. When . . . the employee is aware . . . a defect in the machinery or appliances, of the risks to which he exposes himself under such circumstances that the emin the service, and consents to encounter ployee, by the terms of his engagement. in the service, and consents to encounter them, his employment, subject to the assumes the enhanced dangers, the emrisks, cannot be treated as a breach of ployer is under no obligation to remedy duty." McGinnis v. Canada Southern the defect. He owes no duty to remove Bridge Co. (1882) 49 Mich. 466, 13 N. the danger. Consequently, his failure W. 819. "It can scarcely be claimed to do so will not constitute negligence. that a defective instrument or tool further the danger. This principle was expressly declared in

New England Teleph. Co. (1897) 69 of the plaintiff rendered the complaint Conn. 635, 643, 38 Atl. 359. "Where invulnerable against a demurrer, but . . . the sole act of negligence relied the court said: "The infirmity does not on is participated in, and voluntarily consist of the contributory fault of ap-consented to, by the person injured, with pellee, but of the failure to make a case ployee, by the terms of his engagement, nished by the master, of which the em-ployee had full knowledge and compre-(1886) 108 Ind. 1, 8 N. E. 630." "Culhension, can be regarded as making out pable negligence on the part of one pera case of liability within the [general] son as toward another always involves rule laid down." Marsh v. Chickering a breach of duty on the part of the (1886) 101 N. Y. 396, 5 N. E. 56. "The former as towards the latter. Where duty which the employer is under is mathematically and the state of the control terially affected by the element of [the no culpable negligence; and it is only the master liable.2 Nor is he under any duty to alter dangerous arrangements which the servant has been familiar with during the whole period of his employment.3 Compare § 35,a, ante. All that the servant can require is that he shall not be exposed to unknown risks.4

for negligence of a culpable character other example of similar phraseology, that any person can be held responsible see Coombs v. Fitchburg R. Co. (1892) and paid for assuming a known danger, also the statement that, where the conand the thing itself is not contrary to dition of the master's appliances is open law, it cannot properly be said that the to view and obvious, no duty rests upon duty as towards the person hired, and New York & N. E. R. Co. (1893) 159 therefore it cannot be said that the Mass. 68, 34 N. E. 79. hirer has been guilty of any culpable and the person hired." (1897) 95 Wis. 482, 70 N. W. 671; Os-Rush v. Missouri P. R. Co. (1887) 36 borne v. Lehigh Valley Coal Co. (1897) Kan. 129. 12 Pac. 582. "The rule of 97 Wis. 27, 71 N. E. 814; Anthony v. law, briefly stated, is this: One who Leeret (1887) 105 N. Y. 591, 12 N. E. knows of a danger from the negligence 561. "The character of the machine of another, and understands and appre- and the employer's knowledge being esciates the risk therefrom, and volunta-tablished, it still remains a question of rily exposes himself to it, is precluded fact whether, under all the circumfrom recovering for an injury which restances, a case of actionable negligence sults from the exposure. It has often has been made out. That which caused been assumed that the conduct of the the danger may have been irremediable, plaintiff in such a case shows conclu- and it is no violation of duty by an emsively that he is not in the exercise of ployer to put one in his employ at the due care. Sometimes it is said that the operation of a dangerous machine, if defendant no longer owes him any the employee is fully informed as to its duty; sometimes, that the duty becomes character, and voluntarily accepts the one of imperfect obligation, and is not employment." Findlay Brewing Co. v. recognized in law. In one form or an Bauer (1893) 50 Ohio St. 565, 35 N. E. other the doctrine is given effect as 55. In Guedelhofer v. Ernsting (1899) showing that in a case to which it ap- 23 Ind. App. 188, 55 N. E. 113, it was showing that in a case to which it ap- 25 Ind. App. 188, 55 N. E. 113, it was plies there is either no negligence laid down that the limit of a master's towards the plaintiff on the part of the engagement is that "he will not expose defendant, or a want of due care on the the employee to danger which is not part of the plaintiff." Fitzgerald v. obvious." Other cases in which the document of the distribution of the consecution of the exposure of a servant to limit that the deceased in generating and known risks is recommind are detailed. conduct of the deceased in accepting and known risks is recognized are-Atchicontinuing in the service. with knowlson, T. & S. F. R. Co. v. Wagner (1885) edge of the alleged defects, strictly 33 Kan. 660, 7 Pac. 204; Jennings v. speaking, does not present a question of Tacoma R. & Motor Co. (1893) 7 Wash. contributory negligence on his part, 275, 34 Pac. 937; Sykes v. Packer which, to be available to the defendant, (1882) 99 Pa. 465; Anglin v. Texas & must have been pleaded; but the effect P. R. Co. (1894) 9 C. C. A. 130, 23 U. must have been pleaded; but the effect of such conduct, without a further show- S. App. 62, 60 Fed. 553; The Maharaing by the plaintiff, was to free the defendant from any negligence of which plaintiff had a right to complain."

Reichla v. Gruensfelder (1892) 52 Mo.

The sems difficult to reconcile the cases adverted to in this costion with a Trial adverted to the trial adverted to th

113 Mass. 396.

Where an employee is hired 156 Mass. 200, 30 N. E. 1140. Compare

App. 58, citing Flynn v. Union Bridge adverted to in this section with an Irish decision which lays it down that, where 2 Sullivan v. India Mfg. Co. (1873) the complaint alleges negligence in the construction of an instrumentality, and <sup>8</sup> Fisk v. Fitchburg R. Co. (1893) the defendant's knowledge and the 158 Mass. 238, 33 N. E. 510. For an plaintiff's ignorance of its insecurity,

The memoranda appended to the citations in the subjoined note will indicate with sufficient clearness the classes of risks which are covered by these principles. It should be remarked, however, that, in many of the cases mentioned, the elements explained in the two preceding chapters are also referred to, and constitute additional and independent grounds for denying the right of the servant to recover.<sup>5</sup>

the instrumentality to be insecure is not 301 (unblocked frog); Chesapeake & put in issue by a mere traverse of negli- O. R. Co. v. Hennessey (1899) 38 C. C. gence. Such a plea, it was held, will A. 307, 96 Fed. 713 (switchman handfor the defendant upon a finding that tion); Hodges v. Kimball (1900) 44 C. the materials used for the instrumen- C. A. 193, 104 Fed. 745 (bumpers so

the question whether the plaintiff knew L. R. A. 70, 37 C. C. A. 501, 96 Fed. not warrant the direction of a verdict ling defective cars at inspecting stathe materials used for the instrumentality were unsound, and that the workman who constructed it was incompetent, but that the defendant was not prevent the cars from coming together, aware of that unsoundness and incompetency. Skerritt v. Scallan (1877) it was to couple them); Chicago, B. & Ir. Rep. 11 C. L. 389.

§ Railways.—West v. Southern P. Co. 71 N. W. 42 (foreign cars with double (1898) 29 C. C. A. 219, 56 U. S. App. deadwoods); Myers v. Chicago, St. P. 323, 85 Fed. 392 (uncovered culved a couple them); Chicago, St. P. 323, 85 Fed. 392 (uncovered culved a couple them); Chicago, St. P. 324, 85 Fed. 392 (uncovered culved a couple them); Chicago, St. P. 325, 85 Fed. 392 (uncovered culved a couple them); Chicago, St. P. 326, 85 Fed. 392 (uncovered culved a couple them); Chicago, St. P. 327, 85 Fed. 392 (uncovered culved a couple them); Chicago, St. P. 328, 85 Fed. 392 (uncovered culved a couple them); Chicago, St. P. 329, 85 Fed. 392 (uncovered culved a couple them); Chicago, St. P. 329, 85 Fed. 392 (uncovered culved a couple them); Chicago, B. & Co. V. Curtis (1897) 51 Neb. 442; Chreign cars with double (1898) 29 C. C. A. 219, 56 U. S. App. deadwoods); Myers v. Chicago, St. P. 329, 85 Fed. 392 (uncovered culved a couple them); Chicago, B. & Co. V. Curtis (1897) 51 Neb. 442; Chreign cars with double (1898) 29 C. C. A. 219, 56 U. S. App. deadwoods); Myers v. Chicago, St. P. 329, 85 Fed. 392 (uncovered culved a couple them); Chicago, B. & Co. V. Curtis (1897) 51 Neb. 442; Chreign cars with double (1898) 29 C. C. A. 219, 56 U. S. App. deadwoods); Myers v. Chicago, St. P. 323, 85 Fed. 392 (uncovered culved a couple them); Chicago, B. & Co. V. Curtis (1897) 51 Neb. 442; Chreign cars with double (1898) 29 C. C. A. 219, 56 U. S. App. deadwoods); Myers v. Chicago, St. P. 323, 85 Fed. 392 (uncovered culved a couple them); Chicago, B. & Co. V. Curtis (1897) 51 Neb. 442; Chicago, B. & Co. V. Curtis (1897) 51 Neb. 442; Chicago, B. & Co. V. Curtis (1897) 51 Neb. 442; Chicago, B. & Co. V. Curtis (1897) 51 Neb. 442; Chica W. 819 (unblocked frogs); Illinois C.R. warning. Caldwell, J., dissented). No Co. v. Campbell (1897) 170 Ill. 163, 49 actionable negligence is alleged by a N. E. 314 (complaint alleging that the declaration which shows that an engine servant was injured by an unblocked driver was killed by his head coming frog; held to state no cause of action); into collision with the stone work of a Walker v. Atlanta & W. P. R. Co. bridge, while he was leaning out of his (1898) 103 Ga. 820, 30 S. E. 503 (frog engine, but also shows that the bridge projecting several inches above the had been built many years before, and track); Gleason v. New York & N. E. that the trainmen were well acquainted R. Co. (1893) 159 Mass. 68, 34 N. E. with it. M'Ghee v. North British R. 79 (brakeman's foot caught in space Co. (1887) 14 Sc. Sess. Cas. 4th series, left between planking on a track); Bat-499. To same effect, see Coombs v. terson v. Chicago & G. T. R. Co. Fitchburg R. Co. (1892) 156 Mass. (1884) 53 Mich. 125, 18 N. W. 584 200, 30 N. E. 1140, and cases cited (side track so poorly ballasted as to af- (servant injured while making a flying (side track so poorly ballasted as to afford an insecure footing to a brakeman); Nugent v. Brooklyn Union Elev. imity to an abutment); Lovejoy v. R. Co. (1901) 64 App. Div. 351, 72 N. Boston & L. R. Corp. (1878) 125 Mass. Y. Supp. 67 (platform 2½ feet wide, 79, 28 Am. Rep. 206 (servant struck without a guard rail, along the tracks against signal post close to track); of an elevated railroad company, over which its employees were compelled to Mass. 238, 33 N. E. 510 (brakeman pass, the court remarking that the railway company could lawfully maintain struck by projecting awning); Thain way company could lawfully maintain v. Old Colony R. Co. (1894) 161 Mass. such a platform, notwithstanding the 353, 37 N. E. 309 (engineer came into risks incident to its use, there being collision with post put up as a temponothing latent, hidden, or concealed, and rary support for a bridge); Gibson v. nothing latent, hidden, or concealed, and rary support for a bridge); Gibson v. nothing which was not as apparent to Eric R. Co. (1875) 63 N. Y. 450, 20 the servant as to the master); Hawk Am. Rep. 552 (brakeman struck by v. Pennsylvania R. Co. (1887; Pa.) 9 projecting roof); De Forest v. Jewett Cent. Rep. 786, 11 Atl. 459 (cars in a (1882) 88 N. Y. 264 (brakeman caught train drawn by two engines parted, ow- his foot in one of several small ditches ing to the increased strain thus put on which constituted a normal part of the the couplings); Narramore v. Clevc- drainage system of defendant's yard). land, C. C. & St. L. R. Co. (1899) 48 As regards the last two cases, however,

56. Rationale of the doctrine.—(Compare § 36, ante.)—The authorities are all agreed that the master's nonculpability, as predicated under the theory which is now being discussed, is based, as a matter of ultimate analysis, upon the implied consent of the servant to undertake the known risk. In a logical point of view, this consent may be referred either to the conception that such a case falls within the scope of the broad principle embodied in the maxim, Volenti non fit injuria, or to the conception that the servant's acceptance of or continuance in the employment, with knowledge of the risk, conclusively negatives the existence of any implied contract on the master's part to supply safer instrumentalities. The judicial statements in which the former conception is relied upon will be collected and discussed in the chapter which deals with the meaning and effect of the maxim (xx.). The second conception is clearly set forth in the following extract from the opinion in a leading Massachusetts case:

"The implied contract to have the machinery in such a safe and proper condition as not to expose the servant to unnecessary risk is the foundation of the master's liability. If the servant, being fully capable of choosing and contracting for himself, and with full notice of the risk which he assumes, chooses to undertake a hazardous employment, to put himself in a dangerous position, or to work with defective or unsuitable tools, machinery, or appliances, no such implied contract arises."1

gent. See §§ 69, 70, post.

Other industrial concerns.—Seymour v. Maddox (1851) 16 Q. B. 326, 20 L. J.
Q. B. N. S. 327, 15 Jur. 723 (unguarded and unlighted hole in the floor of a theater); Thomas v. Quartermaine (1887) 56 L. J. Q. B. N. S. 340, 57 L.
T. N. S. 537, 35 Week. Rep. 555, 51 J.
P. 516, 18 Q. B. Div. 685 (uncovered cooling vat not protected by a railing); Lemoine v. Aldrich (1900) 177 Mass.
89, 58 N. E. 178 (revolving shaft stretching across a doorway, 4 feet above the floor); Illinois Steel Co. v.
Paschke (1893) 51 Ill. App. 456 (no

it may be remarked that the precise position of the New York courts with replace of work is shown, where the ingard to a situation of this sort is not jury was caused by a red-hot rail carat all clearly defined, and that there seems to be much wavering between the theory that the servant's knowledge negatives, ab initio, the existence of negligence, and the theory that his possession of such knowledge puts him in the position of one who loses his right of action for the reason that he had ac-

The theory may, therefore, be regarded as representing one of the two alternative ideas with reference to which the dividing line may be drawn between abnormal risks which are, and abnormal risks which are not, assumed by the servant.

On the one hand, it may be said that the servant's knowledge of a particular risk of that description so affects the essential quality of the act which created the risk that this act is transferred from the category of those which import negligence to the category of those which are not culpable. In this point of view the servant's inability to recover is obviously deduced from the fundamental principle that he is chargeable with an assumption of every risk that is incident to the employment after the master has performed all his legal obligations. See § 3, ante.

On the other hand, the position may be taken that the quality of the master's act undergoes no change, and that, for the purpose of the inquiry, this act remains, from first to last, within the category of those which import negligence. The servant's knowledge will then operate as a bar to his suit, for the reason that it is deemed to warrant, as a matter of law, the inference that he has waived that right to an indemnity, which prima facie accrued to him when the risk finally eventuated in the actual injury.2

such cases witnesses could easily so control found who would testify on either side, Pac. 582.

That either way was a safer and a 2 By accepting the employment, or it without any promise of and that either way was a safer and a <sup>2</sup>By accepting the employment, or better way than the other. Now, in such continuing in it without any promise of plovee should obtain knowledge as to on Assumption of Risks (XVII.).

so, and, when rightfully employed to do which of the plans had been adopted, so, and, when rightfully employed to do which of the plans had been adopted, so, neither the employer nor the emwithout being expressly so informed, it ployee can properly be charged with culcular could hardly be said that the employee negligence as toward the other. ployer was guilty of any culpable negwhere the employer and the employee as towards his employee, alare equally competent to judge of the though it might be that the plan not risks and hazards, and both have equal knowledge of the surroundings, the employer cannot be culpably negligent as ployer and the employee might be in towards the employee, although the full and complete agreement and conwork may be dangerous or hazardous, cordance that the plan adopted was the and although it might be made safer by safer and the better plan, and in such and although it might be made safer by safer and the better plan, and in such the employer, if he should choose to do a case neither should be charged with so. In some cases it is very difficult to culpable negligence as toward the other. determine which of two ways of doing In such a case it should be assumed a thing is the better and the safer way that the employee was hired and paid (and it is claimed by the defendant for taking the risk, and that he volunthat this is one of such cases), and in tarily assumed the risk." Rush v. Missuch cases witnesses could easily be souri P. R. Co. (1887) 36 Kan. 129, 12

cases an employer should certainly have change on the part of the master, he the privilege of adopting the way or the "dispenses with the performance of the plan which might seem best to him; and duty," upon the part of the master, if, after adopting a plan, he should into exercise reasonable care. Wood v. form his employee as to which of the plans he had adopted, or if the emsecond seems of the cases cited in the chapter

That judges have not always fully apprehended the significance of the difference between these conceptions, or, at all events, have not always borne it in mind, is apparent from the fact that the language employed often leaves it somewhat uncertain whether the position intended to be taken is that the master was not guilty of any breach of duty, or that, although he may have been guilty of such a breach, the servant had accepted the resulting risks.3

The theory which predicates an entire absence of duty as regards a servant who knows the conditions and appreciates the resulting risks is, in some noticeable respects, less favorable to the servant than that which starts from the notion of certain absolute duties. Under the latter theory, his knowledge of the risk only operates as a bar to the action when the master distinctly relies upon the plea that there was an implied agreement to assume that risk, and does not, in all cases

<sup>3</sup> In Smith v. Baker [1891] A. C. 325, knowledge and assumption of the risk. 336, 60 L. J. Q. B. N. S. 683, 65 L. T. N. In Henderson v. Cooms (1889) 31 Ill. S. 467, 55 J. P. 660, 40 Week. Rep. 392, App. 75, the court held that the plain-Lord Halsbury, in describing the event tiff was unable to recover, because he which caused the injury, said that he assumed the risks of a certain open catemphasized the word "negligently" because "some of the judgments below appeared to him to alternate between the on the part of the company." The last clause in the following statement seems peared to him to alternate between the on the part of the company." The last question whether the plaintiff consented to the risk, and the question whether there was any evidence of negligence to go to the jury, without definitely relying on either proposition." This remark was made in a case where the effect of the maxim, Volenti non fit integration, was the question involved, but is and from which he might be liable to precipe in the present connection. juria, was the question involved, but is pertinent in the present connection. This lack of precision is naturally most apt to occur in cases involving risks which lie on the border line between those which are indisputably ordinary, and those which are indisputably extraordinary. In Kohn v. McNulta (1893) and those which are indisputably extraordinary. In Kohn v. McNulta (1893) tagging the plaintiff on the ground that against the plaintiff on the ground that he had assumed the risk, but remarked, in the course of its opinion, that the defendant railroad company was "guilty of no negligence" in receiving foreign cars of a different construction from its own. See also Schaible v. Lake Shore & M. S. R. Co. (1893) 97 Mich. 318, 21 L. R. A. 660, 56 N. W. 565, where it was held not to be negligence, as matter of law, to shunt cars by kicking them backward, unattended by a brakeman; but the charge of the trial judge take proper precautions for his own man; but the charge of the trial judge take proper precautions for his own was pronounced erroneous because it ignored the element of the servant's Vol. I. M. & S.-10.

and as a matter of law, preclude recovery where the defense put forward is that the servant was himself guilty of contributory negligence, or that the circumstances were such as to let in the principle of the maxim, Volenti non fit injuria. See chapters xvII.-xx., post. It follows, therefore, that the effect of making the servant's knowledge or ignorance of the risk the sole criterion of culpability or nonculpability is virtually to place the servant in the same position as he would be if, under the doctrine of absolute duties, it should be held, either that these two latter defenses cannot be considered at all, as between a master and a servant, or that they are inapplicable, as a matter of law, whenever the servant's knowledge of the risk is conceded or proved. In some jurisdictions the latter of these alternatives represents the doctrine actually accepted; but in others the contributory negligence of the servant and the applicability of the maxim are viewed as being primarily questions of fact for the jury, even after his knowledge of the risk has been proved (see chapters xvii.-xx., post); and he would be distinctly prejudiced if the theory now under discussion were adopted and regularly enforced.

57. Abnormal as well as normal risks deemed to be within the scope of this doctrine.— In most of the cases in which this doctrine has been laid down, the risks under discussion have been of a more or less normal and permanent character. But it is clear, both upon principle and authority, that it is equally applicable where the injury was due to conditions of an abnormal or transitory nature.1

\*\*Feely v. Pearson Cordage Co. (1894) appliances, nor is it one where a serv161 Mass. 426, 37 N. E. 368 (master ont bound to cover a well containing the ordinary service, in which there was hot water, or to keep the floor near it increased bazard. The dangers ordinary; \*\*Murphy v. American Rubber Co. (1893) 159 Mass. 266, 34 N. E. 268 (same facts); \*\*Cerrillos Coal R. Co. v. persons of mature years. Employers (same facts); \*\*Cerrillos Coal R. Co. v. and employees are equally conscious of Deserant (1897) 9 N. M. 49, 49 Pac. such danger, and, ordinarily, equally 807 (presence of dangerous gas in the rooms of a mine, such rooms being marked by a danger signal); \*\*Becker v. Baumgartner (1892) 5 Ind. App. 576, and explosions are not uncommon. 32 N. E. 786 (servant injured by a flying fragment of a stick, entangled in the frayed edges of a rapidly moving legal. An entry upon another's prembelt, and broken while it was being ises to save goods which are in peril is used, in default of any other appliance, belt, and broken while it was being ises to save goods which are in peril is used, in default of any other appliance, not a trespass, and a man's castle may for shifting the belt). It is not negligence to call on a servant to perform of the fire. If it be negligence to some extra-hazardous service, like that call upon his employees to assist in such of extinguishing a fire caused by the carelessness of other employees. Burke v. Parker (1895) 107 Mich. 88. 64 N. which the exigency demands v. Parker (1895) 107 Mich. 88. 64 N. should be done. Suppose the buman W. 1065. The court said: "This is not negligence to assist the an emergency, it would be impossible to do a work which the exigency demands v. Parker (1895) 107 Mich. 88. 64 N. should be done. Suppose the buman bife had been in peril, and the employer had called upon his employees to assist

For the purposes of trial practice there is, under ordinary circumstances, this important distinction between the two classes of cases, viz., that the servant's knowledge of the risk must always be established by specific evidence where the risk is abnormal, but will frequently be presumed where the risk is normal.<sup>2</sup> It would seem, how-

did so at his peril? Can the act, under negligence for the railroad company to such circumstances, be said to have been order and permit such a person who has

a wrongful act?"

An employer is not liable for injury pany doing that kind of business for to an employee, caused by the fall of about five months, to attempt to make ensilage 10 feet deep, resulting from the latter's undermining the same, alto be made in broad daylight, although though the former directed the work to be made in broad daylight, although though the former directed the work to be made in broad daylight, although it may be raining at the time. Atchibe done by undermining, instead of taking from the top. Welch v. Brainard (1881) 25 Kan. 188. Instantaneously (1895) 108 Mich. 38, 65 N. W. 667. stopping a work train, without warn-the court said: "Every adult of ording to a section hand standing on the platform of a caboose, is not negligence that ensilage, or any similar article, is rendering the company liable for instance of the company liable for instance. a wrongful act?" that ensilage, or any similar article, is rendering the company liable for into be expected to fall under such cirjuries to the section hand from being cumstances; and a farmer who hires a thrown from the platform, where he laborer to do farm work has a right to knew that the train was to be moved suppose he knows and understands the forward a car's length. Union P. R. law of gravitation. The defendant is Co. v. Doyle (1897) 50 Neb. 555, 70 N. said to have directed the plaintiff to W. 43. An employee who, in compliremove his ensilage in this way, and that is urged as a reason for enforcing to make an incision in a steel beam by the plaintiff's claim. An employer does "chipping," instead of "blocking," as not necessarily become an insurer be- he has been doing, assumes the risk of cause he requests his employee to incur injury from chips of steel striking him danger in his service. It is only when in the eye, where he fully understands he conceals his knowledge of, or, at the additional risk involved. Smith v. least, fails to make known, a latent dan- Wilmington & W. R. Co. (1901) 129 N. ger. But, if it were otherwise, we dis- C. 173, 39 S. E. 805. ger. But, if it were otherwise, we discover no testimony that shows that defendant asked the plaintiff to undertween these two classes of cases is that, mine this ensilage to a dangerous extended to the one the defects are visible and tent. He merely directed him to take apparent, and the dangers therefrom it from the bottom. We may properly are presumed to be known and assumed, take judicial notice that when earth is while in the other the danger is not to be removed, or stone quarried, it is a seen, and no such presumption arises. common and economical method to un- The condition of the switches and frogs, dermine it, causing it to loosen and fall the degree of the curvature of the track, by its weight, thus facilitating its re- are all fixed conditions which are vismoval; and where good judgment is ible to the eye. The experienced emused, accidents rarely happen. Employee knows that he is to serve the ployer and employee understand that railroad company with its road and this practice is attended with more or cars in the condition in which he sees less danger, and the latter assumes the them, and he knows the danger that risk, as one incident to the employment, may attend such service. But he does when he consents to do such work in the not necessarily know, and cannot be exface of an apparent danger." Where a pected to meet, dangers which arise railroad company is in the habit of refrom changes in those conditions, howceiving from other railroads cars loaded ever apparent may be the causes which with timber which projects over the produce them. He is not presumed to ends of the cars so as to make it dan- know that, the rains and floods will gerous for anyone except a careful, have covered the track with earth and skilful, and prudent person to attempt sand, at a place where common pru-

in the rescue; could it be said that he to couple the cars together, it is not been in the employ of the railroad com-

ever, that this distinction is largely obliterated in those instances where the injury was caused by what the courts denominate "simple appliances." The language used in the decisions as to such injuries seems to amount to an unqualified declaration that the servant's appreciation of the risk is always presumed, as a matter of law, from the mere fact that the instrumentality was one which belonged to this category.3

But it seems difficult to avoid the conclusion that there must be an implied exception to the rule thus enunciated, where the defect is latent, in the sense of being undiscoverable by any examination which the servant is bound to make. See chapter xxx., post. Nor is the presumption of the plaintiff's knowledge available to charge him, as a matter of law, with an acceptance of the risk, where the injury was caused by a defective tool which was used by a fellow servant, and which the plaintiff himself had never inspected.4

The servant's inability to recover for injuries caused by simple appliances is sometimes referred to the conception that the master is not bound to anticipate accidents of this description. See § 143, post.

made against the occurrence of such an ney v. Ohicago, M. & St. P. R. Co. obstruction. He is not required to as- (1891) 80 Wis. 277, 49 N. W. 963 (acsume that ice and snow will be allowed cumulation of ice and snow on a negligently to accumulate upon the track); Union P. R. Co. v. O'Brien track and switches, or that other ob- (1892) 1 C. C. A. 354, 4 U. S. App. 221, structions will be placed on or about 49 Fed. 538 (train derailed by sand and the same, so as to render the track un- gravel washed over the track). safe, or his work more dangerous than it otherwise would be." Oregon Short Y. 396, 5 N. E. 56 (defective ladder); Line & U. N. R. Co. v. Tracy (1895) 14 Burlington & C. R. Co. v. Liehe (1892) C. C. A. 199, 29 U. S. App. 529, 66 Fed. 17 Colo. 280, 29 Pac. 175 (gardener not C. C. A. 199, 29 U. S. App. 529, 66 Fed. 17 Colo. 280, 29 Pac. 175 (gardener not 931 (collision caused by the fact that a guilty of actionable negligence in furcar in front could not be seen on account of the bushes allowed to overgrow the track). The court contrasted Kohn v. McNulta (1893) 147 U. S. 238, 37 L. App. Div. 623, 53 N. Y. Supp. 926, fored. 150, 13 Sup. Ct. Rep. 298 (double mer appeal, 32 App. Div. 635, 52 N. Y. deadwoods); Southern P. Co. v. Seley Supp. 1076 (end of a bar, designed for (1894) 152 U. S. 145, 38 L. ed. 391, 14 a barrier across the opening of an eleSup. Ct. Rep. 530 (unblocked frog); Vator shaft, which is fastened to the Tuttle v. Detroit, G. H. & M. R. Co. side of the shaft, allowed to become so (1887) 122 U. S. 189, 30 L. ed. 1114, loose as to permit the other end to pass 7 Sup. Ct. Rep. 1166 (very sharp curve), with Babcock v. Old Colony R. the employee attempted to lower the Co. (1890) 150 Mass. 467, 23 N. E. 325 (plaintiff, while mounting an engine, Doherty Lumber Co. (1899) 102 Wis. struck against a pile of ties 18 inches 264, 78 N. W. 572 (hook furnished to from the track); Eames v. Texas & N. one engaged in clearing blockades at a from the track); Eames v. Texas & N. one engaged in clearing blockades at a O. R. Co. (1885) 63 Tex. 660 (train slab, saw was dull and straight, instead struck cattle which could not be seen by of curved, and slipped on a slab, thus reason of the bushes overgrowing the allowing the servant to fall).
right of way); Hulehan v. Green Bay,
W. & St. P. R. Co. (1887) 68 Wis. 520, 188, 57 N. Y. Supp. 293 (head of beetle 32 N. W. 529 (brakeman struck his flew off the handle).

dence would require that provision be foot against a piece of wood); McClar-

58. Negligence predicable, where servant is exposed to risks of which he is actually and excusably ignorant.— The second branch of this theory is that a master is deemed to be legally culpable if he employs a person to do work which involves dangers of which the employee has no knowledge, either actual or constructive. "If the employer knowingly make use of defective and unsafe machinery, when an injury is done to a servant, ignorant of its condition, and in the exercise of ordinary care, he should compensate the person thus injured through his neglect." That is to say, a master is not liable to his servant simply "because he uses a dangerous machine, but is liable if he employed a servant to use it in ignorance of the danger."2 The implied contract of a master is that he will not expose the employee to danger which is not obvious, or of which the latter has no knowledge or adequate comprehension, and which is not reasonably and fairly incident to, and within the ordinary risks of, the service which he has undertaken.3 It is negligent, therefore, to subject a servant to a risk not ordinarily incident to the employment, unless the extraordinary hazard be obvious to him, or he be apprised of it in some manner.4

For the purposes of the present discussion it will be sufficient to point out that the cases in which the servant has been held entitled to recover, on the ground that his ignorance of the risk was excusable, may be, broadly speaking, divided into two classes: (1) Those into

not have been reasonably anticipated at the time of the contract of service. the servant neither knew of, nor had Wonder v. Baltimore & O. R. Co. reason to anticipate or to provide (1870) 32 Md. 411, 3 Am. Rep. 143. against, when he entered the employ-"The chief sphere of the duty [of employers to provide for the safety of their workmen] is in the permanent or Atl. 189. Compare the statement that a master is bound to provide his servor the place where the workman is employed so far as it is under the employor the place where the workman is employed, so far as it is under the employer's control, where the danger is not obvious or necessarily incident to the business." Kanz v. Page (1897) 168 (1897) 69 Conn. 476, 38 Atl. 216. See Mass. 217, 46 N. E. 620. "If the server also the cases cited in the following and appliances which are free from secret defects, and is liable for injuries to the servant from his failure to do so. O'Donnell v. Sargent also the cases cited in the following ice required to be performed is danger-ous, or rendered so by reason of the

<sup>1</sup> Buzzell v. Laconia Mfg. Co. (1861) master's failure to provide a place 48 Me. 113, 77 Am. Dec. 212. where the servant may do his work <sup>2</sup> Gilbert v. Guild (1887) 144 Mass. 601, 12 N. E. 368. with safety, but which, by the exercise of due care and reasonable expense on <sup>3</sup> Jenney Electric Light & P. Co. v. the part of the master, might have been Murphy (1888) 115 Ind. 566, 18 N. made safe, his omission would be a breach of duty, and render him liable E. 30.

\*Bonnet v. Galveston, H. & S. A. R. for any injury arising therefrom."

Co. (1895) 89 Tex. 72, 33 S. W. 334. Roth v. Northern Pacific Lumbering

One of the obligations of a master is Co. (1889) 18 Or. 205, 22 Pac. 842.

that, as far as he can, by reasonable "A master's negligence may consist in care, he shall avoid exposing his servant to extraordinary risks which could not have been reasonably anticipated at the servant neither know of the contract of service the servant neither know of nor had

which his inexperience or want of skill does not enter as an element, the decision being put upon the general principle that a servant has a right to rely on the master for the proper performance of his duty as to providing reasonably safe tools, without inquiry on his part; and

Froker v. Pusey & J. Co. (1900) 3 and both hands engaged. Smith v. Penn. (Del.) pt. 1, p. 1, 50 Atl. 61. An Buffalo, R. & P. R. Co. (1893) 72 Hun, ice company is liable for injuries to its 545, 25 N. Y. Supp. 638. It is negli-employee, while engaged in his duty in gence for a contractor to maintain an pushing ice along a slide to an ice unguarded well, of which the servant house, from the fall of the slide because is not aware, near the route which a of insufficiently fastened braces and its servant would naturally take in passing prove construction where the servant through a field by pickt. Indiana Pine poor construction, where the servant through a field by night. Indiana Pipe does not know the actual condition of Line & Ref. Co. v. Neusbaum (1899) 21 the supporting trestle, and has not had Ind. App. 361, 52 N. E. 471. Evidence an opportunity to examine it. Fink v. tending to show that the danger of us-Des Moines Ice Co. (1892) 84 Iowa, ing a machine was increased by the ex-321, 51 N. W. 155. A railroad com-press order of the master directing the pany is chargeable with negligence in removal of a shoe, and that plaintiff using cars having bumpers so badly had no knowledge of this act of the worn and rotten that, when brought to master, nor any information whether gether to be coupled, there are but a such a shoe was an essential part of few inches of space between them, unless it has brought home to its employees actual notice of their defects, and the danger to be incurred in handling (1897) 72 Mo. App. 309. In Tendrup v. them. Chesapeake & O. R. Co. v. Lash John Stephenson Co. (1889) 51 Hun, (1896; Va.) 24 S. E. 385. A railway 462, 3 N. Y. Supp. 882, Affirmed (1890) company which continues to use a few 121 N. Y. 681, 24 N. E. 1097, it was cars of a discarded pattern, the special defects of which are of such a nature tase to be moved and so placed as to be that there is nothing to indicate to a brakeman that they are different from ther cars, is not, as a matter of law, in the exercise of due care. Palmer v. Denver & R. G. R. Co. (1882) 3 McCrary, 635, 12 Fed. 392 (demurrer of defendant overruled). It is negligence due to the negligence of the plaintiff's to maintain a "telltale" so low that it is dangerous to brakemen on cars of more than ordinary height, and therefew inches of space between them, un- the proper construction of the machine, as dangerous to brakemen on cars of stancase, had left the spot for a few more than ordinary height, and thereminutes without taking precautions to fore, not a manifest risk. Darling v. warn persons who might wish to use it. New York, P. & B. R. Co. (1892) 17 as to the latent peril. The servant's R. I. 708, 16 L. R. A. 643, 24 Atl. 462. ignorance was also an element in the The condition of brush by the side of a following decisions, by which recovery was also an element in the servant's and the servant's warn allowed. Hereilton we have a servant to the servant of the se railroad track is not a fixed one, so as was allowed: Hamilton v. Des Moines to make the danger arising to a rail- Valley R. Co. (1872) 36 Iowa, 32 (cars road employee from the obstruction of loaded with lumber, which projected road employee from the obstruction of a view of the track by such brush, one obvious and assumed as a condition of his employment. Oregon Short Line & der, liable to explode when tamped); U. N. R. Co. v. Tracy (1895) 14 C. C. Patton v. Central Iowa R. Co. (1887) A. 199, 29 U. S. App. 529, 66 Fed. 931. To James a view of the nighttime, for shifting purposes in its yard, an engine unprovided with any safeguards or protection to the person who attempts to couple it to a car, and upon which he is required to stand on one foot, with his lantern on his arm over the ends); Spelman v. Fisher Iron over th

(2) those in which the servant's want of sufficient experience to enable him to appreciate the risk is a material factor.

Other cases illustrating, though not primarily dependent upon, the doctrine that it is negligence to require a servant to encounter risks not understood by him, will be found in the chapter (xxv.) dealing with injuries received outside the scope of the work originally contracted for.

The general question, What risks are deemed to be constructively known to the servant? is treated in a later portion of the work (chapter xxi.).

59. Such a situation sometimes treated as a species of deception.— (Compare § 236, post.)—In many of the cases in which the doctrine stated in the preceding section has been recognized expressions are met which appear to commit the courts to the theory that a master

C. C. A. 161, 108 Fed. 19; New Orteans where one kind is inherently dangerous & N. E. R. Co. v. Clements (1900) 40 in the hands of one who does not under C. C. A. 465, 100 Fed. 415. In Phelps stand its properties. Louisville & N. v. Chicago & W. M. R. Co. (1900) 122 R. Co. v. Binion (1894) 107 Ala. 645, Mich. 178, 84 N. W. 66, the court abandoned the position taken at the first trusted with the management of a maderial control of the court and the court abandoned the position taken at the first trusted with the management of a maderial court and the court abandone when the court abandone with the management of a maderial court and the court abandone with the management of a maderial court and the court abandone with the management of a maderial court and the court abandone with the management of a maderial cou hearing ([1899] 122 Mich. 171, 81 N. chine, in putting a boy without experi-W. 101), and, on the ground that a ence at work at a business and on a brakeman was not familiar with the machine which a man of ordinary sabrakeman was not familiar with the surroundings and had had no opportunity to make himself acquainted with them, held that he was entitled to recover for injuries caused by a fish cover for injuries caused by a fish there was no room for his body between the duty of the company as regards such structures when adjacent to the main track, and when abutting on a side track, the view of the court being that in the latter case they are a common arrangement, reasonably necessary for the purposes of the company as regards a laborer who is unacquainted with its qualities. Spelare a common arrangement, reasonably tractularly as regards a laborer who is necessary for the purposes of the company's business, and that all trainmen man v. Fisher Iron Co. (1870) 56 Barb. are therefore affected with knowledge 151. To same effect, see Cartter v. Cotthat they may be encountered in that ter (1891) 88 Ga. 286, 14 S. E. 476 situation (see opinion on first hearing); while in the former case the elether and the handles being jerked from the work-man's green and as it revolved it. ments which thus charge a servant with man's grasp, and, as it revolved, it notice are wanting. This wire-drawn struck him). This principle will endifferentiation is a most instructive ex- able a servant to recover for injuries ample of the shifts to which judges are due to unguarded machinery, if he does

man, it is negligence to use two kinds § 55, ante.

Coal, I. & R. Co. v. Currier (1901) 47 of hand brakes, differing only in size, C. C. A. 161, 108 Fed. 19; New Orleans where one kind is inherently dangerous ample of the shifts to which judges are occasionally put when some particularly hard case tempts them to disregard a line of precedents, and diverge, for a brief space, into the paths of common sense.

and to understand the particular danger not understand the particular danger which caused the accident. Wheeler v. grad a line of precedents, and diverge, for a brief space, into the paths of common sense. 6 As regards an inexperienced brake- cases as to unfenced machinery cited in

who exposes a servant to an unknown danger is guilty, not merely of negligence, but also of bad faith, or even a quasi fraud. A form of statement which is frequently employed to express this conception is, that a master must answer for injuries caused by the existence of abnormally dangerous conditions, which are in the nature of a trap, by which word is meant a condition of an instrumentality which is apt to imperil a person doing work with it or near it "without the caution which knowledge of such condition would enable him to exercise."2

servant has a right to repose confidence ger. Wonder v. Baltimore & O. R. Co. in the prudence and caution of his employer, and to rely upon his not putting This definition is suggested by the ployer, and to rely upon his not putting

<sup>2</sup> This definition is suggested by the
him in charge of implements which,
language of the court in Fredenburg v.
from improper construction or other
Northern C. R. Co. (1889) 114 N. Y.
cause, are so dangerous that a prudent

582, 584, 21 N. E. 1049, where the main-

""It is the master's duty to be care- the master upon which the servant is ful that his servant is not induced to entitled to rely, and if the master fails work under a notion that tackle or main any of these things, and the servant chinery is staunch and secure, when, in fact, the master knows or ought to know that it is not so." Paterson v. Bell (1857) 20 Sc. Sess. Cas. 2d series, Wallace (1854) 1 Macq. H. L. Cas. 748, 137, per Lord Curriehill. A similar per Lord Cranworth, C. "The master's point of view is indicated by the stateliability arises from the fact that he subjects his servant to dangers which, in good faith, he ought to provide against." Pittsburgh & C. R. Co. v. & Gaston Gas Coal Co. [1885] 27 W. Va. against." Pittsburgh & C. R. Co. v. 285, 55 Am. Rep. 304); that liability for Sentmeyer (1879) 92 Pa. 276, 37 Am. injuries, caused by the servant's obey-Rep. 684. If the extraordinary risks of the service are not explained, such risks, or "those which result from knowledge of, or, at least, fails to make methods of carrying on the business, known, a latent danger (Welch v. calculated to mislead the servant to his Brainard. [1895] 108 Mich. 38, 65 N peril," are not assumed by the servant is enwork under a notion that tackle or ma- in any of these things, and the servant peril," are not assumed by the servant W. 667); and that all the servant is enas risks of his employment. Bethlehem titled to require, where he consents to Iron Co. v. Weiss (1900) 40 C. C. A. use a certain machine, is that he shall 270, 100 Fed. 45. "Undoubtedly, a not be deceived as to the degree of danger of the state of the degree of the consents of the degree of the degree of the consents of the degree of the degree of the consents of the degree o

cause, are so dangerous that a prudent 582, 584, 21 N. E. 1049, where the mainman would not make use of them. If tenance of a cattle guard at a place the servant is injured in consequence of where cars had to be constantly unthis confidence being abused, he ought coupled to be put on weighing scales to be remunerated." Ft. Wayne, J. & was held to be negligence, as to a serv-8. R. Co. v. Gildersleeve (1876) 33 ant recently hired. The same term is Mich. 133. In this case, Cooley, J., concluded his argument with the state-the master's liability was affirmed: ment that in the use of the appliance bird v. Long Island R. Co. (1896) 11 objected to, no confidence which was reposed in the prudence and caution of (plank of crossing, loose and so worn the employer had been betrayed, as the at the edge that a brakeman, stepping difficulties connected with handling it on the track to couple cars, was liable difficulties connected with handling it on the track to couple cars, was liable were fully known and understood by to have his foot caught); Mohr v. Lethe servant, and he voluntarily continhigh Valley R. Co. (1900) 55 App. Div. ued to encounter the risks. "The employer must always act in good faith tracks curving irregularly, so that they towards his employee, and see, as far come very close together for some disas he reasonably can, that the employee tance, such fact not being noticeable to does not take any unknown risks or observers, unless their attention has hazards." Rush v. Missouri P. R. Co. been particularly called thereto); Mas- (1887) 36 Kan. 129, 12 Pac. 582. tin v. Levagood (1891) 47 Kan. 36, 27 "There are certain things incumbent on Pac. 122 (owners of a threshing maThis conception is also exemplified under the converse aspect in those passages in which the servant's familiarity with his environment and the peril to which he was exposed is declared to preclude the inference that he was in any way entrapped or deceived or misled.3

such a position with regard to a track may hold the employer liable." Wood-that a servant is in peril of being ley v. Metropolitan Dist. R. Co. (1877) caught unawares between it and moving L. R. 2 Exch. Div. 384, 46 L. J. Exch. cars). In Spaulding v. Forbes Litho- N. S. 521. In a Canadian case the graph Mfg. Co. (1898) 171 Mass. 271, court, in holding the plaintiff to be un-50 N. E. 543, it was held that a seat, able to recover for injuries caused by consisting of a plank laid upon two up- an unguarded machine, declared that rights, but not nailed down, and prothere was "no attempt at concealment," ierting so far over one of the supports although the foreman had told him that as could be imagined," in regard to a servant who had no reason to suppose that the plank was not fastened, and was directed to feed a revolving cylinder in such a posture that his weight was thrown upon the end of the board at the moment that the cylinder mask opened. The phrase "mantrap" is used in Vorhees v. Lake Shore & M. S. R. Co. (1899) 193 Pa. 115, 44 Atl. 335. See also Bolch v. Smith (1862) 7 Hurlst. & N. 736, 31 L. J. Exch. N. S. 201, 8 Jur. N. S. 197, 10 Week. Rep. 387, per Wilde, B., arguendo (covering of hole insufficient, but apparently sufficient); R. I. & P. R. Co. (1898) 33 Or. 451, 40 L. R. A. 799, 53 (1898) 33 Or. 451, 40 L. R. A. 799, 53 (1898) 33 Or. 451, 40 L. R. A. 799, 53 (1898) 35 Or. 451, 40 L. R. A. 799, 53 (1898) 35 Or. 451, 40 L. R. A. 799, 53 (1898) 35 Or. 451, 40 L. R. A. 799, 53 (1898) 35 Or. 451, 40 L. R. A. 799, 53 (1898) 35 Or. 451, 40 L. R. A. 799, 53 (1898) 35 Or. 451, 40 L. R. A. 799, 53 (1898) 35 Or. 451, 40 L. R. A. 799, 53 (1898) 35 Or. 451, 40 L. R. A. 799, 53 (1898) 35 Or. 451, 40 L. R. A. 799, 53 (1898) 35 Or. 451, 40 L. R. A. 799, 53 (1898) 35 Or. 451, 40 L. R. A. 799, 53 (1898) 35 Or. 451, 40 L. R. A. 799, 53 (1898) 35 Or. 451, 40 L. R. A. 799, 53 (1898) 35 Or. 451, 40 L. R. A. 799, 53 (1898) 35 Or. 451, 40 L. R. A. 799, 53 (1898) 35 Or. 451, 40 L. R. A. 799, 53 (1898) 35 Or. 451, 40 L. R. A. 799, 53 (1898) 35 Or. 451, 40 L. R. A. 799, 54 (1894) 189 (1894) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (1897) 189 (

chine are liable for personal injuries to the following words: "If the danger is a workman, who, without knowledge concealed from him [the servant] and that certain wheels and cogs usually an accident happens before he becomes covered are uncovered, attempts to oil aware of it, or if he is led to expect, or the machine, and has his hand caught may reasonably expect, that proper pre-in such cogs); Chicago, R. I. & P. R. cautions will be adopted by the em-Co. v. Clark (1882) 11 Ill. App. 104 ployer to prevent or lessen the danger, (held proper to submit to jury the and, from the want of such precautions, question whether a railway company is an accident happens to him before he negligent in maintaining a platform in has become aware of their absence, he jecting so far over one of the supports although the foreman had told him that that it was liable to tip up when the some persons had suffered in working weight of a person was thrown upon it, the machine, but that he would be all constituted "as clear a case of a trap right. This was said to be a very natas could be imagined," in regard to a ural expression when the plaintiff was servant who had no reason to suppose known to be acquainted with similar or the detendant, to maintain an action N. 1. 312, 37 Am. Rep. 723, 8 N. E. 529 for injuries resulting from risks which come under this description.

3 In a leading English case, where the servant failed to recover, Chief Justice not a trap or hidden defect as to a Cockburn remarked that "no deception brakeman acquainted with his work); was practised on the plaintiff as to the Atchison, T. & S. F. R. Co. v. Plunkett degree of danger to which he would be (1881) 25 Kan. 188 (brakeman injured exposed," and stated the general rule, by lumber projecting over end of car); with reference to this point of view in The Maharaiah (1889) 40 Fed. 786. with reference to this point of view, in The Maharajah (1889) 40 Fed. 786.

Language of this sort, however, is obviously not intended to be taken too literally, for it is now well settled that an action sounding in fraud cannot be maintained without proving the wrongful act to have been designedly and purposely done, and that proof of such design and purpose is not a prerequisite to recovery where the gravamen of the complaint is negligence.4 That it would be preferable, under these circumstances, to avoid using forms of expression which tend to obscure the fundamental difference between these two distinct kinds of torts seems to be scarcely open to question.<sup>5</sup>

According to one case a master may, with impunity, maintain a "mantrap," where the instrumentality in question is an ordinary one, and of first-class construction.6 But unless the word is here used in a very loose sense, implying merely a very dangerous thing, this ruling is plainly inconsistent with the general principle developed in this chapter, and with the rationale and qualifications of the doctrine by which a master is allowed to carry on his business in his own manner. See §§ 35, 39-41, ante.

60. Master no longer liable after he has given the servant notice of the existence of a risk previously unknown to the latter .- (Compare the cases cited in chapter xvi., post, on the master's duty to instruct young and inexperienced servants.)—It is obvious that, either under the theory discussed in this chapter, or under the theory of extraordinary risks created by the breach of certain absolute duties, and the assumption of those risks, as a separate fact, inferred from the servant's continuance of work with a knowledge of their existence, the effect of informing him that the employment involves exposure to some particular risk which, if it should actually have eventuated in disaster while he was ignorant thereof, would have constituted a cause of action, is to transfer that risk to the category of those for which the master cannot be made responsible.1 In other words, where a

Northern C. R. Co. v. Husson (1882)

<sup>&#</sup>x27;See 2 Bevin, Neg. pp. 1624 et seq.; Shearm. & Redf. Neg. § 20. 'In a well known English case it was remarked, by Brett, M. R., that "to lay a trap means, in ordinary language, to a trap means, in ordinary language, to something with an intention."

Heaven v. Pender (1883) L. R. 11 Q. (1870) 32 Md. 411, 3 Am. Rep. 143; B. Div. 503, 52 L. J. Q. B. N. S. 702, 49 Nugent v. Kauffman Milling Co. (1895) L. T. N. S. 357, 47 J. P. 709. In New-131 Mo. 241, 33 S. W. 428; Roth v. ark Electric Light & P. Co. v. Garden Northern Pacific Lumbering Co. (1889) (1896) 37 L. R. A. 725, 23 C. C. A. 649, 18 Or. 205, 22 Pac. 842; Murphy v. Wa-39 U. S. App. 416, 78 Fed. 74, the court bash R. Co. (1893) 115 Mo. 111, 21 S. limited the use of the word "trap" to W. 862; Bethlehem Iron Co. v. Weiss cases where there is a "purpose to (1990) 40 C. C. A. 270, 100 Fed. 45; Pagnare" ensnare."

<sup>&</sup>lt;sup>6</sup> Stewart v. Newport News & M. Valley Co. (1890) 86 Va. 988, 11 S. E. 885 (cited with approval in Richmond & D. R. Co. v. Risdon [1891] 87 Va. 335, 12 S. E. 786) (coal chute near track).

Wonder v. Baltimore & O. R. Co. (1870) 32 Md. 411, 3 Am. Rep. 143; Nugent v. Kauffman Milling Co. (1895) 131 Mo. 241, 33 S. W. 428; Roth v.

master hires a servant to do something which will expose him to abnormal dangers, all that can be required of the master is that he shall see that the servant is informed with respect to all the dangers and hazards incident to the work; and when this is done the servant will assume all the risks and hazards of his employment.<sup>2</sup> The statement of an employee at the time of the contract of employment, that he is accustomed to the work, excuses the employer from explaining to him peculiar dangers ordinarily incident to such work; but it does not qualify the obligation of the master to furnish reasonably safe appliances, or excuse him from liability for any neglect so to do.3 For a further discussion of this subject, see the chapter which deals with the master's duty to instruct and warn his servant (xvi.).

## В. THEORY DISCUSSED AND CRITICIZED.

61. Extent of the immunity which the master secures by the theory.—It is manifest that the effect, both of the theory developed in the foregoing sections and also of the particular phase of the doctrine of absolute duties to which, in its practical operation, that theory is equivalent (see § 55, ante), is to extend the master's liberty of action in respect to the quality of his instrumentalities and methods far beyond the limits fixed by the principles discussed in the preceding chapters. If negligence is not predicable of the maintenance of extraordinary risks which the servant appreciates, or if, supposing such maintenance to imply negligence, the servant's knowledge charges him, as a matter of law, with their assumption, the conclusion is inevitable that, as to any servant who understands the conditions and the risks arising therefrom, a master may, without being affected with legal culpability, carry on his business with instrumentalities

<sup>2</sup> Rush v. Missouri P. R. Co. (1887) 36 Kan. 129, 12 Pac. 582. That the obligation of the master is, in the alternative, either to provide reasonably safe appliances, or to notify the servant of the danger, was also recognized in

101 Pa. 1, 47 Am. Rep. 690 (where not Smith v. Baker [1891] A. C. 325, 359, only was the danger obvious, but the 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. servant had received a special warning 467, 55 J. P. 660, 40 Week. Rep. 392; on the very day of the accident); Johnson v. St. Paul, M. & M. R. Co. Schultz v. Bear Creek Ref. Co. (1897) (1890) 43 Minn. 53, 44 N. W. 884; My-180 Pa. 272, 36 Atl. 739. (1899) 43 Minn. 53, 44 N. W. 884; My-180 Pa. 272, 36 Atl. 739. (1899) 37 C. C. A. 137, 95 Fed. 406 36 Kan. 129, 12 Pac. 582. That the obligation of the master is, in the alterregive either to provide reasonably safe.

<sup>3</sup> Steen v. St. Paul & D. R. Co. (1887) 37 Minn. 310, 34 N. W. 113.

that are defective and in bad repair, and by methods which are abnormally dangerous. This conclusion the courts have not been at all backward in drawing. So far as common-law principles are concerned, there is no reason why an employer who has shipped a crew upon a "coffin ship," which fulfils its natural destiny by going to the bottom and drowning all hands, should not escape liability, if only the men were aware of the actual condition of the funeral craft which they were hired to navigate.

62. Ultimate basis of theory is economic rather than juristic.— In the last analysis, this conclusion must rest upon the hypothesis that the fear of losing remunerative work does not deprive of its voluntary quality the action of a servant who enters or continues in an employment with a knowledge that it involves extraordinary hazards. To obtain an adequate support for this hypothesis, it is necessary to accept the most extreme doctrines of the laissez faire school of sociologists. The nature of the relation between those doctrines and the conclusion stated above will be more readily understood if we advert to the fact that it was first announced, in all its repulsive nakedness, by the late Lord Bramwell, one of the straitest of the sect of those economic Pharisees whose Gamaliels were such writers as Ricardo and John Stuart Mill. It is not too much to say that the opinion delivered by him in Dynen v. Leach, has contributed more largely than any other judicial utterance to establish the principle of assumption of risks, in the rigorous and unmerciful form in which we now have it. The judgment that the master was not liable in that case mirrors, most instructively, the views of a generation which was only induced, with the greatest difficulty, to enact such humanitarian legislation as the truck acts and the factory acts. Tre length to which the decision goes will be better understood when we point out that the appliance which caused the injury had been deliberately substituted for one of the safer type, generally used, and for no other reason than that it was less expensive. Indeed, the report shows very clearly that the master had been guilty of the most cynically reckless neglect of his duties. Upon this state of facts we find Lord (then Baron) Bramwell discoursing as follows:

"There is nothing legally wrongful in the use by an employer of

<sup>1 (1857) 26</sup> L. J. Exch. N. S. 221. [1858] 3 Hurlst. & N. 258, 259, 27 L. Considering the far-reaching effects J. Exch. N. S. 325), must be regarded of this ruling, the fact that the so-called "authorized reporters" omitted as one of the most amusing instances on record, of the inability of such reportant mention of this case "because the comparative importance of law was decided by it" ance of decisions. (see note to Williams v. Clough

works or machinery more or less dangerous to his workmen, or less safe than others that might be adopted. It may be inhuman so to carry on his works as to expose his workmen to peril of their lives, but it does not create a right of action for an injury which it may occasion, when, as in this case, the workman has known all the facts, and is as well acquainted as the master with the nature of the machinery, and voluntarily uses it."2

The note sounded in this passage has been echoed and re-echoed ad nauseam through all the countries in which the common law is administered. The following passage from a case which has been so constantly cited that it may fairly be regarded as a fountain of law on this subject will suffice to show how closely the American judges have followed in the footsteps of their English brethren:

"Every manufacturer has a right to choose the machinery to be used in his business, and to conduct that business in the manner most agreeable to himself, provided he does not thereby violate the law of the land. He may select his appliances and run his mill with old or new machinery, just as he may ride in an old or new carriage, navigate an old or new vessel, or occupy an old or new house, as he pleases. The employee, having knowledge of the circumstances and entering his service for the stipulated reward, cannot complain of the peculiar tastes and habits of his employer, nor sue him for damages sustained in and resulting from that peculiar service."3

How effective a bulwark for the master this theory has proved to be is only too notorious to students of this branch of law. that "inhumanity" which, as several judges have conceded, may be predicated of the conduct of employers who are at the same time free from legal liability, has found a secure shelter.4 That the standard of

servant is foolish enough to agree to it."

\*\*Hayden v. Smithville Mfg. Co.\*\*
(1861) 29 Conn. 548. Compare the language used by the supreme court of Massachusetts, to the effect that it is the legal right of every person to carry on a business which is dangerous, either in itself, or in his manner of conducting it, if it is not unlawful, and interferes with no rights of other persons.

\*\*Coombs v. New Bedford Cordage Co.\*\*
(1869) 102 Mass. 572, 3 Am. Rep. 506.

\*\*In addition to the made the basis employment, cannot be made the basis of a liability in favor of an employee who suffers an injury in the course of his employment, for the reason that the employer has a right to have and use there to enter his employ to aid him in such use, and in so doing does not undertake to insure the employee."

\*\*Ragon v. Toledo, A. A. & N. M. R. Co.\*\*
(1893) 97 Mich. 265, 56 N. W. 612.

\*\*In addition to the remarks of Lord\*\*

<sup>2</sup> In Smith v. Baker [1891] A. C. 325 Another pertinent passage is the follow-(p. 346), 60 L. J. Q. B. N. S. 683, 65 ing, from a recent judgment rendered L. T. N. S. 467, 55 J. P. 660, 40 Week. by a court which has always construed Rep. 392, Lord Bramwell reiterated the the doctrine of assumption of risks very opinion thus expressed, remarking that strongly in favor of the employer: a master is entitled to carry on his "Obvious imperfections in methods or business in a dangerous way, "if the servant is foolish enough to agree to it." employment, cannot be made the basis

duty which it fixes for employers is often preposterously low is apparent from the decisions cited in the present chapter, as well as from numbers of others which are collected in that chapter which deals more particularly with the doctrine of assumption of risks as a distinct defense where negligence is established (xvii.).

63. Suggested exception in cases of a temporary forgetfulness of a known danger.—The harshness of the general principle might be somewhat relieved if the servant were allowed to maintain an action in cases of this type, where the accident occurred by reason of a temporary forgetfulness of the conditions which caused it, and this forgetfulness was excusable under the circumstances. This point of view is, however, only possible where the right of recovery is made to turn exclusively upon the question whether the servant was in the exercise of due care.1 A doctrine which imputes to the servant an acceptance of every risk which is known and understood necessarily implies that he takes the situation, as a whole, for better or worse. must be quite immaterial, therefore, whether the particular peril which eventually produced the injury was or was not present to his thoughts at the critical moment, and whether he ought or ought not

Bramwell, already referred to, the following cases may be referred to as safety under them." But the court showing that the courts fully recognize, which expressed this just sentiment has but are in no wise influenced by, the rendered some decisions which are esfact that the doctrine of assumption of risks will, in many instances, divorce law from morality. In Woodley v. Bridges v. Tennessee Coal, I. & R. Co. Metropolitan Dist. R. Co. (1877) L. R. (1895) 109 Ala. 287, 19 So. 495, the 2 Exch. Div. 384, 46 L. J. Exch. N. S. court declined to break in upon the following all in their continue working was the employee's ous work without doing all in their desire to serve the defendant, and save it from inconvenience in an emergency.

1 See West v. Southern P. Co. (1898) 29 C. C. A. 219, 56 U. S. App. 323, 85 Fed. 392; Wallace v. Central Vermont of doing work, if the dangers are obvious and the servant is "foolish enough" to consent to do the work in that manner. ous and the servant is "foolish enough" 1069, and the Kentucky cases cited in to consent to do the work in that manner. § 30a, b, ante. The question whether, Robinson v. Dininny (1898) 96 Va. 41, as a matter of public policy, the stand 30 S. E. 442 (removing débris from an ard of diligence required of the master old shaft, by excavating from a passage which entered it at the bottom). In Derby v. Kentucky C. R. Co. (1887) 9 tainty that it is unjust to expect that Derby v. Kentucky C. R. Co. (1887) 9 servants, invited to take part in a committed that "consideration for humanity should certainly prompt" a railway a company to construct its overhead bridges at such a height above the track that an employee standing upon track that an employee standing upon

to have remembered its existence. See chapter xvIII., post, regarding the relation between the defenses of assumption of risks and contributory negligence. Accordingly, in cases where the former of these defenses is relied upon, we find the courts holding, with the most perfeetly logical barbarity, that the servant's position is not in the least strengthened by the fact that, owing to the suddenness of the emergency, or his close attention to the work in hand, he conducted himself like a person to whom the conditions were unknown.2

64. Theory inconsistent with a true conception of public policy .--That the Rhadamanthine doctrine which prevents the servant from obtaining compensation in such cases is repugnant to the unsophisticated mind of the average layman is well known to every lawyer. It has, as is abundantly demonstrated by the persistency with which juries disregard it, been introduced into our jurisprudence in the

<sup>2</sup> Baylor v. Delaware, L. & W. R. Co. strikingly exemplified, is Rohan v. Met- (1878) 40 N. J. L. 23, 29 Am. Rep. ropolitan Street R. Co. (1901) 59 App. 208; Baltimore & O. R. Co. v. Stricker Div. 250, 69 N. Y. Supp. 570, where the (1878) 51 Md. 47, 34 Am. Rep. 291; plaintiff fell through a space at the end Louisville & N. R. Co. v. Hall (1888) of a bridge in a boiler room, while he 87 Ala. 708, 4 L. R. A. 710, 6 So. 277; was making his way along the bridge Bengtson v. Chicago, St. P. M. & O. R. to shut off steam which was escaping Co. (1891) 47 Minn. 486, 50 N. W. 531. after an explosion. The unfortunate The practical effect of this rule eviservant, it will be noticed, was here dently is, that a servant is required, at his peril, to exercise in some cases of bridge, through a room darkened by the this class,—notably, those involving the perils produced by low overhead bridges the confusion caused by the explosion, on railways,—a degree of skill and vigithan, that which, as we learn from der ordinary circumstances, would not Mark Twain's delightful book, "Life on have been a source of any danger. the Mississippi," was possessed by an expert pilot, who, when his hour of duty arrived, was expected, even on the darkest night and in the most tempestate the time of the accident, forgotten for the revietors. tion of the Roman satirist:

Ridentem dicere verum Quid vetat?

consequences to which the doctrine of (1898) 20 R. I. 452, 40 Atl. 7. assumed risks sometimes leads are very

on railways,—a degree of skill and viginaturally thought more about doing his lance which is equal to, if not greater duty than about conditions which, un-

uous weather, to comprehend, at a for the moment the existence of a preglance, the exact position of the boat viously known risk is a wholly irrele-without any instruction from his pred-ecessor. The analogy may be thought relied upon is an assumption of that rather frivolous for a grave legal trea- risk, seems to have been lost sight of in tise. But this is not the only instance a late Rhode Island case, in which the in which the central doctrine of this court, in denying recovery on the branch of jurisprudence has, when rigidly and ruthlessly applied, led up to an obvious risk, which was presumably results so monstrous that the commenappreciated and assumed by the plaintator is tempted to abandon serious ar- tiff, emphasized the fact that there was guments for a brief space, and resort no exigency or unusual circumstances to a kind of criticism which finds its demanding his exclusive attention. In justification in the unanswerable ques- all the cases mentioned as recognizing this implied exception to the general rule, the actual defense put forward was contributory negligence. Di-A recent decision, in which the harsh sano v. New England Steam Brick Co.

very teeth of public opinion. This popular disapproval is usually looked upon merely as one of the manifestations of that bitter feeling which the tyrannical use of capital, and more especially capital as wielded by corporations, has engendered in our times among the classes upon which this unscrupulous exercise of the power of the purse has weighed most heavily. If this explanation be correct the administrators of the law, bound, as they are, to be no respecter of persons, have simply done their duty in ignoring a sentiment emanating from such a source. But legal rules are defensible only in so far as they correspond with principles of abstract justice, and there is always room for at least a suspicion that this correspondence does not exist in the case of any rule which jurors lose no opportunity of evading. It is worth while, therefore, seriously to consider whether, after all, there is not, at the bottom of this general hostility, something of which jurisprudence may, without being untrue to itself, take notice, -whether, in short, this hostility is not based upon conceptions which are thoroughly and essentially juridical, struggling for expression in an irregular, and often times illogical, manner. We think that an investigation of the subject will disclose some weighty reasons for taking the position that the simplicitas laicorum has, in this instance, obtained a clearer insight into the true rationale of the situation than the trained intellects of the judges.

The rule which leaves a master at liberty to carry on his business with any instrumentalities which he may think proper to use, provided the servants who will have to handle or be near them in the course of their work, fully understand the situation and appreciate the risks, is conceded to be an exception to the general principle that "no man may, in conducting his business, unnecessarily disregard the rights of others, whether employees or strangers." A salutary principle like this, which constitutes the very foundation stone of private rights, is not lightly to be broken in upon, and the grounds upon which any exception to it claims recognition should be closely scrutinized. Can it fairly be said that the reasons for thus putting employers in a class by themselves are stronger than those which would subject them to the same responsibility as other persons?

The doctrine which thus segregates employers has been referred by the courts to several considerations, to one or other of which greater prominence has been assigned according to special circumstances which happened to be under review. But, for practical purposes, it

<sup>&</sup>lt;sup>1</sup> Hayden v. Smithville Mfg. Co. (1861) 29 Conn. 548,

must stand or fall according to the truth or falsehood of two theories, which, although distinct, are yet, in some measure, interdependent. The hypothesis underlying one of these is that, on the whole, it is best for the commonwealth at large that every man should be suffered to manage his property—whether that property be represented by capital, or by a capacity for performing certain duties—in any manner which does not involve a breach of some positive law. The hypothesis underlying the other is that, in those civilized communities with which alone our jurisdiction is concerned, employer and employed contract with each other upon an equal footing, and are, therefore, properly treated as voluntary agents in respect to the inception, continuance, and termination of their relations. Compare § 55, ante.

The essential meaning of the former of these theories is that the courts, by virtue of the general power which they exercise, of conferring from time to time a legal sanction upon rules of conduct which have no other foundation than public policy, have decreed that cases involving the liability of an employer to an injured servant shall be determined upon the assumption that what is commonly known as "paternal government" is ordinarily deleterious to those whom it is intended to benefit, and therefore justifiable only in cases where it is absolutely essential for the purpose of obviating some greater evil. In the case of the contract of employment, the existence of this prerequisite of a clear necessity is supposed to be clearly negatived, for the reason that matters will regulate themselves satisfactorily through the mere operation of the feeling of self-interest both in the master and in the servant. The master, we are told, will be fully alive to the fact that, in these days of keen competition, the business man who uses poor and defective appliances will be unable to hold his ground against those who avail themselves of all the improvements which the progress of invention places within their reach, and keep both their plant and their staff in a high state of efficiency. The servant, it is said, will realize that the same conditions which conduce to the prosperity of the master must also conduce to his own comfort and safety, and will, therefore, shun any service in which those conditions are not obtainable.2

<sup>2</sup> As a type of the numerous cases in way" made the following remarks: which this line of argument is exempli- "Any form of car a railroad company

fied, we may refer to *Michigan C. R.* may select for use must be one that, Co. v. Smithson (1881) 45 Mich. 212, with care, can be coupled safely, or the 7 N. W. 791, where Judge Cooley, in company could not afford to operate its discoursing on the text that, "in the road by means of them. With needless main, the state must leave every man exposure of its men to danger by the to manage his own business in his own use of unsuitable cars, the company Vol. I. M. & S.-11.

The only flaw in the beautifully simple theory thus outlined is, that it reposes upon a supposititious state of facts which is notoriously opposed to the teachings of experience. On the one hand, although there are numerous capitalists who comprehend that it is, in the long run, for their advantage to procure the best instrumentalities and to keep them in good order, there are quite as many, if not more, who either do not comprehend this, or, what amounts to the same thing in the present connection, are constantly acting as though they did not comprehend it. The result is, that a large proportion of the available capital of the civilized world is expended upon instrumentalities so imperfect that their use will carry the business of the employer, more or less rapidly, to ruin, and, in the meantime, create for the employees much avoidable danger of a more or less serious character.3 It is rather a startling position to take, that public policy requires judges to take under their protection a doctrine which not only operates as a license to the master to employ his money unwisely, either because he is simply an incapable manager, or because his greed for temporary profits diverts him from the course which he knows to be the right one, but also leaves him free to imperil, by his unwisdom, the lives and limbs of his servants. How far a court, in fixing the degree of care which a master is bound to exercise in respect to his servants, is entitled to consider the circumstance that a system of business which is profitable to the master, - for any considerable length of time, at least, —will not, ordinarily, involve any unnecessary danger for the servant, is a question to which it is not easy to give a definite reply. But surely, if expediency is to be imported at all into the question, and the courts are to take a hand in promoting the industrial efficiency of the nation, a theory countenancing an employment of capital which operates as a constant menace to the personal safety of those whom the capitalist invites to take service under him is rather a sorry one to favor. It does not, by any means, follow that, because judicial action, with a view to improving the plant of an employer, would be unjustifiable, if it were taken solely on the ground that his financial prosperity would thereby be promoted, the courts should abstain from declaring that such mismanagement shall be at his own risk, so far as it may unnecessarily endanger the lives and limbs of the employees.

would inevitably subject itself to public odium and disfavor, casualties to property would be increased, and, if it master's exercise of due care should be could succeed in manning its road with laborers, it must pay them wages increased by the risks of danger."

3 Compare the criticism at the close of § 47, ante, upon the doctrine that the master's exercise of due care should be treated as an irrebuttable presumption whenever he is shown to have conformed to common usage.

The new sociology, which, in this respect, is merely a revival, under a different form, of that which prevailed before the apostles of laissez faire commenced their mission, is laying more and more stress upon the principle that the duties of capital are correlative rights, and the legislatures, acting in full harmony with the views of the profoundest thinkers of our day, are holding the possessors of capital to an ever more and more strict accountability for the proper discharge of those It would certainly be quite in harmony with the ideas which pervade this sociology, to affirm that an employer is derelict in respect to his obligations, if that part of the accumulated wealth of the community, in the enjoyment of which he is secured by the governmental machinery, is used by him in such a way as to tempt his fellow citizens to expose themselves to dangers which are at once avoidable and likely to cause serious bodily harm. The result of such injuries as are commonly received by those engaged in modern industrial occupations is frequently the loss, partial or complete, of the only means which they have of supporting themselves and their families. It is surely not unreasonable to argue that any employer who thinks fit to conduct his business in such a way that it will, in the long run, inevitably entail the maining or death of a certain number of citizens. and, consequently, the diminution of the public resources and the increase of the public burdens, ought to be, at least, required to bear all the responsibility for such accidents as may occur. Even if the results of the uncontrolled play of self-interest had been satisfactory, in the sense assumed by the courts, the state is fairly entitled to say that any methods of business, through which the use of capital becomes a temptation to citizens to expose themselves to any perils greater than those which are necessarily inherent in each employment, even where the appliances are kept up to a proper standard of efficiency, should be treated as a breach of social duty, in such a sense that the judiciary ought to accord them no active encouragement. Much more should this view of public policy be decisive when the presumptions indulged by the courts are utterly at variance with facts. It may be conceded that competition between employers, and the natural preference of employees for concerns which are properly managed, will often create conditions of safety as nearly ideal as can reasonably be expected. But the residuum of cases in which these causes fail to operate is so large that the most elementary principles of a scientific induction are violated if they are made the foundation of a general rule.4

<sup>&#</sup>x27;It is surprising to find how little importance has been attributed to this obwhich have, for the last seventy years,

65. Servant not really a voluntary agent.—So far, therefore, as public policy is a factor in the question, the true conception of the situation seems rather to be that the state has a right to see that the bodily and mental faculties of its citizens shall not be impaired unnecessarily. The true force of this consideration will be more clearly understood from an examination of the second of the theories to which the employer's liberty of action is referred, viz., that, as he and the servant are on an equal footing, the latter, in regard to anything which he does with a full appreciation of the risks involved, is to be treated as a voluntary agent, not subject to any coercive influence which will save him from being chargeable with the consequences either of contributory negligence or of an assumption of the risks of his position.

The essential weakness of this theory is that it commits the courts to the anomalous position that actual constraint is something different from legal constraint. Upon the average man it is certain that the fear of the disagreeable, and, it may be, frightful, consequences which will almost certainly ensue from the failure to obtain work or from the loss of a position, must always operate as a very strong coercive influence, indeed. To speak of one whom that fear drives into or detains in a dangerous employment as being a voluntary agent is a mere trifling with words. The courts which, under the inspiration of the tenets of laissez faire economists, declare that the only coercion of which the law can take notice in the case of an adult of full age and ordinary intelligence is physical coercion<sup>1</sup> are not only guilty of a flagrant petitio principii, but also stand sponsors for a view which is

been developing the doctrine of assumption of risks. The extreme rarity of such remarks as the following renders them doubly precious: "The state has an interest in the lives of her citizens, and will not [in view of the actual decisions of the courts, the learned judge ought rather to have said should not] permit an employer needlessly to imperil the lives of his employees. The very highest consideration of public policy demands an enforcement of this rule." Myers v. Chicago, St. P. M. & or needlessly demands an enforcement of this cussion, to use all reasonable skill to rule." Myers v. Chicago, St. P. M. & or mitigate, tolerating nothing to aggravate, the necessary danger. This is fed. 406, per Caldwell, J. "The state has great interest in the protection of its members, and this of the most utilitarian character. In the case of a maimed employee, he and his family are likely to become a public charge; the same is true of the family of an employee killed. The community would seem to have as much interest in the protection of the life and limbs of a Western R. Co. (1889) L. R. 14 App.

been developing the doctrine of assump- member of it, as in the question

at variance both with science and common sense. The real position, of course, is that his "poverty, and not his will, consents." It is simply amazing that, in these rationalizing days, when every dogma is being subjected to a searching analysis, any considerable body of educated men should continue to determine the rights of citizens on the assumption that physical compulsion may be predicated of an act which a servant does because he fears the suffering produced by the stroke of the whip or a bludgeon, and not of an act which a servant does because he fears the suffering produced by inanition. If it were not for the intensely serious nature of the subject, one would be disposed to say that a doctrine which pretends to differentiate between the bodily pain caused by a blow, and by starvation, partakes largely of the ludicrous. The bald absurdity of decisions based upon this distinction cannot be disguised by vouching in aid the maxim, Volenti

Cas. 179, 58 L. J. Q. B. N. S. 563, 61 L.
T. N. S. 566, 38 Week. Rep. 145, 54 J.
P. 244, and Smith v. Baker [1891] A.
C. 325, 60 L. J. Q. B. N. S. 683, 65 L.
T. N. S. 467, 55 J. P. 660, 40 Week.
Rep. 392. (Extracts are given in the subsequent chapter which deals with the maxim, Volenti non fit injuria.)
The followinig passage will serve as a typical exposition of this view, as it is applied by American courts: "Morally, to coerce a servant to an employment, the risks of which he did not wish to encounter, by threatening, otherwise, to deprive him of an employment he can readily and safely perform, may assumed an employment, if an additional and more dangerous duty is assumed an employment, if an additional and more dangerous duty is radded to his original labor, he may accept or refuse it. If he has an executangerous service, and, if for that reason he is discharged, he may avail himself of his remedy on his contract. If J. But it should be observed that the he has no such contract, and knowingly, accepts the additional andired in the maxim, Volentia and more dangerous than the metal compel them to take even dangerous employment rather than idle-metal want. Employers thus hold a whip over their employees, forcing them to perform services attended by danger arising from the negligent acts of the employers themselves." Patton v. Central lova R. Co. (1887) 73 Iowa, v. Central lova R. Co. (1887) 74 Iowa R. Co. (1887) 75 Iowa R. Co. (1887) 75 Iowa R. Co. (1889) 37 Iowa R. Co. (1887) 84 Iowa R. Co. (1887) 84 Iowa R. Co. (1887) 85 Iowa R. Co. (1887) 84 Iowa R. Co. (1887) 85 Iowa R. Co. (1889) 87 Iowa R. Co. (1887) 85 Iowa R. Co. (1889) 87 Iowa R. Co. (1887) 85 Iowa R. Co. (1889) 87 Iowa R. Co. (1887) 85 Iowa R. Co. (1887) 86 Iowa R. Co. (1887) 86 Iowa R. Co. (1887) 86 Iowa to them, and idleness with safety. The is volens.

self of his remedy on his contract. If he has no such contract, and knowingly, although unwillingly, accepts the additional and more dangerous employment, he accepts its incidental risks." Leary v. Boston & A. R. Co. (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115. The "average man," however, is not altogether unrepresented on the bench, as passages like the following show: "The doctrine . in its effects is cruel and oppressive towards the employees, who are thus compelled to choose between employment with dangers known to them, and idleness with safety. The

non fit injuria, for the ultimate question to be settled is whether, as a matter of fact, the servant, confronted with the alternative of throwing up remunerative work or of encountering some abnormal peril, is really volens; and the determination of this question necessarily involves an investigation into the actual relations of the master and servant, and the true character of the influences to which the servant is subjected.

66. Alternative theory suggested as being the correct one.—It would seem, then, that neither of the theories to which the right of an employer to conduct his business with abnormally dangerous appliances is referred will bear close examination. The only support of one is an hypothesis which represents a false and discredited view of public policy. The only support of the other is an hypothesis which ascribes to the word "voluntary" a meaning which is at variance with the most obvious facts.

A correct view of the situation, it is submitted, cannot be arrived at, unless we wholly eliminate from the question the element of a freedom of will which has no existence, except in the imagination of a certain school of economists, and resort to first principles, for the purpose of ascertaining what standard of diligence is demanded from the employer by those large considerations of public policy upon which, in the last analysis, the whole law of negligence may be said If we view the subject from this standpoint, all the difficulties of the subject will vanish. All that is necessary is to construe, in a manner appropriate to the relations of the parties to the contract of service, the principle that no person has a right to keep his property in such a condition that persons who, with his consent, are brought into close relations with it, will be likely to receive injury, even though they may exercise all the care which it is justifiable to expect from them under the circumstances. If the degree of care which the servant must exercise in order to escape injury is greater than that which, considering the exigencies of the work, and other matters which are likely to divert his attention and produce a temporary forgetfulness of a known danger, it is reasonable to demand from men of average prudence and average powers of observation, then it may be fairly maintained that the master ought to bear the responsibility of any accident which may occur, quite irrespective of the question whether the servant was or was not aware of the nature and extent of the dan-The acceptance of this principle would not involve any very startling changes in the law as we now have it. It would merely require us to fix the standard of care incumbent on the master, with a view to the consideration that, as the implied agreement of the servant is merely that he will use ordinary diligence in the discharge of his functions, it is a breach of duty in the master to keep his instrumentalities in such a condition that ordinary diligence will not always save the servant from injury. A rule formulated upon this basis would not make the master an insurer, nor would it necessarily render him liable simply for the reason that his appliances were old and imperfect. It would merely make his liability dependent upon whether he had or had not acted unreasonably, and, therefore, negligently, in holding out inducements to do work which, at certain conjunctures not unlikely to arise, could not be performed safely without the exercise of a degree of care which no fair-minded, considerate person would demand from a servant. Such a rule would not impose any burden upon the employer which a just and sensible man would be unwilling to bear, and would effectually prevent that cruel abuse of the doctrine of assumption of risks, which has done so much to embitter the feeling with which capitalists are regarded by the working classes.1

The appropriateness of the test of VIII. A, post. See, especially, those liability which the writer has here proposed as the one to which all other considerations should be subordinated is recognized, virtually, if not explicitly, in many of the cases cited in chapter by unguarded machinery (§§ 76, 77).

## CHAPTER VIII.

## LIABILITY OF EMPLOYERS FOR INJURIES CAUSED BY VARIOUS INSTRUMENTALITIES.

66a. Introductory.

- A. Injuries caused by conditions of a normal or permanent character.
  - 67. Railway tracks; generally.
  - 68. Conditions of the permanent way which affect the safe operation of trains.
    - a. Location of tracks.
    - b. Bridges.
    - c. Channels for the discharge of surplus water.
    - d. Switches and sidings.
  - 69. Track considered as a footway for servants.
    - a. Location.
    - b. Roadbed and ties considered as a footway.
    - c. Frogs and guard rails.
    - d. Side tracks and yards.
  - 70. Objects alongside and dangerously near the track.
    - a. Conditions held to import negligence.
    - b. Conditions held not to import negligence.
    - c. Convenience or necessity as justifying elements.
    - d. Employer's liability as affected by the probability of the accident which actually occurred.
  - 71. Objects dangerous to employees on the tops of cars.
    - a. Conditions held to import negligence.
    - b. Conditions held not to import negligence.
    - c. Convenience or necessity as justifying elements.
  - 72. Want of fencing of railway tracks.
  - 73. Coupling appliances of railway cars and locomotives.
  - 74. Other parts or appurtenances of railway cars and locomotives.
  - 75. Elevators.
  - 76. Unguarded machinery; generally.
    - a. Conditions not reasonably safe.
    - b. Liability tested by the servant's knowledge or ignorance of the conditions.
    - Liability negatived on the ground that a master may carry on his business in his own way.
    - d. Conformity or nonconformity to usage.
    - The probability or improbability of injury resulting from the machinery in question.
  - 77. Revolving shafts.

- Employer's liability for injuries caused by various other mechanical appliances.
- 79. Structures.
- 80. Unguarded openings in floors, open hatchways, etc.
- 81. Substances generating explosive gases.
- 82. Substances giving off poisonous fumes.
- 83. Appliances for giving servants warning of danger.
- B. Injuries caused by conditions of an abnormal, transitory, or sporadic character.
  - 84. Conditions of railway tracks and appurtenances by which the safe operation of trains is affected.
  - 85. Track considered as a footway for servants.
    - a. Track and roadbed itself.
    - b. Casual obstructions on or near the track.
  - 86. Objects dangerous to employees in moving trains or cars.
    - a. On the track.
    - b. Alongside the track.
    - c. Above the track.
  - 87. Railway fences.
  - 83. Rolling stock on railways.
  - 89. Vehicles other than those used on railways.
  - 90. Appliances designed to support or lift heavy objects.
  - 91. Elevators.
  - 92. Vessels subjected to the pressure of steam.
  - 93. Miscellaneous appliances.
  - 94. Imperfect attachment of parts of apparatus.
  - 95. Abnormal movements of machinery.
  - 96. Changes in the parts of machines.
  - 97. Structures.
  - 98. Injuries caused by falling rocks, earth slides, etc.
  - 99. by other heavy substances.
  - 100. Unguarded openings.
  - 100a. Surface of paths, floors, etc.
    - 101. Conditions exposing a servant to risk of injury from fire.
  - 102. from currents of electricity.
  - 103. from explosions.
  - 104. from dangerous fluids.
  - 105. Defective lighting.
  - 106. Unseaworthy ships.
  - 107. Inadequate ventilation.
  - 108. Inadequate protection against severe cold.
- 66a.—Introductory.—In the foregoing chapters the cases have been grouped under headings designed to exhibit the scope and effect of the general principles upon which they turn. This method of classification, however, is quite inadequate to bring out fully the extraordinary conflict of opinion which exists between the courts with regard to the responsibility of employers for injuries received under circum-

stances essentially identical. This defect it is proposed to supply in the following sections by arranging the decisions with reference to the specific instrumentalities which were the subject of discussion. The chaotic condition into which, as this summary shows, the law has fallen, as a result of the evolution of doctrine which has been going on simultaneously in a large number of independent jurisdictions, is most deplorable, when it is considered that all those jurisdictions constitute parts of what is, socially and economically, a single country, and that the employers who are the defendants in nine tenths of the actions of this description are railway companies whose business often extends over several different states.

The cases with which we have to deal may be divided, broadly speaking, into two main categories: (1) Those in which the instrumentality which caused the injury was in its normal condition, the gravamen of the action being that it was negligent to use that kind of instrumentality; and (2) those in which the circumstances were abnormal and the servant seeks to recover on that ground. As a general rule, the dividing line between these classes is easy to define; but at certain points they fade almost imperceptibly into each other, and it is often far from easy to determine whether a given case should be assigned to one or to the other. The inconveniences which may arise from this source of difficulty have been, as far as possible, obviated by abundant cross-references between the various sections in the two subtitles of the chapter.

## A. Injuries caused by conditions of a normal or permanent character.

67. Railway tracks; generally.—The general rule is that any person who maintains a railway as a part of his plant is bound to exercise ordinary care, to the end that it shall be so constructed and maintained as to be reasonably safe as a place of work.<sup>1</sup> For the purposes of this

<sup>1</sup> Fifield v. Northern R. Co. (1860) Wilkie v. Raleigh & C. F. R. Co. (1900) 42 N. H. 225; Babcock v. Old Colony 127 N. C. 203, 37 S. E. 204; Taylor, B. R. Co. (1890) 150 Mass. 467, 23 N. E. & H. R. Co. v. Taylor (1890) 79 Tex. 325; Gorham v. Kansas City & S. R. 104, 14 S. W. 918, and the cases cited Co. (1893) 113 Mo. 408, 20 S. W. 1060; in §§ 68, 69, post. A complaint framed Little Rock & Ft. S. R. Co. v. Voss on the theory that a railroad company (1892; Ark.) 18 S. W. 172; Chicago & had caused injury to a fireman by fail. N. W. R. Co. v. Delaney (1896) 68 III. ing to perform its duty in constructing App. 307, Affirmed in (1897) 169 III. and maintaining a safe roadbed is not 581, 48 N. E. 476; Knapp v. Sioux City demurrable. Chicago & N. W. R. Co. & P. R. Co. (1887) 71 Iowa, 41, 32 N. v. Swett (1867) 45 III. 197, 92 Am. W. 18; Rosenbaum v. St. Paul & D. R. Dec. 206. Co. (1888) 38 Minn. 173, 36 N. W. 447;

rule it is immaterial whether the employer is, as is usually the case, a company engaged in transportation as a common carrier, or a company or individual operating a railway as an accessory to some other business,—as, a coal company,2 or a lumber manufacturer who owns and conducts a railroad running from his mill to the timber.3 It is also clear that the employer is equally liable whether he constructed the track through his own agents or acquired it after its completion by another party.4

68. Conditions of the permanent way which affect the safe operation of trains.—a. Location of tracks.—Some decisions treat the location of the track, with regard to its curves and gradients, as being a purely engineering question which a railway company is entitled to settle for itself under the general principle explained in chapter v., ante.1

Others proceed upon the theory that a jury is warranted in finding a railway company guilty of negligence, where it has located its track with curves so sharp as to create an imminent risk of derailments.2 The inference of negligence may be strengthened by evidence showing that the curve in question was peculiarly dangerous, owing to its position with relation to the gradients.3 It may also be a question for the jury in some instances whether a siding is properly located with regard to the adjacent structures.4

way tracks in use by common carriers. Lynn v. Antrim Lumber Co. (1901) 105 La. 451, 29 So. 874. See general principle explained in § 26, ante.

\*St. Louis & S. F. R. Co. v. Weaver (1886) 35 Kan. 412, 57 Am. Rep. 176,

11 Pac. 408. stopped in time to avoid the obstruc- ascended without accelerating the speed tion). A company cannot be found of the trains before it is reached fol-negligent for the reason that it locates lows a double curve so sharp that the negigent for the reason that it locates a down a double curve so snarp that the a siding on a curve and a grade (International & G. N. R. Co. v. Johnson the gradient is apt to cause a derail-[1900] 23 Tex. Civ. App. 160, 55 S. W. ment (Galveston, H. & S. A. R. Co. v. 772), nor for the reason that on a very ford [1898; Tex. Civ. App.] 46 S. W. heavy grade it does not connect the 77). This case is strangely inconsist-lower end of the siding with the main ent with the decision of the same court track thus rendering it necessary with the decision of the same court track, thus rendering it necessary, cited in note 1, supra.
whenever the cars are to be taken down 'As, where the evidence is that a

<sup>2</sup> Hamilton v. Rich Hill Coal Min. Co. the grade, either to propel them out of (1891) 108 Mo. 364, 18 S. W. 977. the siding by a push pole, or to run <sup>3</sup> Bowman v. White (1895) 110 Cal. them down in front of the engine 23, 42 Pac. 470. But a logging rail- (Watts v. Hart [1893] 7 Wash. 178, 34 road is not expected or required to be Pac. 423, 771). In Twitchell v. Grand laid with the same care and security as Trunk R. Co. (1889) 39 Fed. 419, it is demanded in the construction of rail- was held error to submit to the jury the question whether a siding is proper. the question whether a siding is properly constructed. For other cases to the same effect, see next section, subd. a.

<sup>2</sup> St. Louis Bridge Co. v. Fellows (1893) 52 Ill. App. 504.

<sup>3</sup> As, where it was at the foot of a 11 Fac. 400.

1 Patton v. Central Iowa R. Co. very steep grade, and no guard rail was (1887) 73 Iowa, 306, 35 N. W. 149 provided to prevent derailment (Patcattle on the track until the train was so close to them that it could not be stonged in time to avoid the obstructure ascended without accelerating the speed

- b. Bridges.—Negligence is predicable of the construction of bridges which are of insufficient strength to withstand the floods in the watercourses which they span,<sup>5</sup> or are not strong enough to support the rolling stock.<sup>6</sup> See also subd. d, infra.
- c. Channels for the discharge of surplus water.—It is negligence to build a track without providing channels of sufficient size to prevent the accumulation of water at places where it will endanger the security of the roadbed.7

railroad company unnecessarily placed through a prairie country, for the rea-

a switch just beyond a water tank, so son that there is greater liability to obthat the danger signal thereon could structions being thrown upon the track not be seen till a train was within 60 in the one case than in the other; and feet of it, leaving insufficient time to it is unquestionably true that one who stop the train. Young v. Syracuse, B. engages as an engineer or other train & N. Y. R. Co. (1899) 45 App. Div. hand upon a line running at the foot 296, 61 N. Y. Supp. 202. The switch of a mountain range assumes the inin this case was misplaced by a strancer. creased risk due to this fact. In neiger. \* Terre Haute & I. R. Co. v. Fowler assume the risks and dangers that are caused by negligence on the part of the railway company. What will be required of a company in the exercise of ordinary care in constructing its rack will vary with circumstances. A (1876) 8 S. C. N. S. 173. Recovery is allowed where the result of the defectentive arrangements for the drainage is either that a portion of the track is wholly unsafe if applied to a line washed out (McQueen v. Central running along a mountain range. Branch Union P. R. Co. [1883] 30 Kan. The employee has a right to expect that 689, 1 Pac. 139; Crouse v. Chicago & a company operating a line, which by Name Count F. R. Co. [1883] So Ran. The employee has a light to expect that 689, 1 Pac. 139; Crouse v. Chicago & a company operating a line, which by N. W. R. Co. [1899] 104 Wis. 473, 80 reason of its location is subject to cer-N. W. 752; Bonner v. Wingate [1890] tain hazards, will construct the road-78 Tex. 333, 14 S. W. 790); or sinks bed and track with due reference to (Binns v. Richmond & D. R. Co. [1892] such hazards. If the company has used 88 Va. 891, 14 S. E. 701; Stoher v. St. due care in the construction of its line, Louis, I. M. & S. R. Co. [1891] 105 having regard to its surroundings, and Mo. 192, 16 S. W. 591); or becomes too yet, by reason of its proximity to mounsoft to sustain the weight of trains. tains, rivers, or other natural objects, Louisville & N. R. Co. v. Kemper there exist dangers from landslides or (1899) 153 Ind. 618, 53 N. E. 931. In overflows or other like casualties, a percarrying out this obligation the com- son entering into the service of the company must exercise, in mountainous pany assumes the risks caused thereby; countries, a degree of care proportioned or, to state the proposition in another countries, a degree of care proportioned to the increased risks to which the flow form, he assumes the dangers incident to his employment upon a railway track those increased risks are not assumed by the railway employees. In Union P. maintained along a mountain range; R. Co. v. O'Brien (1892) 1 C. C. A. 354, but he does not assume the risks caused 4 U. S. App. 221, 49 Fed. 538, Affirmed (1896) 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618, the court said: "It is doubtless true, as urged in argument, that persons employed upon lines of railway which are constructed at the foot of mountain ranges are necessarily subjected to greater dangers than those passing case of Tuttle v. Detroit, G. H. & M. employed upon railways passing case of Tuttle v. Detroit, G. H. & M.

d. Switches and sidings.—(See also subd. a, infra, and § 84, post.) -It has been laid down that a railway company is not under any duty to make its side tracks as even as its main track.8 But there is also authority for the doctrine that a side track ought at least to be so constructed that the cars will run with reasonable smoothness.9 Cases showing a similar conflict of opinion with regard to the obligatory quality of sidings, considered as places upon which employees walk, are collected in the next section, subd. b. The switch rails must, at all events, be strong enough to support the rolling stock used on the line.10

By one court it has been held that a jury may find a railway company negligent, where stop blocks were not provided at the end of a siding which did not run out again onto the main track.11 By others it has been denied that a jury can be allowed to decide whether such a safeguard shall be employed. This conclusion is supported either by the argument that such a question is one which must be determined by engineering considerations merely, 12 or is deduced from the princi-

R. Co. (1887) 122 U. S. 189, 30 L. ed. a solid railway roadbed is built across 1114, 7 Sup. Ct. Rep. 1166, was conclusive against the right of the plaintiff able amount of water may be expected to have the case submitted to the jury was thus disposed of: "In one sense to it, it must of necessity collect against it is a question of engineering skill to determine how a roadbed and track of the roadbed, and, perchance, overflow determine how a roadbed and track it. Such facts are matters of common shall be constructed, and if the constructed, and if the constructed, and if the constructed, and if the constructed is final, and cannot be challenged beautiful to pass upon an issue involving considurations of that nature." suffered injury by reason of defects in erations of that nature." the roadbed and track, then it is use
\* Michigan C. R. Co. v. Austin (1879)
less to say that a railway company is 40 Mich. 247 (brakeman was jolted off; directions of its engineer. The difference between the kind of knowledge grounds. called into action in determining the "Trinity & S. R. Co. v. Lane (1891) called into action in determining the \*Trinity & S. R. Co. v. Lane (1891) sharpness of a curve that is needed in 79 Tex. 643, 15 S. W. 477, 16 S. W. 18 running a railway line at a given point, and that exercised in determining to rough track). whether the exigencies of a given situation require that some escape or outlet should be furnished for water liable to come down a natural water way intersecting the line of railway, is so great that it renders the rule applicable to the one case, inapplicable to the which coal cars were run to be unloaded. other. The training and knowledge of Norfolk & W. R. Co. v. Gilman (1891) an engineer is not needed to enable one to understand the action of water in rushing down a gully, or similar water (1898) 176 III. 330, 52 N. E. 921, Reway, nor to know, if an obstruction like versing (1897) 70 III. App. 91.

bound to exercise due care in the con- held not entitled to recover). Compare struction of its roadbed, for it could O'Neal v. Chicago & I. Coal R. Co. always be prepared to prove that the (1892) 132 Ind. 110, 31 N. E. 669, a road was built in accordance with the case in which a similar conclusion was

(brakeman thrown from car by jolt due

<sup>10</sup> Clapp v. Minneapolis & St. L. R. Co. (1886) 36 Minn. 6, 29 N. W. 340. 11 A log not bolted down, but tied with a chain in the middle, is not an adequate stop block at the end of a railroad track on an elevated wooden wharf on

ple that an employer is not bound to provide the best and safest appliances.<sup>13</sup> See chapter v., ante. So, also, it has been held that a jury cannot properly infer negligence, simply for the reason that a company uses a stub switch in place of a split switch.14 See chapter

A company may be found liable if, on a completed line, it fails to provide a switch with lights, to show whether it is open or closed, 15 or to provide a proper apparatus for turning a switch, 16 or if it uses a switch without a target, 17 or one without locks or other devices which will prevent it from being tampered with by strangers.<sup>18</sup>

The obligations of a company with respect to a temporary siding are merely that it should be kept in good condition for the purposes for which it is required. No negligence is inferable from the fact that such a siding is unevenly graded and unballasted. 19

Where the siding is a part of a new road under construction, it is not necessary that the switch stand should have either a lock or a target.20

69. Track considered as a footway for servants.— (See also § 85, post.) — a. Location. — The refusal of the courts to juries to consider the question whether the location of tracks was negligent has sometimes been put upon the ground that, as to permanent conditions which are visible, a master is at liberty to arrange his plant as he thinks proper. See chapter v., ante. But evidence going to

<sup>14</sup> Grattis v. Kansas City, P. & G. R. Co. (1900) 153 Mo. 380, 48 L. R. A. 399, 55 S. W. 108.

To Chicago & A. R. Co. v. House (1898) 172 III. 601, 50 N. E. 151, Affirming (1896) 71 III. App. 147.
 Donald v. Brand (1862) 24 Sc. Sess.

Gurley (1883) 12 Lea, 46.

13 Hewitt v. Flint & P. M. R. Co. ing out of the car shed of a street rail-(1887) 67 Mich. 61, 34 N. W. 659. way company were placed so close toway company were placed so close together and so curved in opposite directions that cars came together. Goldthwait v. Haverhill & G. Street R. Co. (1894) 160 Mass. 554, 36 N. E. 486. Where no more appears than the simple, isolated fact that an ash pit and water plug were so located, relatively Cas. 2d series, 295.

to each other, that a locomotive could reast Tennessee, V. & G. R. Co. v. take water and be freed from its ashes at the same time, it is error to submit <sup>18</sup> Coleman v. Wilmington, C. & A. R. to the jury the question whether the Co. (1886) 25 S. C. 446, 60 Am. Rep. yard was improperly constructed and Co. (1886) 25 S. C. 446, 60 Am. Rep. yard was improperly constructed and 516; Birmingham R. & Electric Co. v. unreasonably dangerous for an em-Allen (1892) 99 Ala. 359, 20 L. R. A. ployee hired to shovel the ashes out of 457, 13 So. 8; Rombough v. Balch (1900) 27 Ont. App. Rep. 32.

\*\*Rosenbaum v. St. Paul & D. R. Co. (1892) 130 N. Y. 682, 29 N. E. 763. A railroad company is not liable for injuries to an experienced brakeman, who had beer employed on the road for a year and was generally familiar with it, and who was struck by located on a very sharp curve. Tuttle v. Detroit, G. H. & M. R. Co. (1887) for the storage of cars, as he was climbing a ladder of a passing freight car, Rep. 1166. As, where the tracks leadshow the existence of a trap would doubtless be regarded in all jurisdictions as introducing an element which would render the liability of the master a question for the jury.2

The broad doctrine has also been laid down that culpability may be inferred where adjacent tracks are so close together that cars cannot pass on one of them without endangering the employees who are handling the cars on the other.3 But in the absence of some special feature like that just referred to, this decision would probably not be accepted as good law in all jurisdictions.

b. Roadbed and ties considered as a footway.—In Pennsylvania the broad rule has been enunciated that a railway company owes no duty to its employees to maintain a safe footway along its roadbed. But, so far, this doctrine seems to have been applied only in cases where the injury resulted from a want of ballasting.4 In the second case cited the rule was declared to be the same, whether the condition of the main track or of a siding was in question.

In New York, also, it has been declared in unqualified terms that railroad tracks are not ballasted for the purpose of making them safer for brakemen to walk upon, but for the purpose of making them safe and firm for the passage of trains.<sup>5</sup> But the injury in the case enunciating the doctrine was received on a side track, and it remains to be seen whether this court will explicitly affirm the Pennsylvania doctrine, when the question of a possible difference in the extent of the obligations with reference to main tracks and side tracks is presented and discussed.

In other jurisdictions the expressions of opinion have been restricted to an assertion of the doctrine that the want of ballasting im-

Atl. 335.

ies of the cars was less than  $2\frac{1}{2}$  feet, and between their eaves less than 2 feet, where the accident occurred in the daytime, and the cars did not differ in width, or otherwise, from ordinary box cars, and could have been seen by him if he had looked, and there was nothing unusual in the conditions existing at the time of the accident. Vining v. New York & N. E. R. Co. (1897) 167
Mass. 539, 46 N. E. 117.

\*2 As, where adjacent tracks curve irregularly (Mohr v. Lehigh Valley R. Co. [1900] 55 App. Div. 176, 66 N. Y. Supp. 199); or where adjacent tracks are constructed about 18 inches closer together than is usual: Vorhees v. Lake Shore & M. S. R. Co. (1899) 193 Pa. 115, 44 Atl. 335.

\*3 Pennsylvania Co. v. McCormack (1891) 131 Ind. 250, 30 N. E. 27. The defendant admitted that it would have been responsible if the obstruction had been permanent, but the court said that it was its duty to anticipate the possibility that sooner or later cars might have to pass each other at each and therefore, no defense that the persons whose acts brought the cars into such dangerous proximity were coemployees of the person injured.

\*Philadelphia & R. R. Co. v. Schertle (1881) 95 Pa. 455; Kerrigan v. Pennsylvania R. Co. (1899) 194 Pa. 98, 44 Atl. 1069.

\*Philadelphia & R. R. Co. v. Schertle (1881) 95 Pa. 455; Kerrigan v. Pennsylvania R. Co. (1899) 194 Pa. 98, 44 Atl. 1069.

ports no negligence where the injury was received on a side track.<sup>6</sup> The decisions to this effect proceed partly upon the theory that the conditions are known to the servants (chapter vii., ante), and that they will use such care as may be requisite to preserve their footing, and partly upon the theory that there is no obligation to make an instrumentality safe, except for the particular purpose for which it is supplied. See § 26, ante.

Several courts hold the action to be maintainable where a servant stumbles, or has his feet caught, owing to the fact that the spaces between the ties are not properly ballasted,—at all events, if the accident happens within the limits where switching is commonly done. Some cases proceed on the ground that the usage of most companies is to ballast their tracks. See chapter vi., ante. But the same conclusion has been reached in cases where this factor has been tacitly ignored, or explicitly denied to be of any significance.8

\*\* Batterson v. Chicago & G. T. R. Co. arm between the deadwoods, where it (1884) 53 Mich. 127, 18 N. W. 584; would be caught when the cars met. O'Donnell v. Duluth, S. S. & A. R. Co. "Illinois C. R. Co. v. Sanders (1897) (1891) 89 Mich. 174, 50 N. W. 801; 166 111. 270, 46 N. E. 799; Preston v. Pennsylvania Co. v. Hankey (1879) Central R. & Bkg. R. Co. (1890) 84 Ga. 93 Ill. 580; Atchison, T. & S. F. R. Co. 588, 11 S. E. 143 (here the ties were, v. Alsdurf (1893) 47 Ill. App. 200 also, too close together). (but see the Illinois case cited in note set. Louis, I. M. & S. R. Co. v. Robling (1893) - Ragam v. Toledo A. A. bins (1893) 57 Ark 377, 21 S. W. 886

(but see the Illinois case cited in note <sup>8</sup> St. Louis, I. M. & S. R. Co. v. Rob-9. infra); Ragon v. Toledo, A. A. bins (1893) 57 Ark. 377, 21 S. W. 886 & N. M. R. Co. (1893) 97 Mich. 265, (here it appeared that the track was 56 N. W. 612, modifying effect of what more dangerous than usual at the place was said in the first appeal (1892) 91 of the accident, and that defendant had Mich. 379, 51 N. W. 1004, where the filled the spaces in some of its yards, court had declined to accept the conbut there do not seem to be differentitention of defendant's counsel, that the company owed no duty to make its Co. v. Brooking (1899; Tex. Civ. App.) side tracks perfect, and held that a 51 S. W. 537. In Little Rock & M. R. freight brakeman does not necessarily Co. v. Moseley (1893) 6 C. C. A. 225, assume the risk of a dangerous hole in the roadbed of a side track, although it is his duty to exercise a higher degree of care at a strange place, or on a side track, than upon the main track. Whether the plaintiff had notice of the This case was followed in Louisville & conditions. In Illinois C. R. Co. v. N. R. Co. v. Boucook (1899) 21 Ky. L. Cozby (1898) 174 Ill. 109, 50 N. E. Rep. 383, 51 S. W. 580, rehearing denied in 21 Ky. L. Rep. 896, 53 S. W. that a railway company is bound to see 262, where the employee was injured on that its tracks, within switch yards and tention of defendant's counsel, that the ating facts); San Antonio & A. P. R. 262, where the employee was injured on that its tracks, within switch yards and a side track at a small station, which, other places where switching is to be like other side tracks on the same road, done, are ballasted up to a level with was not surfaced up. In Mucller v. the bottom of the rails; though the spe-Lake Shore & M. S. R. Co. (1895) 105 cific ruling was merely that negligence Mich. 487, 63 N. W. 416, there was held might be inferred from evidence that to be a variance, where the allegation the spaces between ties near a switch was that the plaintiff, while coupling were not filled for a distance of 10 or cars, was injured by the defendant's 12 feet, where there was no necessity for negligence in not ballasting the track, leaving them unfilled. In Lake Erie & and the evidence was that the injury W. R. Co. v. Morrissey (1898) 177 Ill. was due to the plaintiff's putting his 376, 52 N. E. 299, it was also declared

Injuries due to dangerous conditions, other than those created by want of ballasting, have sometimes been denied to be actionable, but not on the general ground assigned by the Pennsylvania court.9

On the other hand, there are numerous other decisions which are directly and unequivocally inconsistent with the broad theory of that court, that the track need not be made safe as a footway. 10

to be negligent to leave a side track 264, Distinguishing Plank v. New York without ballast. In both the cases last C. & H. R. R. Co. (1873) 1 Thomp. & C. cited the contention that it was a com- 319, Affirmed (1875) 60 N. Y. 607 mon practice to omit the ballasting was (infra, note 10), on the ground that in rejected. Since, however, the want of the earlier case the servant had no ballasting creates an obvious risk, no knowledge of the conditions. In one less than the want of blocking in a frog, case the risk of falling into a properly the Illinois court seems to be somewhat located cattle guard has been held to the Illinois court seems to be somewhat located cattle guard has been held to inconsistent in allowing a servant to be an ordinary one. Henderson v. recover for injuries caused by the former condition, and not for injuries caused by the latter. (See next subd. 10 Negligence has been held to be imputable to the defendant under the following circumstances: Where ties are seem also to conflict with Pennsylvania left projecting a foot further outside Co. v. Hankey (1879) 93 Ill. 580. Alther all than the regulation distance, though the actual ruling there was the consequence being that an employee merely as to the admissibility of evidence of a usage not to ballast side tracks, the reasoning of the court certainly justifies the inference that the want of ballasting was not regarded as after switch rails had been removed). tainly justifies the inference that the want of ballasting was not regarded as after switch rails had been removed). Where the space between a crossing construction put upon the case in Finnell v. Delaware, L. & W. R. Co. (1892) plank and the rail next it is of such a width that brakemen and others are in 129 N. Y. 669, 29 N. E. 825. Strange to say, it is not referred to, either in Louisville & N. R. Co. v. Johnson the two later decisions of the supreme court or in the decision of the appellate court cited in note 6, supra. In one case the company was held liable for injuries caused by an unballasted side track on a part of a road which had been allowed to remain which rails had been removed). time, it had been used only for construc- Where a switch rod is not close enough tion purposes. Gulf, C. & S. F. R. Co. to the ground to enable employees hav-v. Redeker (1886) 67 Tex. 181, 2 S. W. ing occasion to pass over it, to do so

o In one case the court was of the opinion that train hands should be able to avoid open water ways. Couch v. Charlotte, C. & A. R. Co. (1884) 22 S. C. 557. See § 30a, note 6, ante. In another, it was denied to be negligent to leave a space between the planking on a crossing, inasmuch as the conditions thus created were visible. Gleason v. New York & N. E. R. Co. (1893) 159 Mass. 68, 34 N. E. 79. For the same reason recovery has been denied where a servent while source. ant, while coupling cars, was injured through stepping into one of several ditches by which a vard was drained.

De Forest v. Jewett (1882) 88 N. Y.

10 Solve Find Here (1675) 60 N. Y. 607; Franklin v. Winona & St. P. R. Co. (1887) 37 Minn. 409, 34 N. W. 898; West v. Southern P. Co. (1898) De Forest v. Jewett (1882) 88 N. Y.

20 C. C. A. 219, 56 U. S. App. 323, 85 Vol. I, M. & S.—12.

safely, in the exercise of reasonable care. Hannah v. Connecticut River R. Co. (1891) 154 Mass. 529, 28 N. E. 682 (arrangement denied to be necessary, as matter of law). Where ditches, culverts, cattle guards, etc., in a yard, or at any point on the roadbed where employees are apt to go in switching and coupling cars, are left uncovered, and employee falls into them. Plank v. New York C. & H. R. R. Co. (1873) 1 Thomp. & C. 319, Affirmed (1875) 60

It would doubtless be held everywhere that negligence may be inferred from the existence of an isolated hole between the ties, even in a side track. This would clearly constitute a pitfall, and let in the operation of the paramount principle discussed in §§ 58, 59, ante.11

c. Frogs and quard rails.—The position taken in some jurisdictions seems to be that a jury may properly infer negligence from the mere fact that a frog or a guard rail was not blocked. 12 The obvious

Fed. 392; Millen v. New York C. & H. Co. v. Tester (1894) 11 C. C. A. 332, R. R. Co. (1897) 20 App. Div. 92, 46 27 U. S. App. 316, 63 Fed. 527 (hole N. Y. Supp. 748 (ditch 8 to 10 inches covered by slush and snow, when plain-deep and 14 inches wide); Hollenbeck tiff stepped into it); Missouri P. R. Co. v. Missouri P. R. Co. (1897) 141 Mo. v. Jones (1889) 75 Tex. 151, 12 S. W. 97, 38 S. W. 723, Affirmed in banc in 972 (deep holes, made by throwing out 141 Mo. 113, 41 S. W. 887 (ditch from dirt between ties). Compare facts in 4 to 6 inches deep); Hennesey v. Chicago & N. W. R. Co. (1898) 99 Wis. Ill. 109, 50 N. E. 1011.
109, 74 N. W. 554 (open ditch 10 inches wide and 8 deep); Danidson v. South- Co. (1885) 34 Minn 259 25 N. W. at 0 6 Inches deep); Hennesey V. Chillinois C. R. Co. V. Cordy (1898) 99 Wis. III. 109, 50 N. E. 1011.

109, 74 N. W. 554 (open ditch 10 inches wide and 8 deep); Davidson v. Southern P. R. Co. (1890) 44 Fed. 476 (ditch 593; Trott v. Chicago, R. I. & P. R. Co.
extending across the track); Peoria, D. (1901; Iowa) 86 N. W. 33; Mayes v. & E. R. Co. v. Puckett (1892) 42 III. Chicago, R. I. & P. R. Co. (1884) 63

App. 642 (here the fact that the position of a cattle guard was unnecessary Hamilton v. Rich Hill Coal Min. Co.
was emphasized); Fredenburg v. Northern C. R. Co. (1889) 114 N. Y. 582, 21
N. E. 1049 (here an open cattle guard Neb. 793, 60 N. W. 1044; O'Neill v.
was treated as a trap); Galveston, H. Chicago, R. I. & P. R. Co. (1894) 42
N. E. 1049 (here anopen cattle guard Neb. 793, 60 N. W. 1044; O'Neill v.
was treated as a trap); Galveston, H. Chicago, R. I. & P. R. Co. (1901; Neb.)
& S. A. R. Co. v. Slinkard (1897) 17

86 N. W. 1098; Holum v. Chicago, M.
Tex. Civ. App. 585, 44 S. W. 35 (nonconformity with usage to cover cattle
guard erected in accordance with a statute must be one which will not endanguard erected in accordance with a statute must be one which will not endanger employees engaged in coupling cars.
front v. Chicago, R. I. & P. R. Co.
guard erected in accordance with a statute must be one which will not endanger employees engaged in coupling cars.
front v. Chicago, R. I. & P. R. Co.
procedure. And the case of Southern
(1894) 91 Iowa, 179, 24 L. R. A. 657, P. Co. v. Seley (1894) 152 U. S. 145, 38

59 N. W. 5, second appeal (1898) 106
L. ed. 391, 14 Sup. Ct. Rep. 530, note
Iowa, 85, 75 N. W. 650, Reversing on
17, infra, seems to commit the supreme
propaging (1897) 71 N. W. 332 (apttle coupt to the theory that evidence averter. trench 3 feet deep).

Iowa, 85, 75 N. W. 650, Reversing on 17, infra, seems to commit the supreme rehearing (1897) 71 N. W. 332 (cattle court to the theory that evidence merely guard, at a place where cars had fre- of the want of blocking is not enough quently to be coupled, held not to be to establish culpability. In Interna-properly constructed, where it was built tional & G. N. R. Co. v. Bell (1889) 75 of ties laid across the track over a Tex. 50, 12 S. W. 321, the court reversed a judgment for a brakeman, based on a In an action for injuries, caused by finding that the company was negligent stumbling over a ground switch, it is as regards the manner in which the error to instruct a jury that it is the legal duty of a railway company to furnish a suitably lighted yard. It is for on the ground that the instructions had the jury to say whether it was necessary, under the circumstances, to have the yard lighted, in order that it might from the report what precise precauthe reasonably safe. Galveston, H. & S. A. R. Co. v. English (1900; Tex. Civ. should have adopted. In a case where the unblocked frog was a part of a turnout laid down for a temporary purpose A. & N. M. R. Co. (1893) 97 Mich. 265, near a switching yard, it was held that 56 N. W. 612. See also Northern P. R. stumbling over a ground switch, it is as regards the manner in which the

complement of the doctrine is that a court cannot say, as a matter of law, that culpability is imputable where nothing more appears than that there was a want of blocking.13

Another view is that the servant, in order to make good his right to recover, must do more than merely establish the want of blocking. That is to say, he has the burden of proving that frogs, etc., are not reasonably safe for the purposes which they are designed to subserve,14 and must also show that, on the whole, the use of the block would be prudent, in that it would guard against dangers in one direction, without the introduction of new perils in another. 15 See § 38, ante. He cannot recover merely upon evidence that an increase of safety is obtained by using blocks. 16 See § 35, ante.

In many of the cases the circumstance with reference to which the question of reasonable safety has been considered has been the common usage of railway companies. In order to estimate the doctrinal significance of these decisions, the theory held by the courts which ren-

the defendant to block all frogs was frogs ought always to be filled, as a competent, but not conclusive, evidence of negligence in leaving the frog in question without any blocking. Coates of some states expressly require it to v. Burlington, C. R. & N. R. Co. (1883) be done. And why should they not be 62 Iowa, 486, 17 N. W. 760. The following vigorous argument by Lewis, J., posed to unnecessary risks that can so in his dissenting opinion in Richmond easily be guarded against? Is the rule & D. R. Co. v. Risdon (1891) 87 Va. that the master must exercise reason-335, 12 S. E. 786, is worth quoting: able or ordinary care a meaningless "That the frogs were dangerous is not phrase,—a mere jingle of words? I disputed. But it is contended that they were of the standard pattern, and that "That the frogs were dangerous is not disputed. But it is contended that they were of the standard pattern, and that that fact of itself repels the imputation of negligence. From this view I dissent. If a standard frog, unguarded, and situated, as this one was, in a place where there are many tracks, and where cars are shifted at all hours of the day and night, is not reasonably safe, then the company, in allowing it to remain unguarded, was guilty of negligence, and the jury rightly so found. Nor, upon this point, are we left to inference. The expert evidence for the plaintiff is conclusive that the dangerous condition of the frogs could easily have been guarded against by the device of 'filling' them with cinders, which simple and inexpensive method renders them safe to those whose duties call them upon the track, and at the same time does not interfere with their ordinary use. The witness Perry, who for a number of years was in the employ of the defendant company as roadmaster, testifies that at terminal points, or in yards where much shifting is done, the yards where much shifting is done, the

the defendant to block all frogs was frogs ought always to be filled, as a

dered them must be taken into account. In some jurisdictions, as shown in chapter vi., ante, proof that it is the common usage of railway companies not to block frogs or guard rails will prevent recovery, as matter of law. 17 In others, such evidence is merely treated as an element, proper for the consideration of the jury. 18

can be held liable, that the switch or cited cases, but its rationale is not apturn-out, as constructed and used, was parent from the very brief judgment. not reasonably safe, or that it was not constructed with the usual care and (1887) 92 Mo. 440, 4 S. W. 937, it was skill. An employer is not required to change his machinery in order to apply company was negligent in maintaining or adopt every new invention. The fact that a few of the railroads of be resolved merely by showing how the country have adopted this new device, or that the defendant has used it in Austin v. Chicago, R. I. & P. R. Co. on a part of its road, is not enough to (1895) 93 Iowa, 236, 61 N. W. 849,

17 A special finding that the frogs of establish its utility, and establish neglithe defendant company were the same gence in every other road that adheres as those used by the principal roads in to the old system. The old system of the country was one of those upon constructing switches must be conwhich the plaintiff's right to recover demned." It was accordingly held erwas denied in Lake Shore & M. S. R. ror to instruct the jury that the law Co. v. McCormick (1881) 74 Ind. 440. requires a railroad company to use reato the same effect, see Richmond & D. sonable and ordinary care and diligence R. Co. v. Risdon (1891) 87 Va. 335, 12 in providing and maintaining reason-S. E. 786, declaring that to maintain ably safe structures, tracks, side tracks, unblocked frogs of a standard pattern is not negligence; and Smith v. St. to do so, and an injury happens in conLouis, K. C. & N. R. Co. (1878) 69 Mo. sequence thereof to an employee in the 32, 33 Am. Rep. 484, holding a railroad exercise of due and reasonable care, company not liable for injuries caused then the railroad company would be lia-<sup>17</sup> A special finding that the frogs of establish its utility, and establish neglicompany not liable for injuries caused then the railroad company would be liaby a guard rail of a pattern in general ble. The specific negligence charged in use, though a safe one might have been the declaration being the omission to constructed. (But see the Missouri use blocking, such an instruction would case cited in the next note.) A court be understood by the jury as laying will not pronounce a railway company down the rule that the company was will not pronounce a railway company down the rule that the company was negligent, where no proof is given that absolutely required to use blocks blocked frogs are a device in general use (Mulkey, Ch. J., and Shope and Maon other roads (Spencer v. New York gruder, JJ., dissent.) In Southern P. C. & H. R. R. Co. [1893] 67 Hun, 196, Co. v. Seley (1894) 152 U. S. 145, 38 22 N. Y. Supp. 100; Banks v. Georgia L. ed. 391, 14 Sup. Ct. Rep. 530, it was R. & Bkn. Co. [1901] 112 Ga. 655, 37 held error to refuse the following in S. E. 992); nor where the evidence is struction: "The jury are instructed that some railway companies adopt and that, if they find from the evidence that some reject that precaution (McNeil v. the railroad companies used both the New York, L. E. & W. R. Co. [1893] blocked and the unblocked frog, and 71 Hun, 24, 24 N. Y. Supp. 616); nor that it is questionable which is the where the larger number of witnesses safest or most suitable for the business testify that this arrangement is as safe of the roads, then the use of the untestify that this arrangement is as safe of the roads, then the use of the unas blocking (Kulpatrick v. Choctau R. blocked frog is not negligence, and the Co. [1901; Ind. Terr.] 64 S. W. 560); jury are instructed not to impute the nor where the utmost that is established same as negligence to the defendant, by the plaintiff's evidence is that the and they should find for the defendant." device of blocking is still an experiment, The decision of the territorial court in and of doubtful practicability (Chicago, this case is reported in (1890) 6 Utah, B. & Q. R. Co. v. Smith [1885] 18 III. 319, 23 Pac. 751, where it was held neg-App. 119; Chicago, R. I. & P. R. Co. ligence not to have blocking. Bourgeault v. Lonergan [1886] 118 Ill. 41, 7 N. E. v. Grand Trunk R. Co. (1891) Mont. L. 55). In the latter case the court said: R. 5 Super. Ct. 249, possibly depends on "It must appear, before the defendant the same considerations as the abovecan be held liable, that the switch or cited cases, but its rationale is not ap-

A conception sometimes relied upon has been that the risk created by the unblocked frog was obvious, and therefore assumed. case, this seems to stand as the specific and differentiating reason upon which recovery was denied. 19 But most of the decisions in which phraseology indicative of the conception is employed emanate from courts of which at least a part would deny the master's liability, even apart from this consideration.20

In the case of an inexperienced minor, it is the duty of a railway company to warn him as to the risks incident to unblocked frogs.<sup>21</sup>

Where a railway company has been in the habit of blocking its guard rails at some particular place, there is a special ground for charging it with negligence in failing to replace the blocking, when forced out by accident; but, even conceding there is a duty, under such circumstances, to see that the blocking is restored, it is plain that, upon general principles, the servant cannot recover for an injury caused by the want of the blocking, in the absence of evidence showing that it had been displaced so long that the company might, by the exercise of reasonable care, have discovered its absence.<sup>22</sup>

Negligence cannot be inferred merely from the fact that the track would have been safer if a different kind of rail had been used for a guard rail.23

d. Side tracks and yards.—(See also subd. b, infra.)—As sidings with their appurtenances of switches, turntables, etc., are essential to the operation of the main line of a railroad company, the duty of the master in regard to their construction and maintenance is the same as that which is incumbent on him with respect to the main line itself.24

declared that a brakeman, who was in- Burnham v. Concord & M. R. Co. (1896) jured through catching his foot in a 68 N. H. 567, 44 Atl. 750; Narramore space left unfilled between the ties on v. Cleveland, C. C. & St. L. R. Co. each side of the bars of a switch, was (1899) 48 L. R. A. 68, 37 C. C. A. 499, each side of the bars of a switch, was not precluded from recovering by proof that this arrangement was customary.

10 Rush v. Missouri P. R. Co. (1887)

that an instruction was correct, which 392, 51 N. E. 920 (unblocked frog); 96 Fed. 298.

<sup>21</sup> Davis v. St. Louis, I. M. & S. R. Co. (1890) 53 Ark. 117, 7 L. R. A. 283, 13 S. W. 80; S. C. (1892) 55 Ark. 462, 18

70. Objects alongside and dangerously near the track.—(See also § 86, post.)—a. Conditions held to import negligence.—One line of decisions proceeds upon the theory that a jury is warranted in finding a railway company to be guilty of negligence in maintaining structures or other fixed objects so near its track that employees are in danger of being struck by them, while performing duties which require them to place their persons outside of locomotives or cars. The posi-

to make such corresponding changes in

to maintain a ground switch of the or- bridge, the accident being due to the

definite period of time. The court here trains are switched is not negligence. distinguished the degrees of care re-Grattis v. Kansas City, P. & G. R. Co. quired in the case of permanent and (1900) 153 Mo. 381, 48 L. R. A. 399, 55 temporary structures. Where new ensures are put into use, so much larger switch has been denied to be negligence than those for which a turntable was as to a switchman who has occasion to originally constructed that, when they cross a track in a yard, the ground reare being turned, they are liable to be lied upon being the absence of any evistruck by engines passing on an adjadence of a general usage requiring such cent track, it is the duty of the company a safeguard. Grant v. Union P. R. Co. a safeguard. Grant v. Union P. R. Co. (1891) 45 Fed. 217. Contrast Illinois

to make such corresponding changes in the track and turntable as will render the handling of the larger engines reasonably safe. Lake Shore & M. S. R. (1897) 103 Iowa, 665, 72 N. W. 780 Co. v. Fitzpatrick (1877) 31 Ohio St. (bolt in bridge truss caught brake-tranch line does not import negligence. (1897) 103 Iowa, 665, 72 N. W. 780 (1899) 46 W. Va. 569, 33 S. E. 293.

It is negligence not to provide a pit, over which to place engines while they are being cleaned. South Florida R. Co. v. Taylor (1898; Tex. Civ. App.) It is for the jury to say whether it was negligence to construct a split switch with the rails about 3¾ inches apart, so that they were likely to catch a brakeman's foot, the evidence being that tho maintain a ground switch of the ordinary nattern and so constructed that fact that the track was negligent to the dinary nattern and so constructed that fact that the track was negligent to the dinary nattern and so constructed that fact that the track was negligent to the dinary nattern and so constructed that fact that the track was negligent to the dinary nattern and so constructed that fact that the track was negligented. to maintain a ground switch of the ordinary pattern, and so constructed that dinary pattern, and so constructed that it may be worked, without danger from placed nearer to that side of the bridge passing trains, by a servant standing than to the other); Pidcock v. Union midway between the rail which it shifts P. R. Co. (1888) 5 Utah, 612, 1 L. R. and the adjacent track. Randall v. A. 131, 19 Pac. 191 (switch stand Baltimore R. Co. (1883) 109 U. S. 478, within 10 inches of passing cars); 27 L. ed. 1003, 3 Sup. Ct. Rep. 322. Southern Kansas R. Co. v. Michaels Nor is it negligent to change a patent (1896) 57 Kan. 474, 46 Pac. 938 (arswitch to a common switch at a place row of switch stand, when turned, was where the condition of the grades, etc., 9 inches from cars); Bonner v. La None affords good reasons for believing the (1891) 80 Tex. 117, 15 S. W. 803 (same latter kind to be the safer. Piper v. facts); Boss v. Northern P. R. Co. New York C. & H. R. R. Co. (1874) 56 (1891) 2 N. D. 128, 49 N. W. 655 (tarnet N. Y. 630. Where there is no uniform get so close as sometimes to come into rule on the subject, the location of a contact with passing trains); Colf v. switch stand on the same side of the Chicago, St. P. M. & O. R. Co. (1894) main track as the siding into which the tion taken is that railway companies have no right to place structures, for any purpose, so near the track that the slightest indiscretion on the part of the employee will prove fatal.<sup>2</sup> From this point of view

stand 7½ inches from cars; considerably New York rule); Whipple v. New closer than other stands in the same York, N. H. & H. R. Co. (1896) 19 R. yard); Pennsylvania Co. v. Finney I. 587, 35 Atl. 305 (telegraph pole); (1896) 145 Ind. 551, 42 N. E. 816 Crandall v. New York, N. H. & H. R. (water plug); Chicago & A. R. Co. v. Co. (1896) 19 R. I. 594, 35 Atl. 307 Stevens (1901) 189 III. 226, 59 N. E. (telegraph pole near side track); Chi-Stevens (1901) 189 111. 226, 59 N. E. (telegraph pole near side track); Uni577, Affirming (1900) 91 111. App. 171, cago & I. R. Co. v. Russell (1878) 91
Affirmed (1901) 189 111. 226, 59 N. E. III. 298, 33 Am. Rep. 54 (telegraph pole
577 (footboard outside coal shed); Chiwithin 18 inches of cars); Helfrich v.
cago, R. I. & P. R. Co. v. Clark (1883) Ogden City R. Co. (1891) 7 Utah, 186,
108 III. 113 (platform 10 inches from 26 Pac. 295 (telegraph pole 12 to 18
outside of area catual ruling was that inches from 12 feb. Faget Tempessee V. outside of cars; actual ruling was that inches from track); East Tennessee, V. an instruction was erroneous which decrease an instruction was dangerous, thus ignored that the company was liable if 18 S. E. 976 (danger signal post); Centhe platform was dangerous, thus ignored training training training to v. East Tennessee, V. & noring the question whether it was G. R. Co. (1895) 73 Fed. 661 (station known to be dangerous); Perigo v. Chillimit board); Illinois C. R. Co. v. cago, R. I. & P. R. Co. (1879) 52 Iowa, Welch (1869) 52 Ill. 183, 4 Am. Rep. 276, 3 N. W. 43 (platform dangerously 593 (projecting awning, outer edge of class); Kelleker v. Millerauker & N. R. which was almost directly above the close); Kelleher v. Milwaukee & N. R. which was almost directly above the Co. (1891) 80 Wis. 584, 50 N. W. 942 sides of the cars); Salem Stone & Lime Co. (1891) 80 Wis. 584, 50 N. W. 942 sides of the cars); Salem Stone & Lime (coal shed near side track); Illinois & Co. v. Griffin (1894) 139 Ind. 141, 38 St. L. R. Co. v. Whalen (1886) 19 Ill. N. E. 411 (structure close to tram App. 116 (shed); Chicago, R. I. & P. R. car line); Woodell v. West Vir-Co. v. Cleveland (1900) 92 Ill. App. 308 ginia Improv. Co. (1893) 38 W. Va. 23, (flag shanty); Johnson v. St. Paul, M. 17 S. E. 386 (projecting bough of & M. R. Co. (1890) 43 Minn. 53, 44 N. tree); Stackman v. Chicago & N. W. R. W. 884 (signal post); Arabello v. San Co. (1891) 80 Wis. 428, 50 N. W. 404 Antonio & A. P. R. Co. (1889; Tex.) (bank injured a servant while pushing 11 S. W. 913 (stake); New York, C. & a car along the track; fact that road St. L. R. Co. v. Ostman (1896) 146 Ind. was in course of construction held to be St. L. R. Co. v. Ostman (1896) 146 Ind. was in course of construction held to be 452, 45 N. E. 651, Reversing on rehearing (1895) 41 N. E. 1037 (cattle chute); Borsey v. Phillips & C. Constr. (large rock). In Walker v. Redington, C. R. & N. R. Co. (1897) 42 Wis. 583 (cattle chute); ton Lumber Co. (1893) 86 Me. 191, 29 Allen v. Burlington, C. R. & N. R. Co. (1892) 57 Iowa, 623, 11 N. W. 614 (1884) 64 Iowa, 94, 19 N. W. 807 (cattle chute); Keist v. Chicago, G. W. but the servant's action failed because R. Co. (1899) 110 Iowa, 32, 81 N. W. 6181 (cattle chute); Phelps v. Chicago & W. M. R. Co. (1899) 122 Mich. 171, he was struck by it when needlessly hanging down below the car to see whether the wheels were sliding after 1 N. W. 101 (1900) 121 Mich. 178, 84 he had set the brakes. Where the evidence shows that it is the general cus-St. L. R. Co. v. Ostman (1896) 146 Ind. was in course of construction held to be 81 N. W. 101 (1900) 121 Mich. 1/8, 84 he had set the brakes. Where the evidence Shows that it is the general cuscase, § 58, note 5, ad finem); Murphy tom of brakemen to pass up and down v. Wabash R. Co. (1893) 115 Mo. 111, the sides of cars in motion, and jump 21 S. W. 862 (cattle guard fence 18 inches from locomotive); Houston & T. company is bound to locate its structures. Co. v. Oram (1878) 49 Tex. 341 tures along the track with reference to (water tank closer than usual); Hall this custom, at all places where it may the structure of the str (water tank closer than usual); Hatt this custom, at all places where it may v. Union P. R. Co. (1883) 5 McCrary, reasonably anticipate that brakemen 257, 16 Fed. 744 (telegraph pole 12 will have occasion to alight for this inches from locomotive); Benthin v. purpose. Flanders v. Chicago, St. P. New York C. & H. R. R. Co. (1897) 24 M. & O. R. Co. (1892) 51 Minn. 193, 53 App. Div. 303, 48 N. Y. Supp. 503 (telegraph pole 4 inches from passing locomotive. But see note 5, infra, as to (1871) 58 III. 272 (mail catcher). In

the test of the company's negligence will be, whether the structure or other object which caused the injury was dangerous or unsafe to persons operating its trains, when they were exercising what was, under the circumstances, ordinary care.3

The servant's excusable ignorance of the conditions and the resulting risks is adverted to in many of the cases in which the company has been held liable; 4 but, so far as regards the courts with which we have to deal in this subdivision, this element is merely corroborative in its significance, instead of being differentiating, as is the case in the jurisdictions dealt with in the next subdivision.

Two cases in which the action was held not to be maintainable, the only ground assigned for the decision being that the risk was patent, and therefore assumed, are somewhat difficult to classify.<sup>5</sup> Obviously, such a reason is consistent either with the hypothesis that the court was applying the theory exemplified in the next subdivision, or with the hypothesis that it was intended to assert the doctrine that, although there was a breach of duty, the risk arising therefrom had been undertaken by the servant. In view of the other Texas decisions al-

the court expressly rejected the doctrine sons operating the trains, they would referred to in the next subdivision, viz., be justified in finding that defendants that, as the danger of contact with were guilty of negligence in its locastructures of this kind is a matter of tion).

the risk of being fit by them is, therefore, an obvious danger, and one assumed by the plaintiff when he entered into the service.

Solvey York, C. & St. L. R. Co. v. Ost. & T. R. Co. v. Ost. & T. R. Co. v. Oram (1898) 49 Tex. 341 man (1896) 146 Ind. 452, 45 N. E. 651. (structure closer than usual); Ft. In Pennsylvania Co. v. Finney (1896) Worth & D. C. R. Co. v. Graves (1893; 145 Ind. 551, 42 N. E. 816, a servant injured by a water plug was not allowed to recover, for the reason that there was no evidence to show that he 58 N. W. 408 (same facts); International doubtless have been different in a state where the burden of proving contributory negligence lies on the defendant. The instructions to the jury, in a case of this kind, should express the notion that the defendant was negligent if the structure in question was dangerous to a person exercising ordinary care. Gould v. Chicago, B. & Q. R. Co. (1885) (1888) 71 Tex. 700, 9 S. W. 741, S. C. 66 Iowa, 590, 24 N. W. 227 (disapprovents) as breach of company's own rules); Chi-cago, R. I. & P. R. Co. v. Clark (1882) (1882) into the service as breach of company's own rules); Chi-cago, R. I. & P. R. Co. v. Clark (1882) (1882) into the service as breach of company's own rules); Chi-cago, R. I. & P. R. Co. v. Clark (1882) (1882) into the plant of abreach of company's own rules); Chi-cago, R. I. & P. R. Co. v. Clark (1882) (1882) into the plant of abreach of company's own rules); Chi-cago, R. I. & P. R. Co. v. Clark (1882) (1882) into the plant of abreach of company's own rules); Chi-cago, R. I. & P. R. Co. v. Clark (1882) (1882) into the plant of abreach of company's own rules); Chi-cago, R. I. & P. R. Co. v. Clark (1882) (1882) into the plant of abreach of company's own rules); Chi-cago, R. I. & P. R. Co. v. Clark (1882) (1882) into the plant of abreach of company's own rules); Chi-cago, R. I. & P. R. Co. v. ing of an unqualified instruction to the tle guard struck brakeman while eneffect that, if the jury found that the deavoring to repair a defective brake). water column which caused the injury

Whipple v. New York, N. H. & H. R. was placed in such close proximity to Co. (1896) 19 R. I. 587, 35 Atl. 305, the track as to be dangerous to the per-

common knowledge, and as they are objects plainly visible, their presence is at once suggestive of danger; and that R. Co. (1891) 2 N. D. 128, 49 N. W. the risk of being hit by them is, therefore, an obvious danger, and one as- a breach of company's own rules); Chi-

ready cited, the latter hypothesis seems certainly to be the correct one with respect to the second of the cases cited. That it is also the correct one in respect to the New York case might seem to be a reasonable deduction from some of the decisions of this court in the analogous instance of overhead bridges. See next section. On the other hand, the fact that the English decision in Seymour v. Maddox<sup>6</sup> is cited with approval would rather point to the conclusion that, in the opinion of the court, there was not even a prima facie liability.

b. Conditions held not to import negligence.—In some of the cases in which the maintenance of structures of this description has been denied to be culpable, the controlling factor is the servant's presumed comprehension of the risks created by those structures. This circumstance is regarded as justifying one or other, or both, of two inferences, either of which is fatal to the right to maintain the action, viz., that there is no duty to change the conditions from which known risks arise<sup>7</sup> (see chapter vii., ante), or that the servant is able to protect himself, and if he did not do so, must have been himself guilty of negligence8 (see chapter IV., ante).

(1001) 14 Sc. Sess. Cas. 4th series, 499 11 Atl. 659 (oil house clearing cars by (side of bridge); Lovejoy v. Boston & some 8 inches). See also the cases L. R. Corp. (1878) 125 Mass. 79, 28 cited in note 5, supra, and compare Am. Rep. 206 (engineer struck by a the similar decisions under that section single post as he was leaning out of his control of the Massachusetts employers' liability of the similar decisions. single post as he was leaning out of his of the Massachusetts employers' habil-cab to look for a signal); Thain v. Old ity act which gives the servant a right Colony R. Co. (1892) 161 Mass. 353, 37 to recover for injuries caused by "defect N. E. 309 (similar accident, the obstruction being a temporary post put up as a support for a trestle); Fisk v. N. E. 309, the Massachusetts court Fitchburg R. Co. (1893) 158 Mass. 238, and if the doctrine by the following 33 N. E. 510 (brakeman getting down remark: "We assume that the rule is by a ladder on the side of the car—the not so strict in the case of employees only one on it—was struck by a proonly one on it—was struck by a pro-plecting awning); Hall v. Wakefield & confine themselves within the same line S. Street R. Co. (1901) 178 Mass. 98, at all times. . . . It may be that 59 N. E. 668 (tree close to street rail-they ought not to be held to take the way track); Austin v. Boston & M. R. risk of things 4 feet off, in all cases."
Co. (1895) 164 Mass. 282, 41 N. E. 288 In view of the circumstances under (brakeman proceeding to mount ladder to set brakes was struck by a gatepost); Bell v. New York, N. H. & H. R. Co. (1897) 168 Mass. 443, 47 N. E. 118 (brakeman, while descending a side lad-(brakeman, while descending a side ladder, was struck by a bridge pillar); from recovery.

Goodes v. Boston & A. R. Co. (1894)
162 Mass. 287, 38 N. E. 500 (switch close to track not a trap as to a brakeman engaged in coupling); Coombs v. Reliable of the complete of the

 (1851) 16 Q. B. 326, 20 L. J. Q. B. ing a switch, stood between it and the N. S. 327, 15 Jur. 723.
 Tack and was struck by the cars);
 M'Ghie v. North British R. Co. Kelly v. Baltimore R. Co. (1887; Pa.) (1887) 14 Sc. Sess. Cas. 4th series, 499 11 Atl. 659 (oil house clearing cars by which the injuries were received, in the cases cited above, it is difficult to assign any reasonable meaning to these words which is compatible with the conclusion that the servant was debarred

The courts which take this position concede that the case is for the jury, where the servant may, upon the evidence, have been excusably ignorant of the risk.9

Other cases turn upon the general principle developed in chapter v., ante, which is supposed to justify the conclusion that a railway company must be allowed to use its own discretion as to the kind of bridges it will use, and when, and under what circumstances they will remove or replace them, and that it cannot be required to condemu a bridge which is without fault in its plan, or defect in its structure, while it is in good repair, and safe for the passage of trains, simply because some expert pronounces it not to be as good or convenient as some other kind.10

In several decisions, one of the controlling considerations relied upon has been that the maintenance of the dangerous object did not import negligence, for the reason that it was placed in a position which the common usage of other railway companies sanctioned.<sup>11</sup> See § 44, ante. But this circumstance would not be conclusive in all courts. See § 50, ante.

engine, thus reducing the distance betelegraph pole, the evidence showing tween the side of the locomotive and the that there was no other like obstruction bridge, and making greater care necesalong the road from which plaintiff sary in entering it). This seems to be might have been charged with notice of the actual rationale of two Georgia decisions, in which recovery was denied on R. Co. (1899) 122 Mich. 179, 81 N. W. the ground that the plaintiff was negligent in leaning out of a car at the time hearing [1900] 122 Mich. 205, 82 N. W. and place in question without keeping 245 but this ruling was not modified. however, somewhat peculiar, viz., that, although a street railway company is not a structure, the danger of which negligent in locating a post very near was apparent.

the track, it is not relatively negligent

10 Illick v. Flint & P. M. R. Co. the track, it is not relatively negligent to a structure, the danger of which the track, it is not relatively negligent as to a motorman killed by colliding (1888) 67 Mich. 632, 35 N. W. 708 with such post while riding on the step of the front platform of such car, leaning outward and looking backward underneath the car, while under no necessity or duty to be in that position. In another Georgia case where the plaintiff failed to recover, Wolf v. East Tenessee, V. & G. R. Co. (1891) 88 Ga. (210, 14 S. E. 199 (mail crane), the precise grounds of the decision denying negligence are not mentioned.

As, where he was struck by a signal post closer than usual to the track (Scanlon v. Boston & A. R. Co. [1888] the condition of the decision of the decision denying negligence are not mentioned.

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and place in question without keeping 245, but this ruling was not modified.) a proper lookout. Atlanta & W. P. R. In Wood v. Louisville & N. R. Co. Co. v. Webb (1878) 61 Ga. 586 (water (1898) 88 Fed. 44, the court, in allow-tank); Sundy v. Savannah Street R. Co. ing the plaintiff to recover for an in- (1895) 96 Ga. 819, 23 S. E. 841. The jury caused by a cattle chute, distinghraseology used in the latter case is, guished such a case from those of low bridges, etc., on the ground that it was

c. Convenience or necessity as justifying elements.—The courts mentioned in subd. a, supra, naturally take the ground that railway companies, in erecting structures required for the transaction of their business as common carriers, are bound to consider the safety of their employees as well as their own convenience.<sup>12</sup> Under the doctrine adopted by the courts mentioned in subd. b, this element is plainly immaterial either one way or the other.

In the decisions of the first-mentioned group of courts, the fact that an unnecessary risk was created by the position of the structure in question is sometimes emphasized.13 And it seems clear that if there is any reasonable doubt as to a real and actual necessity for placing the structure in question in the position where it caused the injury, the negligence of the company must be primarily an issue for the jury, in all jurisdictions where the servant's knowledge of the conditions merely lets in the defenses of an assumption of the risk or contributory negligence, and is not a circumstance which, of itself, negatives a breach of duty.14 Compare § 23a, ante, and subd. c of the following section.

269, 4 So. 701 (supply pipe of water it was built with a view to the use of tank), the case was held to be for the cars of both descriptions. In that case, jury because the evidence of conformity its dangerous relation to the track was

tank), the case was held to be for the jury because the evidence of conformity to usage was not conclusive.

12 Murphy v. Wabash R. Co. (1892)
115 Mo. 111, 21 S. W. 862 (suitability of structures for the purpose of the company's business not enough to excuse it); Allen v. Burlington, C. R. & N. R. Co. (1882) 57 Iowa, 623, 11 N. W. 614 (1884), 64 Iowa, 94, 19 N. W. 807 (approving the refusal of an instruction requested by defendant, that it "had the right to construct its cattle chute in such manner, and in such close proximity to the railroad track, as would best subserve its purpose in safely loading and unloading live stock"). In Dorsey v. Phillips & C. Constr. Co. (1877) 42 Wis. 583, the court, in upholding a verdict for a brakeman who had been strucked by a cattle chute, said: "It may be that the cattle chute was constructed with a view to the exclusive use of cars having ladders on the ends only; in which case it might have in-

103 (coal bin); Murray v. New York volved no special danger. In that view, C. & H. R. R. Co. (1900) 55 App. Div. it might have become dangerous by the 344, 66 N. Y. Supp. 856 (water plug); use of cars having ladders on their sides Bell v. New York, N. H. & H. R. Co. only. The use of cars of the latter de- (1897) 168 Mass. 443, 47 N. E. 118 (no evidence that pillar of bridge was unusually close to the track). In Wilson mediate duty to remove the cattle chute v. Louisville & N. R. Co. (1887) 85 Ala. or change its structure. It may be that 269 4 So. 701 (supply pipe of water it was built with a view to the use of

d. Employer's liability as affected by the probability of the accident which actually occurred.—Two of the courts mentioned in subd. a, supra, have admitted a qualification of the company's liability in cases where the particular conjunction of events which caused the injury was one so improbable, or of such rare occurrence, that the company is not bound to anticipate or provide for it.<sup>15</sup> See §§ 142-146, post.

The same principle has also been applied in another state,16 in which the views held on the general question of the liability of a rail-

by objects like tunnels, bridges, etc., company could, with due care, have disand by objects not necessary for the opcovered it, and had it removed. Texas eration of the trains. In Louisville & P. R. Co. v. Hohn (1892) 1 Tex. Civ. N. R. Co. v. Milliken (1899) 21 Ky. L. App. 36, 21 S. W. 942.

Rep. 189, 51 S. W. 796, the case was held to be for the jury, only because the case was held to be for the jury, only because the could be shown that we want to the course to show that we want to the course to show that we want to show that ing (1899) 42 App. Div. 548, 59 N. was bound to anticipate that brakemen Y. Supp. 672, a verdict for the plaintiff was upheld, where a locomotive fireman was killed by being struck by a mail crane while on the gangway of his engine, the evidence being that the crane was unnecessarily near the track, and might have been located a few essary or usual does not establish neginches further therefrom, and that decedent was in the line of his duty. The case last cited was distinguished on the gangway of near the reference on the location replace one which had gone out. ground that the change in the location replace one which had gone out). in the present instance which would

inches to a shed belonging to a fac- have minimized the danger was entirely tory); Johnson v. St. Paul, M. & M. R. feasible and easy to make. The mere Co. (1890) 43 Minn. 53, 44 N. W. 884 fact that a timber which struck and incase held to be for jury, as evidence of jured a railway brakeman while he was necessity was not conclusive). In Nance ascending the ladder on the side of a Newport News & M. Valley Co. car was part of a temporary structure (1891) 13 Ky. L. Rep. 554, 17 S. W. erected for the purpose of repairing a 570, where the plaintiff was allowed to water tank will not relieve the comretain a verdict in case of an injury pany from liability, if the projecting caused by a beam projecting from the timber which struck him was not necessity side of an old warehouse, the court dissary to the work of repair, or was left tinguished between the danger created there so long before the injury that the

neid to be for the jury, only because the (1891) 83 Iowa, 616, 13 L. R. A. 817, 50 evidence tended to show that a "mail N. W. 209 (not negligence to locate crane" was 8 inches closer than was rewing fences of cattle guards, in view of quired by the United States governsuch an improbable occurrence as that ment. In Sisco v. Lehigh & H. River R. of a brakeman hanging out from the Co. (1895) 145 N. Y. 296, 41 N. E. 90, bottom of the car ladder to examine a Reversing (1894) 75 Hun, 582, 27 N. brake); Koontz v. Chicago, R. I. & P. Y. Supp. 671, one of the grounds on R. Co. (1884) 65 Iowa, 226, 54 Am. which it was held that there could be Rep. 5, 21 N. W. 577 (not the duty of a no recovery for an injury caused by a railway company to plank every bridge mail crane was that it did not appear to and cattle guard to prevent accidents to have been practicable to locate it at a its employees, though it may anticipate greater distance from the track, and that trains may be required to halt at greater distance from the track, and that trains may be required to half at still have it answer the purpose for other than the usual stopping places); which it was erected. In Brown v. Flanders v. Chicago, St. P. M. & O. R. New York C. & H. R. R. Co. (1901; Co. (1892) 51 Minn. 193, 53 N. W. 544 N. Y.) 60 N. E. 1107, Affirm- (for jury to say whether the companying (1899) 42 App. Div. 548, 59 N. was bound to anticipate that brakemen

way company for this particular sort of structure are probably the same as in the states just referred to, if such identity of opinion is an allowable inference from its declared adhesion to the doctrine that it is negligent to maintain a low overhead bridge. See next section.

- 71. Objects dangerous to employees on the tops of cars. (See also § 86, post.)—In the main, the considerations relied upon as determining factors in the cases just discussed are controlling in the cases which involve the liability of railway companies for injuries caused by low overhead bridges, and other objects so placed as to imperil the safety of employees on the tops of cars. It will be found, therefore, that the boundaries between the decisions which affirm and those which deny liability for such injuries run, upon the whole, along the same doctrinal lines as we had occasion to trace in the preceding section. Some differences, however, in the footing on which the two classes of cases are dealt with have necessarily arisen from the fact that, in a large proportion of those which are now to be reviewed, the dangerous object was a bridge constructed to carry a highway over the track. This circumstance introduces into the problem a new element which can rarely, if ever, appear in cases of the other type, viz., the interest which particular individuals or the public at large may have in the maintenance of such a bridge at a certain level. Usually, this element does not affect the determination of the problem. sometimes it may be of decisive weight. See subd. c, infra.
- a. Conditions held to import negligence.—The hypothesis underlying one group of decisions is that it is the duty of a railway company to see that structures and other objects above its track are elevated above it sufficiently to enable train hands to perform their work with reasonable safety.1 Gauging the significance of the phrase "reasonable safety" by the standard of an employee who is assumed to exercise ordinary care (see chapter iv., ante), most of the courts which reason upon this basis have deduced a doctrine which is recognized explicitly in many of the cases cited below, and is not inconsistent with any of them, --viz., that a jury is always warranted in finding a railway company culpably negligent whenever a dangerous object is not sufficiently elevated above its track to clear the heads of trainmen while they are standing or walking, in an erect posture, on the tops of freight cars.2 Some other cases possibly embody the same

<sup>\*\*</sup>Baltimore & O. & C. R. Co. v. Rowan (1885) 104 Ind. 88, 3 N. E. 627. Compare the phraseology used in St. Louis, 584 (bridge 4 ft. 9 in. above the tops Ft. S. & W. R. Co. v. Irwin (1887) 37 of cars). The court sustained its view by adverting to the fact that the brakes

view, but, owing to the grounds upon which the decisions actually turned, the precise position of the courts is not always clearly defined.3 It should be remarked, however, that the manner in which

were on the tops of the cars, and, to get & H. R. Co. v. O'Leary (1899) 35 C. C. pass over the tops of the cars, not only stretched across track). in the daytime, but also in the nighttime, and often, doubtless, when the Co. (1889) 116 N. Y. 628, 22 N. E. night was dark, rainy and foggy, and 1117, Reversing (1886) 39 Hun, 430, when it would be almost, if not quite, the court seems to have assumed that impossible for them to know of the the maintenance of the low bridge imeven if they had knowledge that such servant was himself negligent, the accibridges were maintained. The vigorous dent having occurred in broad daylight, denunciation of structures of this type when there was nothing to distract his in Shearm. & Redf. Neg. § 197, was attention. An inference of the same mentioned with approval. Other siminature may be drawn from Wallace v. mentioned with approval. Other siminature may be drawn from Wallace v. lar decisions as to overhead bridges are, Central Vermont R. Co. (1893) 138 N. Pennsylvania Co. v. Sears (1893) 136 Y. 302, 33 N. E. 1069, where the case Ind. 460, 34 N. E. 15, 36 N. E. 353; was held to be for the jury, on the Louisville & N. R. Co. v. Banks (1894) ground that the evidence as to the 104 Ala. 508, 16 So. 547 (maintenance plaintiff's negligence was not concludenied to be wilful negligence); Cleveluse order, and it is not altogether clear, (1893) 147 Ill. 60, 35 N. E. 529; Wells from the reasoning of the court, v. Burlington, C. R. & N. R. Co. (1881) whether this was regarded as a different on the ground of an assumption of maintenance of the low bridge a breach the risk); St. Louis, Ft. S. & W. R. Co. v. Love of duty, or whether such maintenance v. Irwin (1887) 37 Kan. 701, 16 Pac. was considered to be, in itself, a negli-146; Atchison, T. & S. F. R. Co. v. Love (1895) 57 Kan. 36, 45 Pac. 59; Atchison, T. & S. F. R. Co. v. Love ond ground was also assigned for the son, T. & S. F. R. Co. v. Rowan (1895) 55 Kan. 270, 39 Pac. 1010; Cincinnati. the bridge was patent, and therefore asson. O. & T. P. R. Co. v. Sampson (1895) 97 Ky. 71, 30 S. W. 13; Derby v. Ken-vous significance in the present connectivity. I. M. & S. R. Co. (1879) 71 Mo. 164, 36 view of the stress laid on the contribAm. Rep. 459; Hunter v. New York, O.

& W. R. Co. (1890) 32 N. Y. S. R. 713, latter conception may fairly be taken to
10 N. Y. Supp. 795; Atlee v. South Carollina R. Co. (1884) 21 S. C. 550 (nonsuit rightly refused, where bridge was
too low for a brakeman to pass under it,
standing); Texas & P. R. Co. v. Moore
(1894) 8 Tex. Civ. App. 289, 27 S. W.
a visible one, clearly incident to the em962; Northern P. R. Co. v. Mortenson
(1894) 11 C. C. A. 335, 27 U. S. App.
313, 63 Fed. 530. See also, to the same
effect, Clark v. St. Paul & S. C. R. Co.
(1881) 28 Minn. 128, 9 N. W. 581 (proconstruction as that which we have atjecting roof); Renne v. United States
11 Leather Co. (1900) 107 Wis. 305, 83
N. W. 473 (steam pipe less than 4 feet
above a side track); New York, N. H. Min. Co. (1891) 40 N. Y. S. R. 556, 15

to them, the brakemen were required to A. 562, 93 Fed. 737 (guy of derrick

<sup>3</sup> In Williams v. Delaware, L. & W. R. proximity of such bridges when called ported negligence, as one of the grounds to apply the brakes upon moving trains, on which the action failed was that the 97 Ky. 71, 30 S. W. 13; Derby v. Kenous significance in the present connectucky C. R. Co. (1887) 9 Ky. L. Rep. tion, as it would be appropriate to an 153, 4 S. W. 303; Louisville & N. R. Co. application either of the theory disv. Cooley (1899) 20 Ky. L. Rep. 1372, cussed in chapter VII., or of the theory 49 S. W. 339; Devitt v. Pacific R. Co. of a waiver of a breach of duty which (1872) 50 Mo. 302; Rains v. St. Louis, would otherwise be actionable. But, in I. M. & S. R. Co. (1879) 71 Mo. 164, 36 view of the stress laid on the contribsome of the courts have construed the obligation of the employees to exercise due care has, for practical purposes, greatly restricted the beneficial operation of this doctrine. See chapters IV., XIX.

If a bridge is of such a height that a servant on top of the trains cannot avoid danger, by bending or stooping, it is regarded as not only importing gross negligence, but as being per se a nuisance.4

In Illinois, while it is conceded that the upper timbers of bridges constructed to carry the trains themselves should be high enough to allow brakemen to pass, without danger, through the bridges,5 it is also held that this rule does not oblige the companies to construct those timbers at such a height that a train hand can pass under them in a standing posture.6

of this state to explain somewhat more merely corrobative evidence of negli-

was negligence, but the decision turned on the tops of cars, the maintenance of on the contributory negligence of the plaintiff. In Carbine v. Bennington & negligence, but decided against the R. R. Co. (1889) 61 Vt. 348, 17 Atl. plaintiff on the ground of his assumption of the basis of the decision is that plaintiff knew of, and therefore accepted, the risk. In Darling v. New South Carolina R. Co. (1884) 21 S. C. York, P. & B. R. Co. (1892) 17 R. I. 550.

708, 16 L. R. A. 643, 24 Atl. 462, it was held that the maintenance of a danger. held that the maintenance of a dangerously low telltale was negligence as to So. 277. a servant who did not know of the conously low telltate was legigented as to 21.1.

a servant who did not know of the conditions. But, in view of the position waster (1893) 147 Ill. 60, 35 N. E. taken in this state as to the culpability 529; Chicago & A. R. Co. v. Johnson of a company in maintaining structures (1886) 116 Ill. 206, 4 N. E. 381 (apof a company in maintaining structures dangerously near a track (see note 1 to proving an instruction that the roof of preceding section), it may reasonably be presumed that the servant's ignorance be high enough to enable servants to pass under it in safety).

of the risk, or contributory negligence.
In Ft. Worth & R. G. R. Co, v. Kime

pass under it in safety).

of Chicago & A. R. Co. v. Johnson
(1886) 116 Ill. 206, 4 N. E. 381.

N. Y. Supp. 872, the court did not decide explicitly whether the maintenance 558, Affirmed in (1899; Tex.) 54 S. W. of a low bridge was negligent, recovery 240, the gist of the negligence is stated being denied on the ground that the to be that the defendant had not plaintiff was negligent in standing upright on an unusually high car, with his in Gulf, C. & S. F. R. Co. v. Know back towards the bridge. A decision of (1901; Tex. Civ. App.) 61 S. W. 969, the supreme court which is clearly in the actual scope of the decision is no the servant's favor has already been cited in note 2, supra. This sumlow bridge without telltales is neglimary of the effect of the cases shows gence. But, apparently, the elements that it would be desirable for the courts thus adverted to are to be treated as of this state to explain somewhat more of this state to explain somewhat more merely corrobative evidence of negliclearly the position which they hold gence, and these decisions are not to be with regard to injuries of this sort.

In Goff v. Norfolk & W. R. Co. (1888) 36 Fed. 299, and Williamson v. Moore (1894) 8 Tex. Civ. App. 289, 27 Neurport News & M. Valley Co. (1891)

34 W. Va. 657, 12 L. R. A. 297, 12 S. G. R. Co. (1884) 21 S. C. 541, the court E. 824, the courts seemed to concede doubted whether, in view of a change of that the maintenance of a low bridge regulations, requiring brakemen to be on the contributory negligence of the a low bridge ought not to be treated as

<sup>4</sup>Louisville & N. R. Co. v. Hall (1888) 87 Ala. 708, 4 L. R. A. 710, 6

a truss bridge carrying the track should

In some of the cases cited in this subdivision, the injury was due to the fact that the car on which the servant was standing was considerably higher than usual. Under the doctrine applied in the cases cited in the next subdivision, it is presumed that this circumstance would, at all events, be sufficient to require the submission of the case to the jury, and recovery would ultimately depend upon whether the servant knew of the unusual danger thus created.

b. Conditions held not to import negligence.—Other courts treat the servant's knowledge or ignorance of the conditions and the resulting risks as the differentiating factors by which the defendant's liability is determined. One inference drawn from evidence showing that he understood the risk to be encountered is simply that, under the general principles explained in chapter VII., ante, there is no negligence in maintaining the bridge, whatever may be its height.8 Viewed from another standpoint, the servant's comprehension of the danger is regarded as justifying the conclusion that an overhead bridge, so low that it will strike an employee standing on the top of a car, may be maintained without culpability for the reason that he can pass under it, by what is termed, in one case, the "simple and easy expedient of stooping or sitting down."9 The courts which be-

'See Darling v. New York, P. & B. the top of the car, although he was at R. Co. (1892) 17 R. I. 708, 16 L. R. A. his post in response to a signal just 643, 24 Atl. 462 (telltale so low as to given by the engineer to apply the be dangerous to men on unusually high brakes). But, in an earlier Virginia be dangerous to men on unusually high brakes). But, in an earlier Virginia cars); Northern P. R. Co. v. Mortenson (1894) 11 C. C. A. 335, 27 U. S. App. have been somewhat different, as it re-313, 63 Fed. 530 (car was 2 ft. 6 in. higher than the average); Southern R. Co. v. Duvall (1899) 21 Ky. L. Rep. pable for lowness of bridge, yet the 1153, 54 S. W. 741, Affirming on rehearing 20 Ky. L. Rep. 1915, 50 S. W. 535 (car was about 2 feet higher than those of ordinary height. Bridge could just be touched by a man of average height, with the tips of his fingers, ter. Clark v. Richmond & D. R. Co. while standing on an ordinary car); (1884) 78 Va. 709, 49 Am. Rep. 394. Derby v. Kentucky C. R. Co. (1897) 9 In another case, Beard v. Chesapeake & Ky. L. Rep. 153. 4 S. W. 303.

\* Myers v. Chicago, St. P. M. & O. R. 559, the same court allowed a brakeman Ky. L. Rep. 153. 4 S. W. 303.

<sup>8</sup> Myers v. Chicago, St. P. M. & O. R.

Co. (1899) 37 C. C. A. 137, 95 Fed. 406; to recover for an injury caused by an Allen v. Boston & M. R. Co. (1897) 69

N. H. 271, 39 Atl. 978.

<sup>9</sup> Baltimore & O. R. Co. v. Stricker (1878) 51 Md. 57, 34 Am. Rep. 291; which acted so slowly that he was car-Baylor v. Delaware, L. & W. R. Co. ried with unexpected rapidity against (1878) 40 N. J. L. 23, 29 Am. Rep. 208; the structure. In Pittsburgh & C. R. Chesapeake & O. R. Co. v. Hafner Co. v. Sentmeyer (1879) 92 Pa. 276, 37 (1894) 90 Va. 528, 31 N. E. 899 (recovery detay to be error to give an instruction to the 96 Va. 528, 31 N. E. 899 (recovery de- to be error to give an instruction to the nied, where a brakeman struck his head effect that the defendant was bound to against a bridge only 28 inches above have all the bridges crossing its road of

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long to this group concede that the maintenance of a low bridge is negligence as to a servant who is not aware of the danger.<sup>10</sup>

Sometimes the maintenance of such bridges is justified in part by the consideration that they are in common use, 11 or that such an arrangement is an allowable exercise of the right of the companies to carry on their business in their own way.12

- c. Convenience or necessity as justifying elements.—In some of the cases cited under subd. a, note 2, supra, stress is laid by the courts on the fact that the construction of the bridge at the level in question was not necessary.<sup>13</sup> What is to be regarded as a justifying necessity is discussed generally in § 23a, ante, where, also, the bearing of the fact that a bridge could or could not have been altered without much expense and inconvenience is dealt with. Compare also subd. c of the last section.
- 72. Want of fencing of railway tracks.—(See also § 87, post.)— The cases in which the common-law right of an employee to recover for injuries caused by the want of fences to keep out cattle has been discussed are singularly conflicting.

In a recent New York case the existence of a duty to build fences has been deduced as a corollary from the duty of the company to

such a height that, whether its employees were careful or negligent, no damage could result to them therefrom, said: "What is the logical result of a doctrine such as this? Is it not that the company must not only guard its servants from probable, but also from possible dangers, and that it must place its servants."

Sentmeyer (1879) 92 Pa. 276, 37 Am. Rep. 684.

"Baylor v. Delaware, L. & W. R. Co. (1878) 40 N. J. L. 23, 29 Am. Rep. 208.

"Brossman v. Lehigh Valley R. Co. (1886) 113 Pa. 491, 57 Am. Rep. 479, 6 Atl. 226. servants from probable, but also from possible, dangers, and that it must place no dependence on their care and skill, even in the matter of their own preservation and personal safety? That it must provide against their very negligence, and become an insurer of their limbs and lives? We need not say this limbs and lives? We need not say this reasonably practicable, to place its overwill not do; that neither natural nor artificial persons can bear a burden such artificial persons can bear a burden such as this; neither ought they so to do.

as this; neither ought they so to do. When men are hired, something must that they may be built below the level be predicated of their judgment and prudence, and hence, when the employer furnishes them with tools and appliances which, though not the best possible, may by ordinary care be used public in the use of the bridge, or without danger, he has discharged his duty, and is not responsible for accidents."

The view taken is that, under these circumstances, one inconvenience must vield to another. Louisville & N. these circumstances, one inconvenience of the stress of th

keep its line free from obstructions. This doctrine has been adopted in Missouri.2

But other decisions are to a contrary effect.3 Three of these, however, antedate the New York case cited above, and one of them, as is pointed out in the note thereto, relies on the case there expressly overruled. The other two, although they were of later date than the New York case, do not refer to it, and are, therefore, only entitled to such weight as may be claimed for them, in view of the fact that the arguments there used were not considered by the courts. To the present writer, those arguments seem to be quite conclusive in favor of holding a company liable for its failure to provide against such an obvious source of danger as cattle straying on the line.

The right of an employee to take advantage of the breach of statutes requiring railway companies to fence their tracks is discussed in chapter xxxiv.

73. Coupling appliances of railway cars and locomotives.— (See also § 88, post.)—The cases dealing with injuries caused by coupling ap-

¹Donnegan v. Erhardt (1890) 119 N. fence its track for the benefit of em-Y. 468, 7 L. R. A. 527, 23 N. E. 1051. ployees. Cowan v. Union P. R. Co. The court said: "The track must be (1888) 35 Fed. 43 (complaint relying properly laid and the roadbed properly on such an obligation, held demurraconstructed, and reasonable prudence and care must be exercised in keeping (1879) 5 Ill. App. 590, it was held, on the track free from obstructions, animate and inanimate; and if, from want (1854) 19 Barb. 365 (see note 1, of proper care, such obstructions are supra), that there was no common-law permitted to be or come upon the track, duty to fence a track. In Patton v. and a train is thereby wrecked, and any Central Iouca R. Co. (1887) 73 Iowa, person thereon is injured, the railroad company, upon plain common-law printaken that railway companies must be

did not require a railway company to

person thereon is injured, the railroad 300, 35 N. w. 149, also, the ground was company, upon plain common-law printaken that railway companies must be ciples, must be held responsible. Expeallowed to determine for themselves rience shows that animals may stray whether they will put up fences in all upon a railroad track, and that, if they places where they might. The risks do, there is danger that a train may arising from the unfenced condition come in collision with them and be were said to be obvious, and therefore the condition of the condi wrecked. Adequate measures, reason-accepted by trainmen. In *Tillotson* v. able in their nature, must be taken to *Texas & P. R. Co.* (1892) 44 La. Ann. guard against such danger. Independ- 95, 10 So. 400, the court, in applying ently of any statutory requirement, a this doctrine, also held that the fact of jury might find, upon the facts of a the defendant's having fenced a part of case, that it was the duty of a railroad its track did not impose upon it the company to fence its tracks, to guard duty of fencing the whole track, and against such danger." Langlois v. Buf-that, in the absence of legislation refalo R. Co. (1854) 19 Barb. 365, was quiring the entire fencing of the tracks, the company was left with the discre-<sup>2</sup> Dickson v. Omaha & St. L. R. Co. tion of placing fencing where there was, (1894) 124 Mo. 140, 25 L. R. A. 320, 27 in its judgment, danger. In Ward v. in its judgment, danger. In Ward v. Bonner (1891) 80 Tex. 168, 15 S. W. 8. W. 476.

a In a short opinion, Mr. Justice
Brewer, while a circuit judge, laid it with cattle was held to be an ordinary down that the common law in Colorado one.

pliances and other parts of railway cars furnish a most instructive illustration of the futility of expecting anything like unanimity in respect to the application of the general principle, not disputed by any court, that the law does not require that all the appliances of a certain kind used by an employer should be constructed after the same pattern, but merely that they should all be reasonably safe.

Numerous decisions, in asserting for the employer the privilege of selection which is secured to him by the former clause of this statement, have gone to such lengths that the qualification contained in the latter statement seems to have been, for practical purposes, altogether ignored. Thus, it has been held that negligence cannot be inferred from the mere fact that the drawbars, drawheads, or buffers were so short that the two cars to be connected came dangerously close together when they met; 1 nor from the mere fact that the couplings were so dissimilar that the cars could not be united without an unusual degree of peril.2 It should be observed, however, that the serv-

drawhead).

 <sup>2</sup> Pennsylvania Co. v. Ebaugh (1895)
 144 Ind. 687, 43 N. E. 936; McDonald v. Norfolk & W. R. Co. (1897) 95 Va. 98, 27 S. E. 821 (two patterns in use); CO. (1898) 172 Mass. 130, of N. E. 415, Ft. Wayne, J. & S. R. Co. v. Gildersleeve (1876) 33 Mich. 133 (one car lower than the other); Botsford v. Michigan C. R. Co. (1876) 33 Mich. 256 (similar facts). The rule is the same, whether the dissimilar cars belong to the definition of the design of th on foreign cars, single on defendant's);

Whitwam v. Wisconsin & M. R. Co. (same facts); Murphy v. Lake Shore & (1883) 58 Wis. 408, 17 N. W. 124 (not M. S. R. Co. (1896) 67 Ill. App. 527. negligence to use an engine, the drawbar of which was too short to permit (1895) 91 Va. 668, 22 S. E. 496, the one of the cars to be safely coupled to court said: "To hold that a railroad court said one of the cars to be safely coupled to court said: "To hold that a railroad or detached from it); Brooks v. North-company was negligent unless every car ern P. R. Co. (1891) 47 Fed. 687 in a train was of the same height would, (drawhead of engine so short as to in our opinion, be requiring an extraor-leave an insufficient space for a brakeman, when the tender had to be attached to a car); Way v. Illinois C. R. be to compel such company to have all Co. (1875) 40 Iowa, 341 (deadwoods its own cars changed to or made the of foreign cars came very close together same height, or to have only cars of the same height placed in the same train. It would also be required to have the same height placed in the same train. It would also be required to have the railroad companies whose cars pass over its line make their cars of the same height, or put only those of the same height in the same train, or transfer all Ellsbury v. New York, N. H. & H. R. freight at its terminal points to other Co. (1898) 172 Mass. 130, 51 N. E. 415; cars, or cease to do business with connecting lines. Such a rule would be impracticable, as well as expensive and burdensome to the railroad company." In Pittsburgh & L. E. R. Co. v. Henly (1891) 48 Ohio St. 608, 15 L. R. A. 384, 29 N. E. 575, the court said: "To the dissimilar cars belong to the defendant, or to a connecting company. require that railroad companies shall Woodworth v St. Paul, M. & M. R. Co. provide uniform couplings on all their (1883) 5 McCrary, 574, 18 Fed. 282; cars would cripple every effort looking Louisville & N. R. Co. v. Boland (1892) towards improvement. No change could 96 Ala. 626, 18 L. R. A. 260, 11 So. 667; be made, no new appliance tested and Baldwin v. Chicago, R. I. & P. R. Co. its utility determined, without incur- (1879) 50 Iowa, 680 (double deadwoods ring a liability no prudent company of foreign cars, single on defendant's): would care to assume. The occupation would care to assume. The occupation of one whose duty is to couple cars is, Rohn v. McNulta (1892) 147 U. S. 238, of one whose duty is to couple cars is, 37 L. ed. 150, 13 Sup. Ct. Rep. 298 at best, highly hazardous, and it acant's excusable ignorance of the conditions introduces into cases of this type a new element, which will enable him sometimes to recover for an injury which would otherwise not be actionable.3 See chapter vii., ante.

Other decisions upholding the right of the employer to conduct his business in his own way may be justified on special grounds, applicable to the particular circumstances,—as, where the device in question was one of a merely temporary character,4 or where the dangers created by the arrangements objected to were such as to be readily apparent to the servant from the very first moment that the cars came

cords with a sound and enlightened decisions, therefore, are essentially inigencies of commerce require that cars of other railroads shall be transported over it, with couplings as varied as human ingenuity, and the taste and judgment of the managers of the railroads of the country, may choose to make them." In Umback v. Lake Shore & M. S. R. Co. (1882) 83 Ind. 191, it was not specifically determined whether the use of dissimilar couplings was negligence, the action being held not mainof the risk. The same uncertainty exists as to the views of the court in Norfolk & W. R. Co. v. Emmert (1887) 83 Va. 640, 3 S. E. 145, as the action failed on the ground that the plaintiff was negligent in not using a crooked coup-

Two courts have refused to hold the company negligent in using the ordinary style of drawbar, in combination freight car).
with that termed the "Miller" coupling. 'Negligence is not predicable from Toledo, W. & W. R. Co. v. Asbury (1877) 84 Ill. 429; Thomas v. Missouri P. R. Co. (1891) 109 Mo. 187, 18 S. W. 980. In the former case the court prosafety, for it is mentioned in the opin-station where it could be repaired. Darion that there was nothing to provent racott v. Chesapeake & O. R. Co. (1887) the platform on the "Miller" car coming against the end of the other. Those

public policy to encourage such at- consistent with those cited in note 7, tempts as may be made to introduce de-vices designed to diminish this danger. (1893) 9 C. C. A. 229, 13 U. S. App. But, were that not so, it nevertheless 229, 60 Fed. 704, the court seems to would be of little or no practical bene-have assumed that this combination of fit to one engaged in coupling cars, to couplings was negligent, but the main require a railroad company to have all ground of the decision was that no its couplings uniform, so long as the exproper pin was furnished with which to make the coupling.

In two cases it was even denied to be negligent to use a car, the drawbar of negigent to use a car, the drawbar of which had dropped below its normal level. Brewer v. Flint & P. M. R. Co. (1885) 56 Mich. 625, 23 N. W. 440; Texas & P. R. Co. v. Rhodes (1895) 18 C. C. A. 9, 30 U. S. App. 561, 71 Fed. 145. But this view is inconsistent with the grapelly accepted destrict that the generally accepted doctrine that a master is not entitled to carry on his tainable on the ground of an assumption business with instrumentalities which are specifically defective. See § 41,

<sup>3</sup> Russell v. Minneapolis & St. L. R. Co. (1884) 32 Minn. 230, 20 N. W. 147 ("Miller" and common coupling used together); Hungerford v. Chicago, M. & St. P. R. Co. (1889) 41 Minn. 444, 43 N. W. 324 (goose-neck coupling device on engine, and common coupling on

the fact that a rope was used, instead of a chain, to couple two of the cars in of a chain, to couple two of the cars in a wrecking train. Tabler v. Hannibal & St. J. R. Co. (1887) 93 Mo. 79, 5 S. W. 810; Muirhead v. Hannibal & St. J. R. Co. (1890) 103 Mo. 251, 15 S. W 530. Nor from the fact that what is known as the "three-link coupling" was 980. In the former case the court pro& St. J. K. Uo. (1881) 93 Mo. 79, 5 S.
ceeded upon the ground that there was W. 810; Muirhead v. Hannibal & St. J.
no evidence to show that the "Miller" R. Co. (1890) 103 Mo. 251, 15 S. W
coupling was more dangerous than the 530. Nor from the fact that what is
other. But the latter can only be regarded as an unqualified assertion of the company's right to use two different drawhead, in order that the car might
patterns, without regard to the servant's be put in a condition to proceed to a
secretar for it is mentioned in the oninstation where it could be renaired. within his range of vision, and it was, therefore, not unreasonable to assume that he could protect himself from injury by the exercise of ordinary care. See chapter iv.

It is not the duty of a company to equip its cars with deadwoods, so as to prevent the drawheads from coming into contact when the cars are being coupled. Some of the cases in which the courts have allowed the plaintiff to recover, on the ground that the standard of reasonable safety had not been attained, are, upon the facts presented, irreconcilable with many of those cited in the foregoing paragraphs.7

<sup>6</sup> Under this head may be classed the hook was used as a means of attaching cases in which the use of cars with a traction cable alternately to each of double buffers has been denied to im- two cars which were operated on an inport negligence: Kohn v. McNulla cline. Burke v. Witherbee (1885) 98 (1893) 147 U. S. 238, 37 L. ed. 150, 13 N. Y. 562. Sup. Ct. Rep. 298; Northern P. R. Co. "Hannigan v. Lehigh & H. River R. v. Blake (1894) 11 C. C. A. 93, 27 U. Co. (1898) 157 N. Y. 244, 51 N. E. 992, S. A. D. 100, 25 Ed. 45, Michigan C. Revision (1895) 21 Hy 230, 24 N. v. Blake (1894) 11 C. C. A. 93, 27 U. S. App. 190, 63 Fed. 45; Michigan C. R. Co. v. Smithson (1881) 45 Mich. 212, 7 N. W. 791; Hathaway v. Michigan C. R. Co. (1883) 51 Mich. 253, 47 Am. Rep. 569, 16 N. W. 634; Indianapolis. B. & W. R. Co. v. Flanigan (1875) 77 Ill. 365; Pennsylvania Co. v. Ebaugh (1895) 144 Ind. 687, 43 N. E. 936; Dysinger v. Cincinnati, S. & M. R. Co. (1892) 93 Mich. 646, 53 N. W. 825; Chicago, B. & Q. R. Co. v. Curtis (1897) 51 Neb. 442, 71 N. W. 42; Toledo, W. & W. R. Co. v. Black (1878) 88 III. 112; Illinois C. R. Co. v. Harris (1894) 53 Ill. App. 592; Osborne v. Knox & L. R. Co. (1877) 68 Me. 49, 28 Am. Rep. 16. Upon the same ground, if at all, E. 957 (tender was 3 or 4 inches higher must be sustained the following decisions: That a chafing iron was used as a means of coupling an engine to a freight car. Hatter v. Illinois C. R. Co. (1892) 69 Miss. 642, 13 So. 827. That a locomotive tender was not furnished with an iron rail at the rear, to serve as a hand-hold for brakemen. Lyttle v. Chicago & W. M. R. Co. (1890) 84 Mich. 289, 47 N. W. 571. That a common passenger engine with a high tender and a "goose-neck" coup-ler was used, instead of the switch engine of the pattern usually adopted in large yards. Fowler v. Chicago & N. W. R. Co. (1884) 61 Wis. 159, 21 N. W. 40 (switchman here had been instructed in the use of the engine). That the couplings used were too weak to bear the strain put upon them by "double heading" the train. Hawk v. Pennsylvania R. Co. (1887; Pa.) 9 Cent. Rep. 786, 11 Atl. 459 (contention of plaintiff was that, if two engines were used, one 845, 16 S. E. 698, it was laid down as should have been a "pusher"). That a a general rule, that when freight cars

Reversing (1895) 91 Hun, 300, 36 N. Y. Supp. 293, where it was also said that, even if it were to be assumed that the use of a car without deadwoods is negligent, the plaintiff could not recover on this ground for an injury caused by the drawheads coming together, since practically all the evidence in the case was to the effect that the function of deadwoods was not to prevent drawheads from coming together.

<sup>7</sup> As, where two pieces of rolling stock, regularly coupled together, were so illy matched that they could not be safely operated. Krueger v. Louisville, N. A. & C. R. Co. (1886) 111 Ind. 51, 11 N. than deck of engine, and lost motion was thereby generated, rendering the tender liable to be detached from the engine). And where coupling appliances or other parts of the car were such as to render the work of coupling unusually dangerous. Toledo, W. & W. R. Co. v. Fredericks (1874) 71 Ill. 294 (drawbars too short); Lawless v. Connecticut River R. Co. (1883) 136 Mass. 1 (same facts); Belair v. Chicago & N. W. R. Co. (1876) 43 Iowa, 662 (same facts); Dooner v. Delaware & H. Canal Co. (1895) 171 Pa. 581, 33 Atl. 415 (same facts); Gibson v. Pacific R. Co. (1870) 46 Mo. 163, 2 Am. Rep. 497 (spring of drawbar too short); *Chi*cago, R. I. & P. R. Co. v. Linney (1893) 7 C. C. A. 656, 19 U. S. App. 315, 59 Fed. 45 (short drawhead on foreign car). In Mason v. Richmond & D. R. Co. (1892) 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 698, it was laid down as

Other cases in which the action was held to be maintainable, so obviously came within the principle that a master is not justified in exposing his servants to danger, from which they cannot protect themselves by ordinary care, that it is probable that no court would deny that the circumstances presented a case of prima facie liability. Cases answering this description are those in which the couplings of two cars were so constructed that they overlapped when they came together, thus exposing the person making the coupling to the danger of being crushed.8 But the inchoate right of action thus conceded will, of course, be defeated if, as a matter of fact, it appears that the servant understood the risks involved (see chapter xvII.), or that he was guilty of contributory negligence. 10

leave only 10 inches between a car and the ground that the risk was obvious, locomotive when they came together, and therefore assumed.

goose-neck, was not reasonably safe used, in the a when used with freight cars seems to connect cars). have been assumed in Grannis v. Chi-

are so defectively made, whether owing Munroe (1877) 85 III. 25, it was not to a failure to attach bumpers at all, directly decided whether the absence of or to make them sufficiently long to pro- an appliance to keep the coupling link tect a person standing between the cars from running back imported negligence, when in motion, or in consequence of the servant being held to have assumed any other fault in construction, that the risk, as an obvious one. In Second the slightest indiscretion on the part v. Chicago & M. L. S. R. Co. (1895) 107 of an operative may endanger his life, Mich. 540, 65 N. W. 550, it seems to the company is liable for any injury rehave been regarded as negligent to use sulting from such defects. In Bennett a car with a drawbar which had to be v. Northern P. R. Co. (1891) 2 N. D. raised and lowered in the saddle to 112, 13 L. R. A. 465, 49 N. W. 408, adapt it to other drawheads of different where a drawbar was so short as to heights. But recovery was denied on

leave only 10 inches between a car and locomotive when they came together, the usual space, according to the evidence, being from 24 to 30 inches, the court said: "To so diminish this usual standing room that an employee is almost sure to be caught, when in the discharge of his duties, between a heavy standing car and an engine whose momentum, because of its weight, is nomentum, because of its weight, is remendous, however slow its speed, would seem to be some evidence of negligence. If the space is too narrow for locomotive too low); Ellis v. New York, L. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le Clair v. First Div. of St. Paul & P. Le

9 Upon this ground the plaintiff was Ga. 465, it was apparently regarded as v. Williston [1892] 48 Minn. 299, 51 N. negligent to use on a tender a hinged W. 373 [drawbars on cars of logging drawbar, which was too short, and liatrain were so low that they passed unble to turn, when a coupling was made der the engine]; Moore v. Kansas City, with a car. In Chicago & A. R. Co. v. Ft. S. & M. R. Co. [1898] 146 Mo. 572,

There is no dispute as to the point that negligence may be predicated of the failure of a company to supply coupling pins and links of the kind required for the purpose of making a reasonably safe coupling under the circumstances.11

In some cases of this type conformity or nonconformity to common usage is the controlling element, or one of the controlling elements, 12 but it must be remembered that its significance is not the same in all iurisdictions. See chapter vi., ante.

74. Other parts or appurtenances of railway cars and locomotives.— In the cases collected in the note below, recovery was denied upon the ground that a railway company has the right to use whatever pattern of rolling stock it may prefer. But proof that the servant

48 S. W. 487; Hulett v. St. Louis, K. C. dering it dangerous to couple to cars); & N. R. Co. [1878] 67 Mo. 239); and Bennett v. Northern P. R. Co. (1891) 2 where there was no hand-rail on a locomotive (Chicago & G. W. R. Co. v. Molice (1892) 44 Ill. App. 466).

10 Toledo, W. & W. R. Co. v. Asbury (1877) 84 Ill. 429 (drawbars over-left than those in the left that a railway was not bound to introduce self-groupless. Toledo, W. & W. Co. W. Asbury (1877) 84 Ill. 429 (drawbars over-left than the supreme court of Illinois introduce self-groupless. Toledo, W. & W. Co. W. Asbury (1877) 84 Ill. 429 (drawbars over-left than the supreme court of Illinois introduce self-groupless.

lapped).

11 Denver, T. & G. R. Co. v. Simpson (1891) 16 Colo. 55, 26 Pac. 339; Boatwright v. Northeastern R. Co. (1886) wright v. Northeastern R. Co. (1886) 25 S. C. 128 (cars of different heights); Southern P. Co. v. Burke (1893) 9 C. C. A. 229, 23 U. S. App. 1, 13 U. S. App. 110, 60 Fed. 704 ("Miller" and ordinary coupling apparatus); St. Louis & S. F. R. Co. v. Keller (1900; Kan. App.) 62 Pac. 905 (coupling pins too large); Missouri, K. & T. R. Co. v. Hauer (1897; Tex. Civ. App.) 43 S. W. 1078 (same facts).

<sup>12</sup> On the one hand, it has been held not to be negligent to use drawheads of a certain well-known pattern (Richmond & D. R. Co. v. Jones [1890] 92
Ala. 218, 9 So. 276; Georgia P. R. Co.
v. Propst [1887] 83 Ala. 518, 3 So. 764); nor to use double deadwoods (Osborne v. Knox & L. R. Co. [1877] 68 Me. 48, 28 Am. Rep. 16); nor to omit to introduce a new kind of coupling, as long as the one retained is commonly used by railway companies (Burns v. Chicago, M. & St. P. R. Co. [1886] 69 Iowa, 450, 58 Am. Rep. 227, 30 N. W.

generally abandoned by other companies. Crane v. Missouri P. R. Co. of a brake, though the latter contrivance (1885) 87 Mo. 588 (locomotive with may have superior merits. Wonder v. drawhead of peculiar construction, ren- Baltimore & O. R. Co. (1870) 32 Md.

held that a railway was not bound to introduce self-couplers. Toledo, W. & W. R. Co. v. Asbury (1877) 84 Ill. 429. More than twenty years afterwards, we find it laid down in North Carolina that the failure to furnish automatic car couplers in common use for freight cars is negligence per se, which renders a railroad company liable to an employee for injuries received in attempting to couple cars having skeleton drawheads of unequal height. Trowler v. Southern R. Co. (1899) 124 N. C. 189, 44 L. R. A. 313, 32 S. E. 550. The difference between the two rulings is significant of the fact that this desire had been at the fact that the fact that this device had been almost universally adopted during the intermediate period. It has also been held to be for the jury to say, whether it is negligence to send out a train in which only the angine and four course. which only the engine and four cars out which only the engine and four cars out of ten are provided with automatic brakes. Wright v. Southern R. Co. (1900) 127 N. C. 225, 37 S. E. 221.

<sup>1</sup> Texas & P. R. Co. v. Minnick (1893) 6 C. C. A. 387, 13 U. S. App. 520, 57 Fed. 362 (bridge ignited by sparks from

a smoke stack of peculiar design, the characteristics of which were known to 25). As to self-couplers, see *infra*. the servant). A railway company, not being bound to adopt every new inventeen held negligent in continuing to tion, is not negligent, simply because it use a kind of coupling which has been has failed to exchange a hook for an appearably character of which the servant. did not appreciate the risks involved lets in the operation of the principle discussed in chapter vii.2

In other decisions the determinative element has been the defendant's failure to provide a reasonably safe appliance.3

That the cars were not provided 553; La Pierre v. Chicago & G. T. R. Co. (1894) 99 Mich. 212, 58 N. W. 60 (use for fifteen years without accident was here emphasized). That a block and tackle was not provided to guide a cable which, while it was being used to draw a plow by which earth was unloaded from flat cars, was laid in a groove in a socket which held a stake on the side of one of the cars. Nolan v. Montana C. R. Co. (1901; Mont.) 63 Pac. 926. That the pattern of brake used was more dangerous than another kind. Winkler v. St. Louis Basket & Box Co. (1897) 137 Mo. 394, 38 S. W. 921. That there was no fusible plug in a locomotive boiler, and no stationary light to enable the engineer to see the test cocks. Leary v. Lehigh Valley R. Co. (1894) 76 Hun, 575, 28 N. Y. Supp. for a caboose was used as one. Galveston, H. & S. A. R. Co. v. Davis (1893; Tex. Civ. App.) 23 S. W. 1019. (Compare Pennsylvania case cited in note 4, infra.) That a device for picking up the cable of a motor car was not as safe as another kind. Friel v. Citizens' R. Co. (1893) 115 Mo. 503, 22 S. W. 498. That a street car had no guard extending outside the wheels to prevent the feet of employees who might fall off the car from getting on the track. Denver Tranway Co. v. Nesbit (1896) 22 Colo. 408, 45 Pac. 405.

Hand cars need not be of any particular pattern. Hamilton v. Chicago, R. I. & P. R. Co. (1894) 93 Iowa, 46, 61 N. W. 415. In a Texas case the court whole, considered an improvement over it was introduced, there was no negli-

411, 3 Am. Rep. 143. Negligence can-been more likely to be derailed, owing not be inferred from the following to its lightness. But the decision was that, even conceding this lightness to with check chains to lessen the risk of be a defect, the danger arising from it was fully appreciated by the servant. Culf, C. & S. F. R. Co. v. Williams 331. That there were no hooks on a gangway laid from a car to a platform, International & G. N. R. Co. v. Doyle for the unloading of freight, is not negligence. D'Arcy v. Long Island R. Co. been considered that the use of an un(1898) 34 App. Div. 275, 54 N. Y. Supp. covered, eight-sided iron handle on the Co. (1898) 24 Percentage of the control of th section hand, who grasped it with a gloved hand, to dangers exceeding those which were apparent with ordinary care and attention. But the precise position of the court on this point is not very clear.

<sup>2</sup>Louisville & N. R. Co. v. Binion (1894) 107 Ala. 645, 18 So. 75 (brake of a certain pattern dangerous to inexperienced brakeman). The driver of a tram car in a mine may recover for an injury caused by his striking against a low place in the roof, while he was sitting, in the usual manner, on a new car which he did not know to be higher than the ones he had been using. Tennessee Coal, I. & R. Co. v. Currier (1901) 47 C. C. A. 161, 108 Fed. 19.

<sup>8</sup> A jury is warranted in finding neg-187. That a car not originally designed ligence where the defendant used a locomotive, the footboard of which was about 9 inches, and the pilot 5 inches, above the rails (Chicago & N. W. R. Co. v. Delancy [1897] 169 Ill. 581, 48 N. E. 476 [pilot struck obstruction, which caused the breaking of the footboard on which plaintiff was standing]); and where there is no continuous hand-hold on a switch engine (Wible v. Burlington, C. R. & N. R. Co. [1899] 109 Iowa, 557, 80 N. W. 679); and where a "push pole" which had no handle was used for propelling cars (Philadelphia. W. & B. R. Co. v. Keenan [1883] 103 Pa. 125); and where a yard engine with a square, instead of a sloping, tank is used (Missouri P. R. Co. v. Lehmberg [1889] 75 Tex. 61, 12 S. W. 838); and where no seemed to consider that, as a hand car, handles were provided on tank cars for known as the "Sheffield," was, on the the use of brakemen engaged in coupling (Graham v. Boston & A. R. Co. [1892] those in ordinary use at the time when 156 Mass. 4, 30 N. E. 359); and where an ordinary freight engine is used for gence in adopting it, though it may have switching purposes in a yard, the evi-

Not a few decisions are controlled by the element of conformity or nonconformity to common usage.4 Others give prominence to, and are controlled by, the principle that appliances are only required to be reasonably safe for the purpose for which they are furnished.<sup>5</sup>

more easily, and that the engineer who Nor to use as a caboose a box car with is operating it can see signals more eas- no platform or guard rail at either end. ily (Missouri P. R. Co. v. Lamothe Davis v. Baltimore & O. R. Co. (1893) [1890] 76 Tex. 219, 13 S. W. 194); and 152 Pa. 314, 25 Atl. 498. Nor to use where cars without ladders are used the ordinary appliances for the purpose (Greenleaf v. Illinois C. R. Co. [1870] of carrying broad-gauge car bodies on 29 Iowa, 14, 4 Am. Rep. 181); and narrow-gauge trucks. Titus v. Bradwhere cars were sent out, unprovided ford, B. & K. R. Co. (1890) 136 Pa. 618, with proper lights (Chicago & N. W. R. 20 Atl. 517. Nor to adopt a certain Co. v. Taylor [1873] 69 Ill. 461, 18 Am. method of fastening the arch pipe of a Repr. 696 force were making a flying locometry. Rep. 626 [cars were making a flying locomotive, when there is no evidence switch]; Denver & R. G. R. Co. v. of any common usage in respect to a dif-Sipes [1899] 26 Colo. 17, 55 Pac. 1093 ferent method. Hale v. New York & N. [cupola of caboose not lighted]). See E. R. Co. (1899) 174 Mass. 317, 54 N. also Wedgwood v. Chicago & N. W. R. E. 844. Nor to omit to provide a re-Co. (1877) 41 Wis. 478 (long bolt unnecessarily projecting from brake beam); Missouri P. R. Co. v. Fox being no evidence that such a device (1898) 56 Neb. 746, 77 N. W. 130, was in common use. Lorimer v. St. (1900) 60 Neb. 531, 83 N. W. 744 Paul City R. Co. (1892) 48 Minn. 391, (truss rod projecting an unnecessary 51 N. W. 125. Negligence cannot be inlength through the nut in which it was ferred from the failure to adopt the nution of the first standard of the single where it appears that the single 9 S. W. 550 (hand car derailed, owing lings, where it appears that the single to the fact that the pinion wheel was coupling is still extensively used. Burns too small, so that the cogs caught, binding the car wheels to the rail as they were ascending a grade on a curve). Evidence that it is practicable to place placed lengthwise instead of cross-wise, railings about the top of tenders to increase their capacity, and that this was not done in the case in hand, is admissible on the question of negligence in loading a tender so that coal fell from it and injured the plaintiff. Union P. R. Co. v. Erickson (1894) 41 Neb. 1, 29 L. R. A. 137, 59 N. W. 347.

cars brakes of a kind that are in common use, though not the best. Henry v. Staten Island R. Co. (1880) 81 N. Y. 373. Nor to receive into a train a foreign car of a kind which is in common use, although it has no hand-hold or grab-iron at the end, the evidence being that the steps were so constructed as to serve for that purpose. Dooner v. Delaware & H. Canal Co. (1895) 171 Pa. 581, 33 Atl. 415. Nor to have cars with holes cut in the projecting roof at the ends, to enable brakemen to reach the ladder. Benson v. New York, N. H. & H. R. Co. (1901; R. I.) 49 Atl. 689. hand car. Carey v. Boston & M. R. Co. will serve as a safe means of support

dence being that the latter is handled (1893) 158 Mass. 228, 33 N. E. 512. sistance coil, to make the starting of an electric street car more gradual, there v. Chicago, M. & St. P. R. Co. (1886) 69 Iowa, 450, 58 Am. Rep. 227, 30 N. W. 25. The use of hand-holds on cars, is not negligent, though a majority of railway companies use the latter kind. Chicago & G. W. R. Co. v. Armstrong (1895) 62 Ill. App. 228. On the other hand, it is negligent to run a freight engine without such a generally used device as a cowcatcher (Tennessee Coal, I. & R. Co. v. Kyle [1890] 93 Ala. 1, 12 'It is not negligence to use on dirt L. R. A. 103, 8 So. 764); or to operate cars of a generally discarded pattern (Palmer v. Denver & R. G. R. Co. [1882] 3 McCrary, 635, 12 Fed. 392 [freight cars had only four wheels, and those were attached so rigidly that they could not accommodate themselves to curves]).

Thus, it has been held that the safety chains between an engine and its tender need not be strong enough to bear the strain put upon them when the couplings give way. Gardner v. St. Louis & S. F. R. Co. (1896) 135 Mo. 90, 36 S. W. 214. And that there is no obligation to construct the rims of Nor to have projecting bolt on lever of gravel cars in such a manner that they Others again exemplify the exception to this principle, viz., that, if the master himself puts an appliance to a new use, his liability is tested by the same standard as if it had been originally furnished for that purpose. 6 See § 28, ante. Whether a "pushing pole" without a handle is a reasonably safe and suitable instrument for the work of making up trains, is a question for the jury.7

75. Elevators.— (See also § 91, post.)—An employer who uses an elevator for the conveyance of his servants must provide it with a reasonably effective safety-device to arrest the fall of the cage in case of an accident. His duty in this regard is fulfilled if he furnishes a device of an approved style.<sup>2</sup> The elevator must also be made reasonably safe in other respects.3

<sup>1</sup> Fairbank Canning Co. v. Innes (1887) 24 Ill. App. 33. The existence of this obligation is assumed in the cases as to freight elevators cited infra. 561, 55 N. Y. Supp. 127.

Whether an elevator door which 111 Iowa, 347, 82 N. W. 903. closes by pneumatic pressure, operated

to a servant attempting to mount the with force when the operator's foot is cars while in motion. Timmons v. Cen- removed from the button, and which, tral Ohio R. Co. (1856) 6 Ohio St. 105. when it has once started to close, cannot And that push cars need not be so conbe stopped, is a dangerous appliance, is structed that employees can safely ride a question for the jury. Auld v. Manupon them. York v. Kansas City, C. & hattan L. Ins. Co. (1900) 165 N. Y. S. R. Co. (1893) 117 Mo. 405, 22 S. W. 610, 58 N. E. 1085, Affirming (1898) 34 1081. But this last-mentioned position App. Div. 491, 54 N. Y. Supp. 222. The is doubtless subject to some qualifica- proprietor of an elevator is not, as mattion, where the push cars are used for ter of law, free from negligence towards the conveyance of employees, with the an employee who was killed by falling acquiescence of the company. See Mil- into the shaft while running the eleler v. Union P. R. Co. (1883) 5 Mc vator, where the entire front of the ele-Crary, 300, 17 Fed. 67, and the follow-vator was open, and at the floor where Crary, 300, 17 Fed. 67, and the following note.

The case was held to be for the jury where an engine used for switching purposes was not provided with the proper about 3½ feet from the floor, and the horizontal edge of the wooden lining of safeguards for that work. Smith v. Buffalo, R. & P. R. Co. (1893) 72 Hun, above, and the operating cable was only 545, 25 N. Y. Supp. 638. And where a road engine with a flat car in front of it was used, instead of a yard engine, A. 753, 51 N. E. 645, Affirming (1897) for coupling purposes, the result being that an employee, being misled by the manner in which the light from the headlight was thrown on the flat car, of pieces of timber which are fastened was run over while he was crossing the across the shaft above the bucket, and was run over while he was crossing the across the shaft above the bucket, and track. Texas & P. R. Co. v. Gentry ascend with it, is not reasonably safe, (1896) 163 U. S. 353, 41 L. ed. 186, 16 where the follower is not attached Sup. Ct. Rep. 1104. <sup>†</sup>Philadelphia, W. & B. R. Co. v. struction causes the stoppage of the fol-lower the bucket will stop also. Boardman v. Brown (1887) 44 Hun, 336 (follower got caught, and afterwards fell on the persons in the bucket). Negligence may be inferred where a girder <sup>2</sup> Kaye v. Rob Roy Hosiery Co. (1889) protrudes so far into the shaft of a 51 Hun, 519, 4 N. Y. Supp. 571; Biddisfreight elevator as to be in dangerous comb v. Cameron (1898) 35 App. Div. proximity to the edge of the platform. Olson v. Hanford Produce Co. (1900)

On the ground that the nut of an eveby a button in the floor, and which closes bolt, by which the hoisting cable of a

Where an elevator is designed solely for lifting goods, its construction must be such that it can be safely handled by servants.4 But the employer is entitled to act on the assumption that they will not use it as a means of conveyance, and is, therefore, not bound to provide it with those safety devices which are obligatory in the case of passenger elevators.<sup>5</sup> In a Maryland case, this distinction was taken, -that, where employees are merely allowed to use such an elevator as licensees, the measure of care owed to them is that which is designated as "ordinary," but, if they are authorized or directed to use it as a means of transportation, the employer is required to exercise "great care and caution," both in the construction and operation of the machine, so as to render it as free from danger as careful foresight and precaution may reasonably dictate.6 If a safety device is provided, the master's duty is performed if it is one which is commonly used on a freight elevator which the servants are authorized to use.7

W. 971.

means of a patent steam-hoist which, when properly adjusted, could not raise the bucket containing the ashes to the upper edge of the door through which they were to be taken, in the cutting off of his finger by its being caught between the edge of the bucket and the top of such door. New York & W. S. S. Co. v. McLaughlin (1895) 14 C. C. A. 652, 28 U. S. App. 424, 67 Fed. 797. An injury caused by the bursting of a valve in an airhoist, which is insufficient to sustain the pressure put upon it, is actual the jury, where the evidence was that tionable. Slattery v. Walker & P. Mfg. two sides of the elevator cage were unco. (1901) 179 Mass. 307, 60 N. E. 782. guarded; that it ran in a shaft the sides On the ground of conformity to usage, of which were 10½ inches from the plat-the absence of a railing round a freight form, and into which, at each floor, unelevator was denied to be negligence in beveled sills projected 81 inches; and Whatley v. Block (1894) 95 Ga. 15, 21

<sup>5</sup> Stringham v. Hilton (1888) 111 N.

tiff was being conveyed was intended for <sup>4</sup>A steamship is liable for injury to freight only cannot be raised on demura fireman engaged in raising ashes by rer. Anderson v. Hayes (1899) 101

rer. Anderson v. Hayes (1899) 101 Wis. 519, 77 N. W. 903.

<sup>6</sup> Wise v. Ackerman (1892) 76 Md. 375, 25 Atl. 424 (recovery allowed where a joist, which projected so far into the elevator shaft that there was a press of only about 2 inches between it. space of only about 2 inches between it and the edge of the elevator platform, crushed the plaintiff's foot, which happened to extend outside the platform). In Strawbridge v. Bradford (1889) 128 Pa. 200, 18 Atl. 346, the question of the employer's negligence was held to be for that it was intended that boys should use it.

<sup>7</sup> Boess v. Clausen & P. Brewing Co. Y. 188, sub nom. Stringham v. Stewart, (1896) 12 App. Div. 366, 42 N. Y. Supp.

76. Unguarded machinery; generally.—(See also § 96, post.)—a. Conditions not reasonably safe.—The rationale of some decisions seems to be simply the principle that a jury is warranted in finding that the absence of a guard creates conditions of such a character that a servant who has to work with or near the machinery cannot perform his duties in reasonable safety by the exercise of ordinary care.<sup>1</sup> From this standpoint, evidence showing that the servant understood the risks created by the want of a guard is treated as being merely matter of defense, whether on the ground of an assumption of the risk or of contributory negligence.2

In some of the cases where recovery was allowed, the place where

made of rags, the ends of which are left loose, on a shaft, easily accessible, where the belt used on it is in a poor condition and requires frequent repair and readjustment, thus bringing someone in close proximity to the pulley. Bell (1897) 15 App. Div. 258, (1890) 76 Wis. 120, 43 N. W. 1135; Adam v. White River Lumber Co. Dodd v. Bell (1897) 15 App. Div. 258, (1890) 76 Wis. 120, 43 N. W. 1135; Adam v. White River Lumber Co. Laves an enormous, rapidly revolving (1896) 67 Minn. 79, 69 N. W. 630, cogwheel partially unprotected, so that supra; Collins v. Laconia Car Co. tongs carrying large masses of iron are (1894) 68 N. H. 196, 38 Atl. 1047 (conliable to be caught and broken in it, ditions were spoken of as a "defect" in and the pieces thrown all about the

848 (the safety device here was of such room with such force as to kill any pera nature that it only served as a safe- son with whom they come in contact, guard against certain kinds of acci- after having been advised by a skilled guard against certain kinds of acciafter having been advised by a skilled dents).

"Wallace v. Culter Paper Mills Co."

(1892) 19 Sc. Sess. Cas. 4th series, tongs catching in the cogs. Richlands 915; King v. Ford River Lumber Co. Iron Co. v. Elkins (1893) 90 Va. 249, (1892) 93 Mich. 172, 53 N. W. 10; 17 S. E. 890. In Nadau v. White River Roux v. Blodgett & D. Lumber Co. Lumber Co. (1890) 76 Wis. 120, 43 N. (1893) 94 Mich. 607, 54 N. W. 492; W. 1135, the court reasoned thus: Anderson v. C. N. Nelson Lumber Co. "That this set of cogwheels was danger-(1896) 67 Minn. 79, 69 N. W. 630; ous, even to the most experienced work-Ames & F. Co. v. Strachurski (1893) 194 Slight forgetfulness on the part of the cogwheels was not fastened in any way, workman while attending to his work cogwheels was not fastened in any way, workman while attending to his work and employee who was passing slipped might bring him in contact with it; an upon the floor and fell in such a manacidental slip while at work might ner as to displace the cover, and thus bring his clothing and limbs in contact put his hand between the cogs). The with it; and we have no hesitancy in question of negligence on the part of an holding, when the employer places such employer in failing to guard a small a dangerous piece of machinery into circular saw, extending about 3 inches which his employee, by the least forgetcircular saw, extending about 3 inches above a table, and running very rapidly, fulness or unavoidable accident, may be but not ordinarily used, is for the jury, thrown and seriously injured, in the imwhere the plaintiff was injured while throwing blocks of wood over the table. employee must do his work, he fails to Egan v. Sawyer & A. Lumber Co. (1896) furnish him a reasonably safe place for 94 Wis. 137, 68 N. W. 756. An employee is not, as matter of law, free ployer is not, as matter of law, free megligence,—especially when the usefulness of the machine is not enhanced by made of rags, the ends of which are left reason of its being uncovered, and when loose. on a shaft, easily accessible, the expense of covering would be a mere

the uncovered machinery was set up was imperfectly lighted.3 But it does not appear that this circumstance can ever be a differentiating one, either under the theory that the want of a guard imports negligence, or under the theory that it does not.

b. Liability tested by the servant's knowledge or ignorance of the conditions.—The rationale of several decisions is that a court cannot say, as matter of law, that the maintenance of the unfenced machinery is not negligence, where the evidence tends to show that the injured servant was excusably ignorant, either of the general risks incident to the use of such machinery, or the particular risks incident to the use of the machinery in question.4 For general principle, see § 58, ante.

In the cases in which the servant's knowledge is the controlling element, two conceptions emerge. Some of them proceed upon the theory that, under ordinary circumstances, the obvious character of

\*\*Jensen v. Hudson Sawmill Co. jury. Miller v. Itasca Cotton Seed Oil (1897) 98 Wis. 73, 73 N. W. 434 (un- Co. (1897; Tex. Civ. App.) 41 S. W. guarded saw); Stubbs v. Atlanta Cot- 366. See also American Tobacco Co. v. ton-Seed Oil Mills (1893) 92 Ga. 495, Strickling (1898) 88 Md. 500, 41 Atl. 17 S. E. 746 (unboxed gearing); Knuth 1083 (clothing of inexperienced girl v. Geo. A. Weiss Malting & Elevator Co. caught on upright revolving shaft while (1897) 72 III. App. 389 (servant's she was sweeping the floor); Coombs clothes caught on a shaft in a poorly v. New Bedford Cordage Co. (1869) 102 lighted room); Gisson v. Schwabacher Mass. 572, 3 Am. Rep. 506 (hand of (1893) 99 Cal. 419, 34 Pac. 104 (simi-inexperienced boy was caught in un-

was known to him, and not to the serv- Or. 480, 53 L. R. A. 459, 63 Pac. 645. ant, is sufficient to take the case to the

lar facts).

In Wheeler v. Wason Mfg. Co.

Rap. Jud. Quebec, 12 C. S. 113 (boy of (1883) 135 Mass. 294, the court said: fifteen injured by board-cutting ma
"The jury might well hold the defendant to be acquainted with the tendency Minn. 485, 29 N. W. 198 (cogwheels, of a board, when warped, to spring back formerly protected, but not covered at during the operation of sawing; and the time of the accident; servant had also with the tendency, especially on no notice of the change); Craver v. the part of an inexperienced person, to Christian (1887) 36 Minn. 413, 31 N. W. the part of an inexperienced person, to the purpose of steadying the board, if the purpose of the fact that th saw, which, according to some of the owing to the improper adjustment of testimony, is the danger from which ac- a guard rail on a mangle, the servant cidents most commonly arise, might not was misled as to the amount of protective known without practice." An alletion which it afforded, and thus allowed gation that the defendant maintained her hand to be drawn into the machine. an uncovered shaft the danger of which Stager v. Troy Laundry Co. (1901) 38

the danger which the servant is required to encounter in working near unfenced machinery relieves the employer of any obligation to change the condition.<sup>5</sup> In other words, an employer owes no duty to a servant to place a guard on a machine which the servant has agreed to work with in the condition in which he finds it.6

The effect of this principle is that, where the employee has knowledge that machinery about which he is employed is complicated and dangerous, neglect to fence or cover is not of itself sufficient to make the master liable. Under such circumstances proof of some independent breach of duty is regarded as an essential prerequisite to the maintenance of an action for an injury caused by contact with the machinery.7 Such a failure of duty is shown where it appears that the servant received no instructions as to the dangers of the work, and the facts in evidence do not charge him with knowledge of those dangers.8

<sup>6</sup> McGuerty v. Hale (1894) 161 Mass. negligence per se for a master to omit 51, 36 N. E. 682; Wilson v. Massachuto protect or cover dangerous machinsetts Cotton Mills (1897) 169 Mass. 67, ery, but the question of negligence must setts Cotton Mills (1897) 169 Mass. 67, ery, but the question of negligence must 47 N. E. 506; Murphy v. American Rubber Co. (1893) 159 Mass. 266, 34 N. E.
268; Rock v. Indian Orchard Mills
(1886) 142 Mass. 523, 8 N. E. 401; and notice thereof to the employee.
Foley v. Pettee Mach. Works (1889)
149 Mass. 294, 4 L. R. A. 51, 21 N. E.
287, 46 N. W. 352.
304; Tinkham v. Sawyer (1891) 153
Mass. 485, 27 N. E. 6; Coombs v. New
Mass. 485, 27 N. E. 6; Coombs v. New
Bedford Cordage Co. (1869) 102 Mass.
Swoboda v. Ward (1879) 40 Mich. 420;
572, 3 Am. Rep. 506; Guedelhofer v. Craver v. Christian (1887) 36 Minn.
Ernsting (1899) 23 Ind. App. 188, 55
413, 31 N. W. 457 (here the covering N. E. 113; Rudd v. Bell (1887) 13 Ont.
Rep. 47; Schroeder v. Michigan Car Co.
had been removed; master's liability (1885) 56 Mich. 132, 22 N. W. 220; held not to be diminished by the fact

266, 34 N. E. 268. It is not actionable Mass. 522, 8 N. E. 401.

(1885) 56 Mich. 132, 22 N. W. 220; held not to be diminished by the fact Sanborn v. Atchison, T. & S. F. R. Co. that the original object of the covering (1886) 35 Kan. 292. 10 Pac. 860; Hay- was to keep out dust). But a court. was to keep out dust). But a court, after the jury has been told that the defendant was bound to give the plain-(1886) 35 Kan. 292, 10 Pac. 860; Hayden v. Smithville Mfg. Co. (1861) 29 after the jury has been told that the Conn. 548; Bond v. Smith (1891) 39 N. defendant was bound to give the plainty. S. R. 124, 14 N. Y. Supp. 932. In Dillenberger v. Weingartner (1900) 64 to give an instruction of the following N. J. L. 292, 45 Atl. 638, it was not explicitly decided whether the absence of a guard did or did not import negligence, recovery being denied on the ground that the plaintiff appreciated and assumed the risk.

Toomey v. Donovan (1893) 158 Mass. 232, 33 N. E. 396; Sullivan v. in the defendant was exposed, while in the defendant's masses without fencing, or otherwise sufficiently guarding it, so that the plaintiff was exposed, while in the defendant's masses without fencing, or otherwise sufficiently guarding it, so that the plaintiff was exposed, while in the defendant was employ, to danger of which it gave no sufficient notice, then the defendant was negligent." Such an instruction implies that the defendant was negligent. plies that the defendant was negligent Traver v. Christian (1887) 36 if he did not fence the machine, and is Minn. 413, 31 N. W. 457; Murphy v. therefore regarded as misleading. Rock American Rubber Co. (1893) 159 Mass. v. Indian Orchard Mills (1886) 142

Other decisions rely upon the consideration that the servant is, or ought to be, able to protect himself from a danger of this description, if he appreciates it.9

c. Liability negatived on the ground that a master may carry on his business in his own way.—In some of the cases cited in the last subdivision, as well as in others, the doctrine discussed in chapter v., ante, has been adverted to as a reason for holding that a servant cannot recover for injuries caused by uncovered machinery.10 The master is protected, though the suggested change might have been made at a trifling expense. 11 The impracticability of making a change and using the machine for the purposes for which it was designed is sometimes emphasized as a factor tending to exonerate the master.12

By one of the courts which refers the master's nonliability to the doctrine applied in the cases cited under the present subsection, it has lately been held that the use of an unguarded saw is not negligent, where sufficient room is left to carry on the work to be done. 13

This proviso presumably indicates the limit beyond which the master's privileges, as regards the arrangement of his plant, do not extend.

d. Conformity or nonconformity to usage.—In several cases the use of machinery without a guard has been denied to be negligence for the reason that common usage sanctions such an arrangement,14 or that there was no evidence going to show that it was the gen-

• Young v. Burlington Wire Mattress guards furnished for emery wheels used Co. (1890) 79 Iowa, 415, 44 N. W. 693; for certain work are lighter than those

10 Foley v. Pettee Mach. Works (1889) 149 Mass. 294, 4 L. R. A. 51, 21 N. E. 304; Kleinest v. Kunhardt (1893) 160 Mass. 230, 35 N. E. 458; Feely v. Pearson Cordage Co. (1894) 161 Mass. 426, 37 N. E. 368; Gleason v. Smith (1898) 172 Mass. 50, 51 N. E. 460; Rock v. Indian Orchard Mills (1886) 142 Mass. 522, 8 N. E. 401; Plunkett v. Donovan (1891) 36 N. Y. S. R. 91, 12 N. Y. Supp. 454; Townsend v. Langles (1890) 41 Fed. 919; Schroeder v. Michigan Car Co. (1885) 56 Mich. 132, 22 N. W. 220; Roth v. Northern Pacific Lumbering Co. (1889) 18 Or. 205, 22 Pac. 842; Arizona Lumber & Timber Co. v. Mooney

mill). Where there is a satisfactory Sanborn v. Atchison, T. & S. F. R. Coreason for the difference, negligence can- (1886) 35 Kan. 292, 10 Pac. 860; not be inferred from the fact that the Mackin v. Alaska Refrigerator Co.

Meyer v. Meyer (1899) 86 Ill. App. used for other work. Berning v. Medart (1894) 56 Mo. App. 443. The omission to screw an iron plate over an emery wheel, to confine the fragments if it should burst, was denied to be negligence, in Augerstein v. Jones (1891) 139 Pa. 183, 21 Atl. 24.

<sup>12</sup> Palmer v. Harrison (1885) 57 Mich. 182, 23 N. W. 624; Young v. Burlington Wire Mattress Co. (1890) 79
Iowa, 415, 44 N. W. 693; Keenan v.
Waters (1897) 181 Pa. 247, 37 Atl.
342; Mackin v. Alaska Refrigerator Co.
(1894) 100 Mich. 276, 58 N. W. 999.

<sup>13</sup> Journeaux v. E. H. Stafford Co. (1899) 122 Mich. 396, 81 N. W. 259. 14 Cunningham v. Bath Iron Works (1899) 92 Me. 501, 43 Atl. 106; Young (1895; Ariz.) 42 Pac. 952. v. Burlington Wire Mattress Co. (1890)

"Sjogren v. Hall (1884) 53 Mich. 79 Iowa, 415, 44 N. W. 693; Ford v. An274, 18 N. W. 812 (bull wheel in a saw-derson (1891) 139 Pa. 261, 21 Atl. 18; eral custom to operate it with a guard. 15 But the significance of this factor will obviously depend on the doctrine held in the jurisdiction where the accident occurred. 16 See chapter vi., ante.

On the other hand, liability has been imputed on the ground that the defendant failed to conform to usage.17

e. The probability or improbability of injury resulting from the machinery in question, - respect being had to its position and the character of the work in which the servant was engaged, is a circumstance which will either strengthen the inference otherwise indicated, or will operate as a differentiating element, according to the general theory of the court regarding the liability of the master for injuries of this sort.18

(1894) 100 Mich. 276, 59 N. W. 999; revolving shaft over which, with the Fritz v. Salt Lake & O. Gas & E. L. Co. knowledge and acquiescence of his fore-

Fritz v. Salt Lake & O. Gas & E. L. Co. knowledge and acquiescence of his fore(1899) 18 Utah, 493, 56 Pac. 90; Townman, the workman was in the habit of
send v. Langles (1890) 41 Fed. 919; stooping to remove lumps of ore from
Higgins v. Fanning (1900) 195 Pa. 599, a spout on the opposite side, or in fail46 Atl. 102; Stoll v. Hoopes (1888; ing to adopt another method of doing
Pa.) 22 W. N. C. 159, 14 Atl. 658 (apparently this is the ground of the decision, but no reasons are stated in the
Negligence may be inferred where no
brief opinion). A strong and somebrief opinion). A strong and some-guard is placed over cogwheels, across what dubious application of this prin-which a servant is frequently obliged to what dubious application of this principle is that the failure to provide lean in order to open a gate for the passereens in a bottling establishment, to protect employees from fragments of exploding bottles, does not import negligence. Omaha Bottling Co. v. Theiler (1899) 59 Neb. 257, 80 N. W. 821.

15 On this ground, it was denied to be negligent to omit to have a "spreader" for the purpose of sawing blocks 3½ for a saw (Delaware River Iron-Shin inches long, which is operated by place. for a saw (Delaware River Iron-Ship inches long, which is operated by plac-Bldg. & Engine Works v. Nuttall ing the wood on a slide and pushing the [1888] 119 Pa. 149, 13 Atl. 65); and slide towards the saw, holding the wood to have a guard to prevent planks, in place with the hand, where the slide forced over "dead" rollers, from coming is unsupported for 18 inches next to the into contact with a slab saw (Mississaw, and when if any pressure is placed sippi River Logging Co. v. Schneider on that end the slide is thrown off, and [1896] 20 C. C. A. 390, 34 U. S. App. the operator's hand is likely to be instant. 743, 74 Fed. 195).

18 In Craver v. Christian (1887) 36 80 Minn. 1, 82 N. W. 981. A rapidly Minn. 413, 31 N. W. 457, common usage revolving shaft in a sawmill, below and was held not to be a protection to the only a few feet from a narrow elevated was held not to be a protection to the master.

"Jensen v. Hudson Sawmill Co. (1897) 98 Wis. 73, 73 N. W. 134; Lemcharged with the duty of keeping chutes ser v. St. Joseph Furniture Mfg. Co. clear of clogged slabs by striking the (1897) 70 Mo. App. 209. A duty to screen saws cannot be established by evidence that such screens were used on machines different from the one in question. Journeaux v. E. H. Stafford Co. (1899) 122 Mich. 396, 81 N. W. 259.

15 It is for the jury to say whether a said: "There is a difference between

77. Revolving shafts.—The doctrine adopted by some courts is that a master is, as matter of law, not guilty of negligence in maintaining a shaft with a projecting screw, this doctrine being referred to the principle that it is a common contrivance.1 Or, as the rule may also be stated, to leave gearings, set screws, and other parts of machinery unboxed is not negligence, where other manufacturers in the same line of business operate their machinery in the same manner.<sup>2</sup> It follows, therefore, that, although there may be a safer kind of set screw

working with or at a piece of machinery, and being engaged in other work in that position, or that it might reaclose proximity to such machinery. In the one case, attention is naturally directed to the machinery; and in the cother, attention is directed to the work, and not to the machinery, and the more attention is given to the work, the less must necessarily be given to the machinery. Take the present case. Slabs were clogged, and were collecting in this chute. The boy had not control of the work, but the work was driving this chute. The boy had not control of the work, but the work was driving him. To what would his attention be naturally directed, and what would naturally challenge his entire attention, if less it is shown that it was dangerous in that position, or that it might reasonably have been anticipated that an employee might be injured thereby. Eckels v. Chicago Ship Building Co. (1896) 63 Ill. App. 436. See also the cases cited in note 1, supra, and compare note 5 to § 77, infra.

1 Hale v. Cheney (1893) 159 Mass. 268, 34 N. E. 255 (there plaintiff was only sixteen years of age, but no weight was attached to this fact); Goodnow v. Walpole Emery Mills (1888) 146 Mass. 261, 15 N. E. 576; Dillman v. Hamilton (1898) 14 Mont. Co. L. Rep. 92 (plaintiff was twenty years old); Lewis v. working with or at a piece of machin- less it is shown that it was dangerous naturally directed, and what would naturally challenge his entire attention, if tiff was twenty years old); Lewis v. not the clogged chute? If, from the nature of this boy's work, he was liable 207; Hoffman v. American Foundry Co. to be thrown against this shaft, sudden contact with which was dangerous, can Kreider v. Wisconsin River Paper & there be any question but that the place was one of danger? There was testimony tending to show that shafting like this was not usually covered; but the kol v. Rickel (1897) 113 Mich. 476, 71 necessity for covering any dangerous N. W. 833, the court did not expressly decide whether a set screw imported mecessity for covering any dangerous N. W. 833, the court did not expressly machinery arises from the probability decide whether a set screw imported of contact with it, from its proximity negligence, the case turning upon the to persons engaged at work in its vicin-contributory negligence of the plaintiff. ity. This shafting was 8 feet and 5 inches from the mill floor. Independent of the fact that this conductor and these chutes and this platform had been constructed there, and this boy placed at work beside this shaft, it would have been entirely unnecessary to cover or guard it. If this boy was likely to be thrown against this shaft, and, being thrown against it, would be likely to have his clothes caught, or to clutch it, is there any question but that it should of conformity to usage); Demers v. have been guarded or covered so as to Marshall (1899) 172 Mass. 548, 52 N. prevent just those consequences? Can E. 1066 (1901) 178 Mass. 9, 59 N. E. it be said not to be dangerous, because 454. Under this doctrine, an adult he ought not to have, or might not have, workman assumes the risk from a screw clutched it, or his clothes might not have caught?" If the uncovered machinery is so high above the level where the servants are that it will clear their the servants are that it will clear their the servants are that it will clear their tenses and the previous tenses and the servants are that it will clear their tenses that he remembered the previous persons under ordinary circumstances, condition of the shaft, and was acting the employer cannot be held liable, un- in reliance upon his former observation Vol. I. M. & S.—14.

contributory negligence of the plaintiff. But, in view of the general trend of the decisions in this state, it may reasonably be inferred that the action would not have been sustained in any event. See decisions cited in the last section.

<sup>2</sup> Wabash Paper Co. v. Webb (1896) 146 Ind. 303, 45 N. E. 474; Keats v. National Heeling Mach. Co. (1895) 13 C. C. A. 221, 21 U. S. App. 656, 65 Fed. 940 (but see chapter v., as to the doctrine of the Federal courts as to effect

which is also in common use, the master owes the servant no duty to box the pulley or shaft, or to change the set screw for a safer one.3

In one case, where no projecting screw was involved, recovery was denied simply on the ground that the shaft was a permanent structure, creating an obvious risk.4

By other courts it is held that a jury may properly find a master liable for injuries caused by such a contrivance,<sup>5</sup> and that common usage is not a conclusive justification for adopting or retaining it.6

tinction that, even if the defendant was negligent in having a shaft with a set could be no liability for an injury received by a servant who was oiling the archinery at some distance away, (1895) 16 C. C. A. 545, 36 U. S. App. where the chances of his falling against 32, 69 Fed. 923 (liability of the master they could not reasonably have been anidence being that the servant's clothing ticipated. Groff v. Duluth Imperial was caught upon protruding bolts of a Mill Co. (1894) 58 Minn. 333, 59 N. W. coupling of a rapidly revolving shaft, 1049. The present writer ventures to located in a narrow and dark tunnel, think that the reference to the test of reasonable anticipation is, under such obliged to stoop or crawl while passing circumstances, wholly unwarrantable. That the duty to provide a safe place of his duties); Geno v. Fall Mountain work inures in favor of all servants Paper Co. (1895) 68 Vt. 571, 35 Atl. who are rightfully at the particular 475 (instruction embodying opposite point where the dangerous conditions rule held erroneous).

at the time of his injury. Ford v. Mt. are found seems to be a necessary corol-Tom Sulphite Pulp Co. (1899) 172 lary from the principles which define Mass. 544, 48 L. R. A. 96, 52 N. E. 1065. the position of a person invited on <sup>8</sup> Rooney v. Sewall & D. Cordage Co. premises, as contrasted with the posi-(1894) 161 Mass. 153, 159, 36 N. E. tion of one who is a mere licensee or 789; Goodnow v. Walpole Emery Mills (1888) 146 Mass. 261, 15 N. E. 576.

\*Lemoine v. Aldrich (1900) 177

Mass. 89, 58 N. E. 178. <sup>5</sup> See cases cited in the next note. In ence at the spot where the accident oc-Minnesota, the question as to a master's curred amounted to positive contribunegligence was held to be for the jury, tory negligence; and this is the single in an action for injuries to a servant case in which a master should be alwhose coat sleeve was caught by a set lowed to excuse himself by the plea of screw on a revolving shaft as he was atnonanticipation. In Galveston Oil Co. tempting to place a belt upon a pulley v. Thompson (1890) 76 Tex. 235, 13 S. 2 inches therefrom, where it appears W. 60, the court seems to have regarded that the head of the screw was not pro- a shaft with protruding screws as an tected or guarded in any way, that it appliance the maintenance of which imwas a cube ½ inch square and projected ported negligence, but the specific at least § of an inch from the shaft, ground of recovery was that the plain-which was revolving about 150 times to tiff had been negligently ordered to perwhich was revolving about 150 times to the had been negligently ordered to perthe minute, and that it was frequently form a service not within the scope of necessary to adjust the belt upon the his employment. Under the civil law, pulley. Pruke v. South Park Foundry as administered in Quebec, a master & Mach. Co. (1897) 68 Minn. 305, 71 who maintains a shaft with a danger-N. W. 276. But, in another case, the ous projection thereon is deemed guilty same court took the rather refined disof a breach of duty. George Matthews Co. v. Bouchard (1897) Rap. Jud. Quebec, 8 B. R. 550. See also Horton v. screw projecting so far as to be danger-Vulcan Iron Works Co. (1897) 13 App. ous to a servant whose work required Div. 508, 43 N. Y. Supp. 699, where, him to be in close proximity to it, there however, the successful plaintiff was an independent contractor.

the shaft were so slight and remote that held to be for the jury to decide, the evthey could not reasonably have been anidence being that the servant's clothing

In some of the cases already cited, as well as in others in which the element of usage is not adverted to, the employer's liability is made to turn, wholly or partially, upon the fact of the servant's knowledge or ignorance of the conditions.7

Under any theory of the master's obligations with regard to such machinery, he clearly cannot be held liable where the injury resulted from the fact that the servant was using it for purposes having no connection with his duties.8 See § 26, ante.

78. Employer's liability for injuries caused by various other mechanical appliances.—In the subjoined note are collected a number of cases in which the liability of the master for injuries due to various kinds of mechanical appliances has been discussed and determined with reference to the general question of reasonable safety, and to the effect of the specific principles reviewed in the preceding chapters.1

A complaint stating that plaintiff, 269, 18 L. R. A. 124, 29 Pac. 481 (no rewhile in the employ of defendant, received injuries through the failure of defendant to guard a dangerous set which began to revolve after he had, for screw, the existence of which was unhis own convenience, hung the towel on known to plaintiff, is not demurrable. it).

Rabe v. Consolidated Ice Co. (1899) 91 <sup>1</sup> (1) Appliances for raising heavy

Fed. 457. That a jury might find it weights.—Negligence is inferable where
negligent to require a servant to drive a well-known device for preventing accihis knowledge, repaired with projecting bolts was held in Hawkins v. Johnson Bridge Co. (1897) 183 Pa. 278, 38 Atl. (1885) 105 Ind. 29, 55 Am. Rep. 169, 4 896. A jury may infer negligence from N. E. 172. Whether a master can be the want of a brake on a windlass. held liable for omitting to instruct a Cartter v. Cotter (1891) 88 Ga. 286, 14 servant as to the position of a set screw S. E. 476. The mere fact that a der-depends upon whether the servant was rick which fell was not provided with inexperienced to such a degree that he guy ropes, and proved to be too light could not reasonably be expected to unfor the work which the servants tried derstand the danger arising from it, to accomplish with it, does not import and the master knew or ought to have negligence. Rosa v. Volkening (1901) known of that inexperience. Ingerman 64 App. Div. 426, 72 N. Y. Supp. 236. v. Moore (1891) 90 Cal. 410, 27 Pac. Negligence is inferable from the fact 306; Keller v. Gaskill (1894) 9 Ind. that a smaller hook than was custom-App. 670, 36 N. E. 303; second appeal ary was used to support a heavy bucket. (1898) 20 Ind. App. 502, 50 N. E. 363. Cosselmon v. Dunfee (1901) 59 App. A machinist and engineer is chargeable Div. 467, 69 N. Y. Supp. 271. A court with knowledge that set screws are in cannot say, as matter of law, that the constant use in machinery, and cannot use of ratchet jacks to hold up the body constant use in machinery, and cannot use of ratchet jacks to hold up the body hold a master liable for an omission to of a derailed car imports negligence. apprise him of the danger caused by one how v. Walpole Emery Mills (1888) and 146 Mass. 261, 15 N. E. 576; Keats v. National Heeling Mach. Co. (1895) 13 to draw up the shoring planks from a C. C. A. 221, 21 U. S. App. 656, 65 Fed. sewer. Joyce v. Worcester (1885) 140 940. See, generally, as to the master's Mass. 245, 4 N. E. 565. It is not negligence to use a piece of bridge timber. duty to give instructions, chapter XVI., ligence to use a piece of bridge timber, post.

under a shaft which had been, without dental changes in the gear of a crane as a lever to raise a broken turntable. <sup>6</sup> Kauffman v. Maier (1892) 94 Cal. Bohn v. Chicago, R. I. & P. R. Co.

(1891) 106 Mo. 429, 17 S. W. 580 (con-operate a planer without a belt shifter 109 N. C. 618, 14 S. E. 58.

Div. 472, 70 N. Y. Supp. 1070.

use, for breaking castings, an appliance the friction would tighten it.
which is similar to those used in other (5) Appliances for handle

Md. 257, 34 Atl. 872.

of power.—A master is not bound to extended the second of power.—A master is not bound to extended the second of a common round stick with change a shipper on a belt for another out holes in it, as a lever for tipping a kind. Cushman v. Cushman (1901; large ladle of molten metal, implied Mass.) 61 N. E. 262. Where an employer has conformed to general usage, neering Co. (1898) 172 Mass. 134, 51 N. he cannot be held negligent in failing to E. 463. use certain suggested contrivances to (6) prevent the shifting of a belt shipper. use copper as a filling for emery wheels Ross v. Pearson Cordage Co. (1895) 164 is not negligent, where the evidence Mass. 257, 41 N. E. 284. Negligence is merely is that one manufacturer uses it. not inferable from the mere fact that a Breig v. Chicago & W. M. R. Co. (1893) belt was used, which was apt to slip 98 Mich. 222, 57 N. W. 118. back from the loose on to the fixed pulshifted. Shaffer v. Haish (1885) 110 to handle piles, is negligence, is a ques-Pa. 575, 1 Atl. 575. The mere fact that tion for the jury, where the evidence is would have made it safer to connect and (1899) 109 Iowa, 524, 80 N. W. 561. disconnect the power does not render an (8) Devices for attaching parts of employer guilty of negligence in not appliances to each other.—Negligence making that addition. Jacobson v. Coris inferable where a heavy iron bar nelius (1889) 52 Hun, 377, 5 N. Y. is placed where it is liable to be

formity to usage proved). A pole is an or tightener is a question for the jury, adequate appliance for use as a lever in where there is evidence that such a deprizing up ties on a track. Young v. vice was sometimes used, and also evi-Virginia & N. C. Constr. Co. (1891) dence that it was impracticable in the given case. Maxwell v. Zdarski (1900) (2) Appliances involving the use of 93 Ill. App. 334. An employer may be steam.—It is not negligence to use a found guilty of negligence, where the boiler of a widely used type, though the evidence tends to show that the means addition of certain attachments would adopted for fastening together the have made it safer. Service v. Shone-pieces of a belt were inadequate for that man (1900) 196 Pa. 63, 46 Atl. 292. purpose (McGar v. National & P. The want of a safety valve, to prevent Worsted Mills [1901] 22 R. I. 347, 47 an inrush of steam from a boiler into a Atl. 1092 [belting laced by a single "cooker," imports negligence. Empson strand placed in a single row of holes at Packing Co. v. Vaughn (1899) 27 Colo. each end of a joint]); especially if it ap-66, 59 Pac. 749. It is not negligent to pears that he did not conform to general use hot water instead of steam to heat usage (Nix v. Texas P. R. Co. [1891] a drier, where hot water is customarily 82 Tex. 473, 18 S. W. 571). But he employed for that purpose. Glover v. cannot be declared to be negligent Meinrath (1896) 133 Mo. 292, 34 S. W. merely because he uses one kind of fast-72. The use of cast-iron for a stop ener, rather than another. Harley v. valve on a steamer is not negligent Buffalo Car Mfg. Co. (1894) 142 N. Y. where the use of that material is custo-31, 36 N. E. 813. In Columbia & P. S. mary. Wyman v. The Duart Castle R. Co. v. Hauthorne (1888) 3 Wash. (1899) 6 Can. Exch. 387. It is negli-Terr. 353, 19 Pac. 25, where the injury gent to use steam pipes without attachwas caused by the fact that a pulley on ing a drip pipe to draw off the water a shaft, having become loose, impinged from condensed steam. Meeker v. C. R. on the nut at the end of the shaft, and Remington & Son Co. (1901) 62 App. thus caused the nut to unscrew and come off, and so let the pulley fall, the (3) Appliances for breaking up court said that the nut should have pieces of metal.—It is not negligent to been screwed on in such a manner that

which is similar to those used in other (5) Appliances for handling ladles foundries. Wood v. Heiges (1896) 83 of molten metal.—On the ground that common usage required the adoption of (4) Appliances for the transmission another appliance, it has been held that

(6) Emery wheels.—The failure to

(7) Appliances for handling timber. ley, if it was not held a certain length -Whether the furnishing of crowbars of time on the loose pulley after it was and pinch bars, instead of cant hooks, the addition of a counter shaft and a that cant hooks are the usual applifast and loose pulley to a machine ances. Anderson v. Illinois C. R. Co.

Supp. 306. Whether it is negligent to struck by the arm of a crane, and sus-

79. Structures.—(See also § 97, post.)—The servant is sometimes allowed to recover, simply on the ground that the structure in question was dangerous to a person exercising reasonable care.1

The obvious character of the risk involved will ordinarily prevent recovery for an injury, caused by the fact that the servant was required to work on an elevated structure which was unprotected by a railing or other safeguard to prevent him from falling off.2 The de-

pended by chains to which it is attached chine was so placed that it threw a only by two open hooks. *Monaghan* v. piece of leather into such a position *Pacific Rolling Mill Co.* (1889) 81 Cal. that the head block of the machine "re-

putable where machinery, which is set ment was a permanent, visible one, up in the usual way, falls on a servant. Quigley v. Thomas G. Plant Co. (1896) Schultz v. Bear Creek Ref. Co. (1897) 165 Mass. 368, 43 N. E. 205. See also Schultz v. Bear Creek Ref. Co. (1897) 165 Mass. 368, 43 N. E. 20 180 Pa. 272, 36 Atl. 739; Augerstein v. subd. 4 of this note, supra. Jones (1891) 139 Pa. 183, 21 Atl. 24.

1 As, where a platform,

one, though the latter is superior. Cag-floor, and resting upon brackets placed ney v. Hannibal & St. J. R. Co. (1879) at different heights and different angles,

hammer and chisel were used, instead elevated structure must be provided of a saw, as on some roads, to cut rails. Williams v. Birmingham Battery & Apati v. Delaware, L. & W. R. Co. Metal Co. [1890] 2 Q. B. 338, 68 L. J. (1901) 64 App. Div. 515, 72 N. Y. Q. B. N. S. 918 (no ladders or other Supp. 322 (fragment broke off of hammeans of reaching a tramway). It is mer).

(12) Appliances on ships.—A ship sides of which are so low that lumps of has been held liable for furnishing to a coal roll over. Crown Coal Co. v. reaman, for the purpose of painting a Hiles (1892) 43 Ill. App. 310.

\*\*The sides of which are so low that lumps of has been held liable for furnishing to a coal roll over. Crown Coal Co. v. reaman, for the purpose of painting a Hiles (1892) 43 Ill. App. 310.

\*\*As, where the servant was required pose, and so stiff that, on the short tog-

Where the guard of a dieing-out ma-

190, 22 Pac. 590.

(9) Devices for keeping heavy macrushed a servant's hand, it was held chinery in place.—No negligence is imthat the could not recover as the attach-

Jones (1891) 139 Pa. 183, 21 Atl. 24.

1 As, where a platform, designed for (10) Formers.—A railway company use in oiling an overhead shaft, conis not liable because it uses a single sisted of a single plank 10 or 12 inches former in its shops, instead of a double wide, at a considerable height from the 69 Mo. 416. so that the board was inclined. Zim(11) Appliances for cutting rails.— merman v. Detroit Sulphite Fibre Co.
A jury cannot be allowed to declare a (1897) 113 Mich. 1, 71 N. W. 321. A
railway company negligent because a reasonably safe means of access to an negligence to construct a coal chute the

gle furnished, by reason of its unplia- of assisting in the work of storing ice bility it could not be made to grip hard (Moulton v. Gage [1895] 138 Mass. enough to hold the toggle in place, or to 390); or to wheel heavy loads on a barhold the half hitches made around the row along a narrow platform (Kaare v. the chock on a tugboat is constructed Ohio Coal Co. [1890] 78 Wis. 127, 9 L. and secured in the usual way. The Liz-zie Frank (1887) 31 Fed. 477.

R. A. 861, 47 N. W. 182); or to stand on a platform while endeavoring to comparison (1881) 31 red. 411.

(13) Arrangements permitting automatic movements of machinery.—It is not negligent to omit to provide a [1894] 16 Ky. L. Rep. 1, 24 S. W. 607); clutch for an embossing machine, other than the pedal, to prevent the automatic motion in the machine. Sweeney railway (Nugent v. Brooklyn Union v. Berlin & J. Envelope Co. (1886) 101 Elev. R. Co. [1901] 64 App. Div. 351, N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358. 72 N. Y. Supp. 67). fective lighting of the structure may be a differentiating factor, sufficient to take the case to the jury, if the platform is so shaped that the want of the light converts it into a pitfall at some particular point.3 Compare § 80, note 7. Otherwise, it seems, this circumstance will not enable the servant to recover.4

The particular kind of structure furnished for a given purpose is left to the discretion of the master, 5 except in so far as the usages of the business may affect his responsibility.6

80. Unguarded openings in floors, open hatchways, etc.—(See also § 100, post.)—Some courts proceed upon the theory that the maintenance of unguarded openings required for the purposes of the master's business does not import negligence, where they are plainly visible, and there is no special circumstance which renders them peculiarly dangerous.<sup>1</sup> The rationale of the conclusion thus arrived at

condition the whole of that time).

<sup>6</sup> Usage has been held to sanction the plank thick in a shaft. Smizel v. Odan-employment of a board track on which ah Iron Co. (1898) 116 Mich. 149, 74 to run push cars loaded with the lumber used in building a bridge. Bedford 1 Recovery has been denied, where

\*H. C. Akeley Lumber Co. v. Rauen Belt R. Co. v. Brown (1895) 142 Ind. (1893) 7 C. C. A. 424, 19 U. S. App. 659, 42 N. E. 359. On the ground of 253, 58 Fed. 668 (platform, at the place conformity to usage, it has been denied of the accident, extended only 6 or 8 that there was negligence in locating inches outside the track along which wooden buildings so close to the intake loaded cars had to be pushed. No light air way that, if they are set on fire, that available but that of a fellow servant's way will be filled with snoke and possibly suffocate miners. Coal Creek available but that of a fellow servants way will be filled with shock and poslantern).

A master who builds a bridge for the will suffocate miners. Coal Greek Min. Co. v. Davis (1891) 90 Tenn. 711, purpose of giving access to his works, 18 S. W. 387. For the same reason it and makes it sufficiently wide to admit of has been held that no action could be the passage of vehicles, cannot be found guilty of negligence on the ground that want of a fence round the lower part of it was not protected on either side by a a sheft through which iron ore is raised fence, and not lighted by a lamp. Rob- to a furnace gangway (Murray v. Merry ertson v. Adamson (1862) 24 Sc. Sess. [1890] 17 Sc. Sess. Cas. 4th series, 815 Cas. 2d series, 123 (stress was here laid [laborer injured by a stone which fell on the fact that the injured person had down the shaft, and, striking against been in the service for twenty years, the side, rebounded so that it hit him and the bridge had been in the same while he was standing outside]); or by ndition the whole of that time). the omission to provide a covering to protect workmen from coal which may fact that a single ladder 120 feet long, fall from a hoisting bucket at a dock instead of several shorter ones, was (Prybilski v. Northwestern Coal R. Co. used as a means of ascending and de- [1898] 98 Wis. 413, 74 N. W. 117). On scending a shaft. O'Neill v. Wilson the ground that there was no evidence (1858) 20 Sc. Sess. Cas. 2d series, 427. of any different usage, it has been held Nor from the fact that a passage and that the fact that no staging was fur-steps in a basement are cut out of the nished for the transfer of cotton from solid earth, instead of being made from a barge to a river steamboat does not stone, wood, or cement. McCarthy v. import negligence. Red River Line v. Shoneman (1901) 198 Pa. 568, 48 Atl. Smith (1900) 39 C. C. A. 620, 99 Fed. 493. Nor from the fact that movable 520. On the other hand, the master's steps were used as a means of access to nonconformity to usage has been held to a cellar. Regan v. Donovan (1893) 159 justify a jury in finding that it was Mass. 1, 33 N. E. 702. negligence to build a platform only one

is, mainly, that the servant understands and assumes the risks incident to such arrangements. See chapter vii., ante. But nonculpability is also supposed, in some instances, to be a proper inference from the fact that the risks to which the servant is exposed are of such a nature that he can avoid injury by the exercise of ordinary care.2

Other courts consider that the servant's right to recover for injuries caused by conditions of this sort is primarily a question for the jury, the view being taken that the general rule of law, by which the owner of premises is bound to guard persons lawfully entering thereon from injury by pitfalls, is applicable as between master and servant no less than between persons having no contractual relations with each other.3 In some cases it has been held that even the fact of the defendant's having conformed to general usage in regard to the maintenance of the opening did not necessarily absolve him.4

The courts belonging to the former group regard the liability of the master as being a question for the jury, where the opening in question had no direct connection with the business carried on at the establish-

servants fell through a trap door in a (1894) 58 Mo. App. 322 (uncovered and passage way (Anthony v. Leeret [1887] unguarded tank of hot water); Irmer 105 N. Y. 591, 12 N. E. 561); an unv. St. Louis Brewing Co. (1897) 69 Mo. guarded and unlighted hole in the floor App. 17 (similar facts). guarded and unlighted hole in the floor of a theater (Seymour v. Maddox [1851] 16 Q. B. 326; decision denied to be correct in Ryan v. Fowler [1862] 24 Mr. Y. 410, 82 Am. Dec. 315); a trap door in a laundry, for passing goods from one floor to the other (Moore v. Ross [1890] 17 Sc. Sess. Cas. 4th series, of the door to stand upon, with a vat filled with boiling tallow immediately v. Sandwich Enterprise Co. [1890] 36 Mr. J. 419); a pit in a railway roundhouse (McDonnell v. Illinois C. R. step of the laborer may precipitate him Co. [1898] 105 Iowa, 459, 75 N. W. into the vat,—is liable for his death by falling into such vat. The footing thus an uncovered well, containing hot water an uncovered well, containing hot water whose attention is apt to be diverted by (Feely v. Pearson Cordage Co. [1894] his work. Hess v. Rosenthal (1894) 161 Mass. 426, 37 N. E. 368). 55 Ill. App. 324, Affirmed in (1896) 160

<sup>2</sup> This consideration was emphasized Ill. 621, 43 N. E. 743.

ment where the servant was working.<sup>5</sup> These courts also consider that the master may properly be found negligent, where the opening is so located as to be peculiarly dangerous to employees.<sup>6</sup> Nor, it would seem, could it be successfully contended in any jurisdiction that a servant's right of action is not primarily a question for the jury, where the opening in question was rendered unusually hazardous by the want of proper lighting.7 Compare § 79, note 3.

The appointment of a watchman to warn servants against the dangers created by openings is a sufficient performance of the master's duty to guard them.8

81. Substances generating explosive gases.— (See also § 103, infra.)—Negligence has been denied to be inferable from the fact that the paint supplied for painting a tank was composed of ingredients

a workman, in the discharge of his Fed. 883. duty, falls down an open and unlighted 921, distinguishes cases where the ordi- with the by-laws of the harbor).

<sup>6</sup> In Hoffman v. Clough (1889) 124 nary hatches for the discharge of cargo Pa. 505, 17 Atl. 19, it was held that the are left open, which, as they may be explaintiff, who had been hired to operate pected to be left open in port, persons a carding machine, could not be said, as going on board ships must avoid at a matter of law, to have assumed the their peril. The existence, on an elerisk of falling into a well of water with vated trestle, within 7 feet of where ema loose cover which was frequently reployees were working, of an uncovered moved. The court said: "The dangers hole 7 feet long and 4 feet wide, through incident to the business of operating a which a fall might prove fatal, is a carding machine, reasonably suitable peril to which defendant cannot propfor the work to be done, were assumed erly expose its servants at night, in the when the employee entered upon his absence of light sufficient to disclose its work; but dangers from an opening in presence. Boyle v. Degnon-McLean the floor, from an insufficient staircase, Constr. Co. (1900) 47 App. Div. 311, 61 or other defect in the building, were incident to the place where the business 49 App. Div. 636, 63 N. Y. Supp. 1105.

was conducted."

In National Syrup Co. v. Carlson

(1893) 47 Ill. App. 178, plaintiff recoverable. servant where he fell through an open ered, where the railing of the elevator trap door, which was maintained on the shaft had been taken off during the day trap door, which was maintained on the shatt had been taken off during the day line along which employees had to pass, without his knowledge, and he had come in going from one room to another. into the building after dark. In a Mas-Johnson v. Bruner (1869) 61 Pa. 58, sachusetts case, it was observed that a 100 Am. Dec. 613; Maguire v. Little (1887; R. I.) 13 Atl. 108.

'In Eastland v. Clarke (1901) 165 in leaving an elevator well, which was N. Y. 420, 59 N. E. 202, Reversing situated in a dark basement, where his (1898) 28 App. Div. 621, 51 N. Y. Supp. servants were obliged to go frequently, 1140, the plaintiff recovered for an inopen and unguarded by a fence or any jury caused by his falling into a hole in suitable projection. Taulor v. Caren the cellar of a house, the hole being left Mfg. Co. (1885) 140 Mass. 150, 3 N. E. without the cover provided for it. In 21. The nature of the duty of a ship-Sansol v. Compagnic Générale Transat- owner in regard to the lighting of open Sansol v. Compagnie Générale Transat- owner in regard to the lighting of open lantique (1900) 101 Fed. 390, a long-hatchways is a question to be detershoreman who fell through a trap door mined by considering the usual custom in a dark passage on a steamer was alin respect to such lighting on board simlowed to recover. A ship is liable where ilar vessels. Sunney v. Holt (1883) 15

<sup>8</sup> Gray v. Thomson (1889) 17 Sc. Sess. hatchway in a passage along the side of Cas. 4th series, 200 (watchman here was a ship. The Guillermo (1886) 26 Fed. appointed by a shipowner in compliance which gave off an explosive gas, where it is also shown that it was an article in common use and of a well-known brand. It has also been held that conformity to usage was a conclusive defense, where the employer had purchased, for the conveyance of castings, old barrels which had been filled with benzine, whisky, etc., so that there was likely to be an explosion if a naked light were placed near them.2 But the present writer is of opinion that, in each of these instances, it was a fair question for the jury whether the employer ought not to have inquired more closely into the conditions, before allowing the appliances in question to become part of his plant.

- 82. Substances giving off poisonous fumes.—It is not negligent to use in a stove a patent fuel which produces dangerous fumes which will suffocate anyone sleeping in the room, if the door is closed. An employer cannot be found negligent because he uses acids which give off poisonous fumes, unless it is shown that his practice in this respect is different from that of other employers in the same business.2
- 83. Appliances for giving servants warning of danger.-On the ground of conformity to usage, it has been held that a mine owner cannot be held guilty of negligence because he has not provided any appliance in the mine for giving warning to persons working in a pocket that a draw is about to be made of the coal from the chutes.1 So, also, it has been laid down that the question whether whipping straps, or telltales of some other kind, should be adopted as a means of warning trainhands of the proximity of low bridges, is one which is to be determined by the common usage of well-conducted railway companies.2

The tags used to indicate cars condemned as unfit for further use and ordered to be taken to the repair shop are not sufficient, unless they are of such a size and character as to give due notice of the condition of the cars to employees who have to handle them at night.3

Numerous cases dealing with the sufficiency of the master's performance of the obligation to warn his servants of danger, in so far

<sup>&</sup>lt;sup>1</sup> Allison Mfg. Co. v. McCormick (1888) 118 Pa. 519, 12 Atl. 273.

<sup>&</sup>lt;sup>2</sup> Purdy v. Westinghouse Electric & Mfg. Co. (1900) 197 Pa. 257, 51 L. R. A. 881, 47 Atl. 237.

<sup>1</sup> Murch v. Thomas Wilson's Sons & Co. (1897) 168 Mass. 408, 47 N. E. 111 (not the least singular example of the production of the productions with which the standard standard standard standard standard standard with which the standard st the unflinching steadiness with which 49 La. Ann. 21, 21 So. 120. this court follows out a principle, even to the most preposterous conclusions).

<sup>&</sup>lt;sup>2</sup> Corcoran v. Wanamaker (1898) 185

Pa. 496, 39 Atl. 1108.

<sup>1</sup> Lehigh & W. B. Coal Co. v. Hayes (1889) 128 Pa. 294, 5 L. R. A. 441, 18 Atl. 387.

<sup>&</sup>lt;sup>2</sup>Louisville & N. R. Co. v. Hall (1890) 91 Ala. 112, 8 So. 371.

<sup>&</sup>lt;sup>8</sup> Meyers v. Illinois C. R. Co. (1897)

as such performance is connected with the manner in which his business is conducted, are cited in chapters xv. and xvi., post.

## B. Injuries caused by conditions of an abnormal, transitory, OR SPORADIC CHARACTER.

84. Conditions of railway tracks and appurtenances by which the safe operation of trains is affected.—(See also §§ 67, 68, supra.)— Negligence is inferable from the fact that the track itself was in an intrinsically defective condition; or from the fact that the bridges and other structures built to support the track were inadequate for

R. Co. (1878) 73 N. Y. 585; Louisville, Devlin v. Wabash, St. L. & P. K. Co.

As, where the ties or rails were of 423; Dale v. St. Louis, K. C. & N. R. Co. As, where the ties of rails were of 425; Date V. St. Douis, R. C. & N. R. Copor quality. O'Donnell v. Allegheny (1876) 63 Mo. 455 (defective joint); Valley R. Co. (1868) 59 Pa. 239, 98 Houston & T. C. R. Co. v. Gaither Am. Dec. 336; Burrell v. Gowen (1890) (1896; Tex. Civ. App.) 35 S. W. 179. 134 Pa. 527, 19 Atl. 678; McFee v. Or where the defective drainage ren-Vicksburg, S. & P. R. Co. (1890) 42 La. dered a portion of the track temporarily Ann. 790, 7 So. 720; James v. Northern insecure. See § 68, c, supra. That a P. R. Co. (1891) 46 Minn. 168, 48 N. rail broke solely by reason of frost and W. 783; Mehan v. Syracuse, B. & N. Y. cold weather does not import negligence. R. Co. (1878) 73 N. Y. 585; Louisville, Devlin v. Wabash, St. L. & P. R. Co. E. & St. L. Consol. R. Co. v. Miller (1885) 87 Mo. 545. In Atchison, T. & (1895) 140 Ind. 685, 40 N. E. 116; S. F. R. Co. v. Croll (1896) 3 Kan. App. Henry v. Lake Shore & M. S. R. Co. 242, 45 Pac. 112 (Reversed in 57 Kan. (1882) 49 Mich. 495, 13 N. W. 832; 548, 46 Pac. 972, but this point was not Krogg v. Atlanta & W. P. R. Co. discussed), it was held that the exist-(1886) 77 Ga. 202; Chicago, L. S. & E. ence of low joints at certain points R. Co. v. Hartmann (1897) 71 Ill. App. along a railroad track, caused by the R. Co. v. Hartmann (1897) 71 Ill. App. 427; Swadley v. Missouri P. R. Co. (1893) 118 Mo. 268, 24 S. W. 140; Houston & T. C. R. Co. v. McNamara (1893) 59 Tex. 255; Taylor, B. & H. R. Co. v. Taylor (1890) 79 Tex. 104, 14 S. W. 918; Little Rock, M. R. & T. R. Co. v. Leverctt (1886) 48 Ark. 333, 3 S. W. due to one of such low joints, where the 50; Devlin v. Wabash, St. L. & P. R. Co. (1885) 87 Mo. 545; Wright v. Southern R. Co. (1898) 122 N. C. 959, 30 S. E. 348. Or where the rails were out of alignment. Coughlin v. Brooklyn Heights R. Co. (1901) 59 App. Div. 126, 68 N. Y. Supp. 1105. Or where the track was too rough for the safe operation of trains. Sabine & E. T. R. ercised proper care. O'Neal v. Chicago Co. v. Ewing (1894) 7 Tex. Civ. App. 8, 26 S. W. 638 (see, however, cases at the end of this note). Or where the rails were not properly fastened. Mc-Coubs v. Pittsburg & W. R. Co. (1889) employee on a street railway. Mc-Coulond of the ground track, caused by the along a railroad track, caused by the along the first factor. Combs v. Pittsburg & W. R. Co. (1889) employee on a street railway. Mc-130 Pa. 182, 18 Atl. 613 (want of fish Cauley v. Springfield Street R. Co. plates on a siding); Rosenbaum v. St. (1897) 169 Mass. 301, 47 N. E. 1006 Paul & D. R. Co. (1888) 38 Minn. 173, (no action maintainable by a conductor 36 N. W. 447 (ties not spiked on tem-who goes out on the bumper in order to porary siding); Chicago G. W. R. Co. facilitate the operation of replacing the v. Price (1899) 38 C. C. A. 239, 97 Fed. trolley on the wire).

that purpose; or had been destroyed by some catastrophe; or from the fact that a switch had fallen into disrepair; or from the fact that certain material substances extrinsic to the track itself, but situated on or near it, rendered the operation of trains unduly dangerous.<sup>5</sup>

A servant operating a construction train cannot maintain an action on the theory that the ballasting was imperfect and the number of

such a case as this is, of course, preditrack). Or produce in some other way cated only when it is shown that the de- conditions which will unduly imperil

railment of train).

\*\* As, where obstructions are allowed to remain on the track. True v. Lehigh track, which prevented the engineer Valley R. Co. (1897) 22 App. Div. 588, 48 N. Y. Supp. 86; Fisher v. Oregon v. Texas & N. O. R. Co. (1885) 63 Tex. Short Line & U. N. R. Co. (1892) 22 (660; Oregon Short Line & U. N. R. Co. Or. 533, 16 L. R. A. 519, 30 Pac. 425 v. Tracy (1895) 14 C. C. A. 199, 29 U. (a snow slide covered track; case dissections one of a snow drift, tion can be maintained on the theory which is a risk assumed). Wellman v. that the track was frequently obstructed. tinguished from one of a snow drift, tion can be maintained on the theory which is a risk assumed); Wellman v. that the track was frequently obstructed Oregon Short-Line & U. N. R. Co. by the movements of the cars, so that a (1892) 21 Or. 530, 28 Pac. 625 (same facts); Henry v. Wabash Western R. ordinary risk. Bancroft v. Boston & Co. (1891) 109 Mo. 488, 19 S. W. 239 M. R. Co. (1893) 67 N. H. 466, 30 Atl. (a freight car, not being properly secured on a siding, escaped onto the Rumsey v. Delaware, L. & W. R. Co. main track. But quære, as to the liability under such circumstances, since the accident presumably occurred owthe accident presumably occurred ow-

\*\*Bogart v. Delaware, L. & W. R. Co. ing to the negligence of fellow servants, (1895) 145 N. Y. 283, 40 N. E. 17; and, according to the ordinary view, Warner v. Erie R. Co. (1868) 39 N. Y. the company would not be liable unless 468; Vosburgh v. Lake Shore & M. S. it was negligent in falling to discover R. Co. (1884) 94 N. Y. 374, 46 Am. what had occurred in time to prevent a Rep. 148; Faulkner v. Erie R. Co. catastrophe. See chapter x., post); (1867) 49 Barb. 324; Toledo, P. & W. Balhoff v. Michigan C. R. Co. (1895) R. Co. v. Conroy (1873) 68 Ill. 561 106 Mich. 606, 65 N. W. 592 (water (1871) 61 Ill. 162; Louisville, N. A. & Goded the track and froze); McClardo, P. & W. Sandford (1889) 117 Ind. ney v. Chicago, M. & St. P. R. Co. 265, 19 N. E. 770; Carlson v. Oregon (1891) 80 Wis. 277, 49 N. W. 963 (an Short Line & U. N. R. Co. (1892) 21 accumulation of dirt, ice, snow, and Or. 454, 28 Pac. 497; Bowen v. Chicago, G. (1891) 80 Wis. 277, 49 N. W. 963 (an accumulation of dirt, ice, snow, and chaff around the rails of a side track B. & K. C. R. Co. (1888) 95 Mo. 268, sides of the cuttings through which the R. Co. (1877) 46 Iowa, 109; Chicago G. line is carried are left in such a condi-W. R. Co. v. Healy (1898) 30 C. C. A. tion that masses of earth, rocks, etc., 11, 57 U. S. App. 513, 86 Fed. 245; Bach v. Ivas C. R. Co. (1900) 112 Iowa, 241, high Valley R. Co. (1897) 22 App. Div. 83 N. W. 959 (rotten timbers of a cattle guard sank under the engine, so that the guard sank under the engine, so that slide); Bean v. Western N. C. R. Co. (1890; Colo. App.) 62 Pac. 964 (a R. Co. v. Voss (1892; Ark.) 18 S. W. bridge burned down). The liability in 172 a large rock slipped down upon the such a case as this is, of course, predicated only when it is shown that the deconditions which will unduly imperil fendant was chargeable with notice of the security of employees. Holden v. what had occurred. See, generally, Fitchburg R. Co. (1880) 129 Mass. 268, chapters x., xI., post. 37 Am. Rep. 343 (bank fell on a der-\*Harter v. Atchison, T. & S. F. R. Co. rick, and thus brought one of the guys (1895) 55 Kan. 250, 38 Pac. 778 (described to the track that it swept a ilment of train). brakeman off a car). Or where there As, where obstructions are allowed was a thick growth of bushes near the

ties inadequate, where these conditions were a necessary incident of one of the stages of the work as it was being carried on.6

As regards employees engaged in the work of repairing a defective track, the company is not under any obligation to keep it in good condition.<sup>7</sup> The extent of its duty is merely to give them timely notice of the defects, so that they may take the appropriate precautions to secure themselves against injury.8 See generally, as to cases of this class, § 29, ante.

85. Track considered as a footway for servants.— (See also § 69, supra.)—a. Track and roadbed itself.—From the decisions cited below, it will be seen that the servant has generally been permitted to recover for injuries due to the abnormal condition of any of the component parts of the permanent way.1 But there is some conflict of opinion as to the liability of the company for one particular kind of injury, viz., that caused by a brakeman's clothes catching in splinters projecting from old and battered rails.2

By a court which denies that there is any obligation on the part of a company to keep the track safe as a footway (see 68, b, supra), it has been held that inequalities on a track at a station, occasioned by

<sup>1</sup>The action has been held maintain-down into the depression with unexable where the cause of the injury was pected speed, crushing a brakeman's a loose and worn plank on a crossing. foot). Bird v. Long Island R. Co. (1896) 11 <sup>2</sup> In Georgia it has been held that App. Div. 134, 42 N. Y. Supp. 888. such a condition imported a prima facie Defective planking on the track. Chi-breach of duty. Preston v. Central R.

<sup>6</sup> Evansville & R. R. Co. v. Hender- S. V. & N. W. R. Co. v. Guy (1893; son (1893) 134 Ind. 636, 33 N. E. 1021. Tex. Civ. App.) 23 S. W. 633 (draw-<sup>7</sup> Mitchell v. Fullington (1889) 83 bars slipped past each other); Louis-Ga. 301, 9 S. E. 1083.

<sup>8</sup> St. Louis, I. M. & S. R. Co. v. Morgart (1885) 45 Ark. 318.

<sup>8</sup> Co. v. Morgart (1885) 45 Ark. 318.

<sup>8</sup> St. Louis, I. M. & S. R. Co. v. Morgart (1885) 45 Ark. 318.

recent repairs, are presumed to be known to a brakeman, and that he cannot recover for injuries received through stumbling.3

b. Casual obstructions on or near the track.—Several courts have rendered decisions which proceed upon the theory that negligence may be inferred where movable articles having no immediate connection with the operation of trains are left lying on the track, and cause employees to lose their footing.4 Similarly, employees have been allowed to recover where their injuries were due to obstructions of this kind beside the track.<sup>5</sup> But it is conceded that the company may, without culpability, allow such articles to remain temporarily near the track, when they are placed there in the ordinary way for the purpose of repairing the track itself.6

Other courts absolve the company on the ground, more or less distinctly formulated, that a railway company cannot be found guilty of negligence on the theory that it is bound to keep the entire surface of its premises clear of every object that may cause an employee to slip or be thrown down.7

The existence of any obligation to keep the ground near the track free from accumulations of snow and ice has been denied in one case on the ground that the danger they create is one of the ordinary risks of work in cold climates.8 By other authorities they seem to be put

<sup>3</sup> Philadelphia & R. R. Co. v. Schertle (1881) 97 Pa. 450.

(1881) 97 Pa. 450.

\*\*Kennedy v. Lake Superior Terminal (recovery denied where a brakeman & Transfer R. Co. (1896) 93 Wis. 32, stumbled over one of several piles of 66 N. W. 1137 (ashes); Linck v. Louisville & N. R. Co. (1899) 21 Ky. L. Rep. liminary to using them for ballast).

\*To this been held that no action can be maintained for an injury to an employee caused by falling over a clinker about 1 foot long and 6 inches of unusual size in descending from an thick turned under a switchman's engine. Such an injury is simply a sim

ection man stumbled over a log while assumed by servants handling cars. trying to get out of the way of a Hughes v. Winona & St. P. R. Co. train); Chicago, R. I. & P. R. Co. v. (1880) 27 Minn. 137, 6 N. W. 773. Kinnare (1900) 91 Ill. App. 508, Affirmed in (1901) 190 Ill. 9, 60 N. E. 57 (1883) 52 Mich. 40, 50 Am. Rep. 243, (sand and gravel alongside track).

<sup>6</sup> Hurst v. Kansas City, P. & G. R. Co. (1901) 163 Mo. 309, 63 S. W. 695

Ky. L. Rep. 1288, 49 S. W. 204 (a large clinker about 1 foot long and 6 inches thick turned under a switchman's engine. Such an injury is simply a foot); Fish v. Illinois C. R. Co. (1896) of Iowa, 702, 65 N. W. 995 (cobble stones had dropped from gravel trains).

\*\*Hulehan v. Green Bay, W. & St. P. Co. (1887) 68 Wis. 520, 32 N. W. can a brakeman recover damages where 529 (blocks of timber beside the track); Southern P. R. Co. v. Markey (1892; which has been left lying on a repair Tex.) 19 S. W. 392 (similar facts); track. Williams v. St. Louis & S. F. Hall v. Missouri P. R. Co. (1881) 74 R. Co. (1893) 119 Mo. 316, 24 S. W. Mo. 298 (rail near the track); Bengtson v. Chicago, St. P. M. & O. R. Co. (1893) 119 Mo. 316, 24 S. W. Mo. 298 (rail near the track); Bengtson v. Chicago, St. P. M. & O. R. Co. (1891) 47 Minn. 486, 50 N. W. 531 (a sakes which it is the custom to drop control of the fire box onto the track are section man stumbled over a log while

in the same category as any other kind of casual obstruction, the company being held liable or not, according to circumstances.9

86. Objects dangerous to employees in moving trains or cars.— (See also §§ 70, 71, supra.)—a. On the track.—An employee who, while seated on a hand car with his legs hanging down over the edge, was struck by a plank of a crossing which stuck up several inches above its proper level, has been held entitled to recover.1

It is not negligence to leave cars on a side track so close to a switch that a train traveling at the usual speed of 30 or 35 miles an hour, and running out upon the side track, cannot be stopped in time to avoid a collision.2

b. Alongside the track.—It may be presumed that even the courts which deny that a train hand can recover for an injury caused by striking against a rigid object close to the track, while it is in its normal position, would all concede that there is a prima facie right of action where the injury was due to the fact that the object in question was closer than usual to the track at the time when the accident occurred.3

Nor is there any ground upon which the presence of a casual ob-

\*Recovery has been allowed where a was for the jury. Rifley v. Minneapobrakeman lost his footing on frozen mud lis & St. L. R. Co. (1898) 72 Minn. 469, and snow which had accumulated between the rails. Lake Shore & M. S. Case, on the grounds (1) that more care R. Co. v. Conway (1896) 67 Ill. App. should be used in securing safe conditions, which the company permitted to be shoveled from its tracks onto the space between them. Cregg v. Chicago in the earlier case the place where the & W. M. R. Co. (1892) 91 Mich. 624, plaintiff fell was covered with level 52 N. W. 62. In one Minnesota case a plaintiff was nonsuited on the theory der it. In one case of this type the that a railway company is not bound, breach of duty was admitted, but the unless under very special and peculiar servant failed to recover on the ground circumstances, to remove all the snow that he appreciated the risk. Way v. above the level of the rails, or in dan- track where car repairers worked). above the level of the rails, or in dan-gerous ridges or hummocks, or to form along the content of the rails, or in dan-dangerous holes, it cannot be charged (1881) 53 Wis. 657, 11 N. W. 15 (the with negligence; nor is it negligent in contention was that the road was not failing to cover the snow with ashes or defective, because the plank would in cinders. Fay v. Chicago, St. P. M. & no way interfere with the passage of O. R. Co. (1898) 72 Minn. 192, 75 N. trains). W. 15. But in a case decided a few months later it was held that the ques-tion as to the negligence of a railroad to exposite effect yightly refused) tion as to the negligence of a railroad to opposite effect rightly refused). company in permitting a ridge of ice \*So held in Malott v. Laufman (1899) company in permitting a ridge of ice So held in Malott v. Laufman (1899) covered with snow, and about 2 inches So III. App. 178 (a mail crane became higher than the rails, to remain for so loose on its foundation that it leaned about a week between the rails of a towards the track). track in a large and busy switch yard,

circumstances, to remove all the snow that he appreciated the risk. Way v. from its switch yards; and if it keeps Chicago & N. W. R. Co. (1888) 76 the surface of the snow practically level, Iowa, 393, 41 N. W. 51 (defective conand does not allow it to accumulate dition was the accumulation of ice on a

struction near the track can be excused after a sufficient period has elapsed to charge the company with notice of its position.4 See chapters x., xi., post.

Most of the courts which have dealt with such facts also hold that a railway company is negligent if movable objects which have no connection, or only an indirect connection, with the operation of the road, are left so close to the track that the safety of train hands is endangered.5

The Massachusetts doctrine, however, seems to be that such obstructions are an ordinary incident of railway work, and that the train hands are presumed to be able to protect themselves against the resulting risks.6

c. Above the track.—All courts, whether they do or do not regard as culpable the maintenance of overhead structures so low as to endanger train hands, hold a company liable if those structures cause an injury while they are abnormally low.7

87. Railway fences.—(See also § 72, supra.)—Whether there is or

(1897) 169 III. 581, 48 N. E. 476 (a piece of drawbar lying on the track struck the pilot of the engine, and was thrown against the footboard, breaking it).

Gaffney v. New York & N. E. R. Co. (1887) 15 R. I. 456, 7 Atl. 284 (lumber pile); Bessex v. Chicago & N. W. R. (Co. (1878) 45 Wis. 477 (lumber pile); and it cannot be expected to keep the Smith v. Winona & St. P. R. Co. (1889) 42 Minn. 87, 43 N. W. 968 (stone pile); themselves neglect ordinary precaution. Meredith v. Cranberry Coal & I. Co. (1889) 49 N. C. 576, 5 S. E. 659 (a laws of pile); wood pile seems to be regarded as importing negligence; but the opinion does not contain a direct affirmation of this Co. (1893) 138 N. Y. 302, 33 N. E. 1069 doctrine); Powers v. Thayer Lumber (telltale out of order); Hines v. New doctrine); Powers v. Thayer Lumber (telltale out of order); Hines v. New Co. (1892) 92 Mich. 533, 52 N. W. 937 York C. & H. R. R. Co. (1894) 78 Hun, (tree). But no negligence can be in- 239, 28 N. Y. Supp. 829 (same facts); ferred from the mere fact that a tree Ohio, I. & W. R. Co. v. Johnson (1889) was left standing close to the track on 31 Ill. App. 183 (brakeman killed by a

the maintenance of such obstructions man off a car),

\*Chicago & N. W. R. Co. v. Delaney was not regarded as implying negligence (1897) 169 III. 581, 48 N. E. 476 (a piece is, however, clearly indicated by the re-

a road under construction. Manning v. water-supply pipe, which, by reason of Chicago & W. M. R. Co. (1895) 105 defective appliances for holding the Mich. 260, 63 N. W. 312. Mich. 260, 63 N. W. 312.

<sup>6</sup> In Thompson v. Boston & M. R. Co. (1891) 153 Mass. 391, 26 N. E. 1070, where a brakeman in swinging out along the side of a car after setting a brake struck against a pile of rails, it was held that he could not recover, mainly for the reason that, knowing that there was a possibility that such obstructions might exist, he negligently failed to look out for the pile in question. That the maintenance of such obstructions man off a car). not any common-law duty to fence a track, it would seem that a railway company must at least exercise due care to see that a fence which has been erected is kept in good condition. The position taken is, that a servant working on a fenced line only assumes the risks incident to its operation while the fence is in good condition.1

Rolling stock on railways.— (See also §§ 73, 74, supra.)— Negligence is inferable where a railway company uses rolling stock defective in the respects indicated by the subjoined note.1

<sup>1</sup> Quill v. Houston & T. C. R. Co. R. Co. (1893) 115 Mo. 205, 21 S. W. (1898; Tex. Civ. App.) 46 S. W. 847, 503.

Writ of Error dismissed in (1898) 92
The case is for the jury where no Tex. 335, 48 S. W. 168, distinguishing proper headlight was provided for the the cases in which no fence had even tender of an engine which was backing. been erected.

in three other cases, as the only points assumption of risks or contributory negligence were available to the defend-

V. Chicago & N. W. R. Co. (1871) 31

Lowa, 373.

1 (1) Defective locomotives.—Actions have been maintained where the following parts were in bad order: Boilers. V. New York, N. H. & H. R. Co. (1897) 10

Tewas & P. R. Co. v. Barrett (1895) 14

C. C. A. 373, 30 U. S. App. 196, 67 Fed. held erroneous where a brakeman work. have held in (1897) 166 U. S. 617, ing at the switching of cars with a road 11 L. ed. 1136, 17 Sup. Ct. Rep. 707; engine not provided with a hand-hold Baater v. Chicago & N. W. R. Co. such as is ordinarily used on yard en (1899) 104 Wis. 307, 80 N. W. 644; gines took hold of the figure plate, and Atchison, T. & S. F. R. Co. v. Holt (1883) 29 Kan. 149; Cone v. Delaware, L. & W. R. Co. (1880) 81 N. Y. 206, 37 Am. Rep. 491; Lake Erie & W. R. Co. were declared actionable in Powers v. v. McHenry (1894) 10 Ind. App. 525, New York C. & H. R. R. Co. (1891) 60

37 N. E. 186; Kirkpatrick v. New York Hun, 19, 14 N. Y. Supp. 408, Affirmed C. & H. R. R. Co. (1879) 79 N. Y. 240; in 128 N. Y. 659, 29 N. E. 148; Brad-Keegan v. Western R. Corp. (1853) 8 shaw v. Chicago, R. I. & P. R. Co. (1898) 111. App. 235; Chicago & A. R. Co. v. To Minn. 61, 77 N. W. 541; Bowers v. Depper (1896) 51 M. P. 142 Wheele. Ill. App. 235; Chicago & A. R. Co. v. 75 Minn. 61, 77 N. W. 541; Bowers v. DuBois (1896) 65 Ill. App. 142. Wheels. Union P. R. Co. (1885) 4 Utah, 215, 7 

 Bulbots (1896)
 05 111. App. 142.
 wheels.
 Onton r. E. Vo. (1003)
 4 Clail, 213, 4

 Bridges v. St. Louis, I. M. & S. R. Pac. 251; Norfolk & W. R. Co. v. Am.

 Co. (1879)
 6 Mo. App. 389.
 Levers. pey (1896)
 93 Va. 108, 25 S. E. 226;

 Burlington & M. R. Co. v. Wallace Illinois C. R. Co. v. Harris (1894)
 53

 (1889)
 28 Neb. 179, 44 N. W. 223.
 Ill. App. 592; Fordyce v. Yarborough

 Drawbars.
 Ousley v. Central R. & Blog. (1892)
 1 Tex. Civ. App. 260, 21 S. W.

 Drawbars. Ousley v. Central R. & Big. (1892) 1 1ex. Civ. App. 200, 21 S. W. Co. (1891) 86 Ga. 538, 12 S. E. 938; 421; Denver, T. & G. R. Co. v. Simpson Louisville, N. A. & C. R. Co. v. Bates (1891) 16 Colo. 55, 26 Pac. 339; Trow-(1896) 146 Ind. 564, 45 N. E. 108; ler v. Southern R. Co. (1898) 122 N. C. Norfolk & W. R. Co. v. Nunnally (1892) 902, 30 S. E. 117; Illinois G. R. Co. v. 88 Va. 546, 14 S. E. 367. Footboard. Barslow (1901) 94 Ill. App. 206; Mc-O'Mellia v. Kansas City, St. J. & C. B. Knight v. Chicago, M. & St. P. R. Co.

the cases in which no fence had even tender of an engine which was backing.

Southern P. Co. v. Yeargin (1901) 48.

The same view was apparently taken C. C. A. 497, 109 Fed. 436.

Other cases in which the liability of discussed were whether the defenses of the defendant for defective locomotives was recognized are Wabash & W. R. Co. v. Morgan (1892) 132 Ind. 430, 31 ant under the circumstances. Sweeney N. E. 601; Durgin v. Munson (1864) 9 v. Central P. R. Co. (1880) 57 Cal. 15; Allen, 396, 85 Am. Dec. 770; Atchison, Magee v. North Pacific Coast R. Co. T. & S. F. R. Co. v. Holt (1883) 29 Kan. (1889) 78 Cal. 430, 21 Pac. 114; Dewey 149; Geary v. Kansas City, O. & S. R. v. Chicago & N. W. R. Co. (1871) 31 Co. (1897) 138 Mo. 251, 39 S. W. 774;

tance apart. Seese v. Northern P. R. Co. (1889) 76 Mich. 400, 43 N. W. 370 (draw-bar had dropped down); Brewer v. Flint & P. M. R. Co. (1885) 56 Mich. 620, 23 N. W. 440 (similar facts); Bender v. St. Louis & S. F. R. Co. (1897) 137 Mo. 240, 37 S. W. 132; Gottlieb v. New York, L. E. & W. R. Co. (1885) 100 N. Y. 462, 3 N. E. 344; Evans v. Chamberlain (1892) 40 S. C. 104, 18 S. E. 213; Richmond & D. R. Co. v. George (1891) 88 Va. 223, 13 S. (1896; Va.) 24 S. E. 385. The furnishin coupling cars of different heights is (1897) 17 Tex. Civ. App. 487, 43 S. W. not a sufficient discharge of the company's duty to absolve it from liability for allowing a foreign car with a bumper that had sagged to be taken into a (1886) 66 Tex. 674, 2 S. W. 667; Cambrical Property of the control of th train. Goodrich v. New York C. & H. eron v. Great Northern R. Co. (1898) R. R. Co. (1889) 116 N. Y. 398, 5 L. R. 8 N. D. 124, 77 N. W. 1016 (steps re-A. 750, 22 N. E. 397.

v. Bullard Feltonholds. Hand (1899) 37 C. C. A. 1, 94 Fed. 781; v. Murphy (1898) 59 Kan. 774, 52 Pac. Brann v. Chicago, R. I. & P. R. Co. 863 (rod broke and caught switchman, (1880) 53 Iowa, 595, 36 Am. Rep. 243, and threw him under the wheels). 6 N. W. 5; Settle v. St. Louis & S. F. R. Co. (1895) 127 Mo. 336, 30 S. W. 125; Hayden v. Platt (1895) 84 Hun, 487, 32 N. Y. Supp. 1144; Thompson v. Great Northern R. Co. (1900) 79 Minn. 291, 82 N. W. 637.

Brakes. Northern P. R. Co. v. Charless (1892) 2 C. C. A. 380, 7 U. S. App. 359, 51 Fed. 562; Mexican C. R. Co. v. Jones (1901) 48 C. C. A. 227, 107 Fed. 64; Central Trust Co. v. Texas & R. A. 640, 83 N. W. 446; Ryan v. New St. L. R. Co. (1887) 32 Fed. 448; Bail-St. L. R. V. Co. (1893) 139 269, 34 N. Y. Supp. 665; Bushby v. N. Y. 302, 34 N. E. 918; Chicago, B. & New York, L. E. & W. R. Co. (1887) N. 1. 302, 34 N. E. 316; Chicago, B. & Men Tolk, B. E. & W. R. Co. (1887) Q. R. Co. v. Kellogg (1898) 55 Neb. 107 N. Y. 374, 14 N. E. 407. 748, 76 N. W. 462 (First Hearing, 54 (3) Defective hand cars.—Action held Neb. 127, 74 N. W. 454); Hickman v. maintainable in Indiana, I. & I. R. Co. Missouri P. R. Co. (1886) 22 Mo. App. v. Snyder (1895) 140 Ind. 647, 39 N. 344; Mad River & L. E. R. Co. v. Bar- E. 912; Solomon R. Co. v. Jones (1883) ber (1856) 5 Ohio St. 541, 67 Am. Dec. 30 Kan. 601, 2 Pac. 657; Norton v. Lou-312; Morton v. Detroit, B. C. & A. R. isville & N. R. Co. (1895) 16 Ky. L. Vol. I. M. & S.—15.

(1890) 44 Minn. 141, 46 N. W. 294 Co. (1890) 81 Mich. 423, 46 N. W. 111; (ragged edge on a drawhead caught the Myers v. Erie R. Co. (1899) 44 App. clothing of a brakeman). The follow- Div. 11, 60 N. Y. Supp. 422; Louisville, ing cases recognize the liability which a N. A. & C. R. Co. v. Buck (1888) 116 company incurs when couplings are defective in such a manner that the cars Prosser v. Montana C. R. Co. (1895) to be coupled are not kept at a safe dis- 17 Mont. 372, 30 L. R. A. 814, 43 Pac. 81; Chicago & N. W. R. Co. v. Taylor tance apart. Seese v. Northern P. R. 81; Chicago & N. W. R. Co. v. Taylor Co. (1889) 39 Fed. 487; King v. Ohio & (1873) 69 Ill. 461, 18 Am. Rep. 626; M. R. Co. (1882) 11 Biss. 362, 14 Fed. Texas P. R. Co. v. White (1891) 82 277; St. Louis, I. M. & S. R. Co. v. Hig- Tex. 543, 18 S. W. 478 (brakeman's gins (1890) 53 Ark. 458, 14 S. W. 653; foot was caught by a drooping brake). Elgin, J. & E. R. Co. v. Eselin (1896) A verdict for the plaintiff will not be 68 Ill. App. 96; Louisville & N. R. Co. set aside where a servant was killed by v. Foley (1893) 94 Ky. 220, 21 S. W. the failure of air brakes to work, be-866; Karrer v. Detroit, G. H. & M. R. cause of a leak in a steam pipe in the Co. (1889) 76 Mich. 400, 43 N. W. 370, smoke hox. Pierson, v. New York, N. smoke box. Pierson v. New York, N. H. & H. R. Co. (1900) 53 App. Div. 363, 65 N. Y. Supp. 1039.

Ladders. Richmond & D. R. Co. v. Williams (1889) 86 Va. 165, 9 S. E. 990; Richmond & D. R. Co. v. Moore (1883) 78 Va. 93; Goodman v. Richmond & D. R. Co. (1886) 81 Va. 576; Jones v. New York C. & H. R. R. Co. (1882) 28 Hun, 364; Lake Shore & M. S. R. Co. v. Ryan (1897) 70 III. App. E. 429; Chesapeake & O. R. Co. v. Lash 45; Thompson v. Great Northern R. Co. (1896; Va.) 24 S. E. 385. The furnish- (1900) 79 Minn. 291, 82 N. W. 637; ing of the crooked link customarily used *Missouri*, K. & T. R. Co. v. Chambers

Truss rod. Missouri, K. & T. R. Co.

Floor. Chicago & E. R. Co. v. Branyan (1894) 10 Ind. App. 570, 37 N. E. 190.

Wheels. Union P. R. Co. v. Daniels (1894) 152 U. S. 684; Union P. R. Co. v. Snyder, 38 L. ed. 597, 14 Sup. Ct. Rep. 756, Affirming (1890) 6 Utah, 357, 23 Pac. 762.

Stakes. Jones v. Chicago, St. P. M. & O. R. Co. (1900) 80 Minn. 488, 49 L. York C. & H. R. R. Co. (1895) 88 Hun,

- 89. Vehicles other than those used on railways.— The action has been sustained where the dangerous instrumentality was a defective brake; a defective linchpin; a defective flange in a wheel.
- 90. Appliances designed to support or lift heavy objects.— The action has been held maintainable where the cause of the injury was the defective condition of ropes and cables,1 chains,2 hooks,3 eyebolts,4 rods designed to support a certain weight,5 jackscrews,6 pul-

Wabash, St. L. & P. R. Co. (1886) 21 Mo. App. 213 (lever of hand car cracked at a place where it was covered by the iron at the shoulder); Gulf, C. & S. F.

was allowed in Beardsley v. Minneapolis Street R. Co. (1893) 54 Minn. 504, 56 started with a lunge).

Matthews v. M'Donald (1865) 3 Sc. Sess. Cas. 3d series, 506.

thews (1890) 86 Ga. 418, 12 S. E. 632; McGuigan v. Beatty (1898) 186 Pa. 329, 40 Atl. 490; Bruce v. Beall (1897) 99 Tenn. 303, 41 S. W. 445; Baker v. Allegheny Valley R. Co. (1880) 95 Pa. 'Painton v. Northern C. R. Co. 211, 40 Am. Rep. 634; Yaw v. Whit- (1880) 83 N. Y. 7; Killman v. Robert more (1901) 167 N. Y. 605, 60 N. E. Palmer & Son Shipbuilding & Marine R. 1123, Affirming (1899) 46 App. Div. Co. (1900) 42 C. C. A. 281, 102 Fed. 422, 61 N. Y. Supp. 731 (cable supporting derrick broke); The Persian Monarch (1892) 49 Fed. 669 (wire rope Supp. 628. used as a guy of a derrick gave way); Ashley Wire Co. v. Mercier (1895) 61 Ill. App. 485 (similar accident); Steen

Rep. 864, 30 S. W. 599; Clowers v. Minn. 310, 34 N. W. 113 (a frayed wire rope supporting a pile-driver hammer dangerous to touch with a mittened hand when it was in motion).

<sup>2</sup> Murphy v. Phillips (1876) 24 Week. R. Co. v. Silliphant (1888) 70 Tex. 623, Rep. 647, 35 L. T. N. S. 477; Whitelaw 8 S. W. 673 (section hand injured by the v. Moffat (1849) 12 Sc. Sess. Cas. 2d giving way of the lever of a hand car). series, 434; Hackett v. Middlesex Mfg.

(4) Defective street cars.—Recovery Co. (1869) 101 Mass. 101; Tangney v. J. B. Wilson & Co. (1891) 87 Mich. 453, 49 N. W. 666; Honifius v. Chambers-N. W. 176 ("bucking" car); Murdock burg Engineering Co. (1900) 196 Pa. v. Oakland, S. L. & H. Electric R. Co. 47, 46 Atl. 259; Vincent v. Alden (1900) 128 Cal. 22, 60 Pac. 469 (car (1901) 62 App. Div. 558, 71 N. Y. Supp. 47, 46 Atl. 259; Vincent v. Alden (1901) 62 App. Div. 558, 71 N. Y. Supp. 149 (some of the links here had been <sup>1</sup> Mahood v. Pleasant Valley Coal reduced about a third in thickness); Co. (1892) 8 Utah, 85, 30 Pac. 149; Consolidated Ice Mach. Co. v. Kiefer (1888) 26 Ill. App. 466; Hoffman v. Dickinson (1888) 31 W. Va. 142, 6 S. <sup>2</sup> Boyce v. Schroeder (1898) 21 Ind. E. 53. Evidence that a chain broke un-<sup>2</sup> Boyce v. Schroeder (1898) 21 Ind. E. 53. Evidence that a chain broke undependence of the strain only one tenth of that size strain only one tenth of that which, according to expert testimony, Y. 461, 57 N. E. 738, Reversing (1898) one of that size should bear, if made of the best material, will justify a conclusion by a jury that the chain was defined U. S. 245, 30 L. ed. 354, 7 Sup. Ct. fective. De Graff v. New York C. & H. Rep. 1360; Senior v. Ward (1859) 1 R. Co. (1879) 76 N. Y. 125. "The El. & El. 385, 28 L. J. Q. B. N. S. 139, amount of strain spoken of [by the explorer y v. Ricketts (1870) 55 Ill. 234; when the chain is new, either by hyther Phanix (1888) 34 Fed. 760; Wood draulic pressure, or a dead weight, and v. Pitfield (1887) 26 N. B. Rep. 210; not in the mode in which the chain is The Carolina (1886) 30 Fed. 199; The used on a car. Its use would naturally The Carolina (1886) 30 Fed. 199; The used on a car. Its use would naturally Ethelred (1899) 96 Fed. 446; Hanni-weaken its power of resistance, and gan v. Union Warehouse Co. (1896) 3 there is no obligation to keep it up to App. Div. 618, 73 N. Y. S. R. 753, 38 its maximum strength, and hence the N. Y. Supp. 272; Ocean S. S. Co. v. Mat- breaking might have been from natural and unforeseen causes. But these were considerations for the jury."

<sup>3</sup> Spicer v. South Boston Iron Co.

(1885) 138 Mass. 426.

224; Doyle v. White (1896) 9 App. Div. 521, 35 N. Y. Supp. 760, 41 N. Y.

<sup>5</sup> Moynihan v. Hills Co. (1888) 146 Mass. 586, 16 N. E. 574.

<sup>6</sup> Kennedy v. Chicago, M. & St. P. R. v. St. Paul & D. R. Co. (1887) 37 Co. (1894) 57 Minn. 227, 58 N. W. 878. leys and their attachments,7 jiggers,—contrivances for loading wheels on a railway car,8—handles on boxes.9

91. Elevators.— (See also § 75, supra.)—An employer may be held liable if the safety devices which he is bound to provide for an elevator designed for the use of his servants prove defective. The employer must also respond in damages if an elevator, which is either constructed specially for the conveyance of the servants, or which, though constructed primarily for the carriage of freight, is also used, with his acquiescence, for the conveyance of servants, is in any other way abnormally dangerous to use.2

92. Vessels subjected to the pressure of steam.— (See also supra.)—A servant may maintain an action for injuries caused by

<sup>7</sup>Romono Oolitic Stone Co. v. Phil- (1889) 150 Mass. 125, 22 N. E. 631. lips (1894) 11 Ind. App. 118, 39 N. E. Where it appears that a scrubbing girl

<sup>8</sup> Kain v. Smith (1882) 89 N. Y. 375, Affirming 25 Hun, 146 (parts were of

847.

Macq. H. L. Cas. 30; Bucher v. Pryibil Mo. App. 214; Derwin v. Herrman (1897) 19 App. Div. 126, 45 N. Y. Supp. (1890) 31 N. Y. S. R. 179, 9 N. Y. Supp. 972. Or the spring intended to close 722; Leland v. Hearn (1900) 49 App. an elevator gate automatically does not Div. 111, 63 N. Y. Supp. 204; Hart v. act properly. Larkin v. Washington Naumberg (1888) 50 Hun, 392, 3 N. Y. Mills Co. (1899) 45 App. Div. 6, 61 N. Supp. 227; Findlay Brewing Co. v. Y. Supp. 93. Or the cage runs so loose-Bauer (1893) 50 Ohio St. 560, 35 N. E. ly on the guides that the catches act so 55; Johnson v. Armour (1883) 18 Fed. as to stop it with dangerous suddensess. Mangum v. Bullion B. & C. Min. Co. (1889) 73 Mich. 268, 41 N. W. 269 Co. (1897) 15 Utah, 534, 50 Pac. 834. (the wire rope of an elevator had become broken and ragged); Anderson v. the hoisting apparatus becomes less eften broken and ragged); Anderson v. Hayer ware and fails to perform its fective by wear, and fails to perform its 903. functions. Myers v. Hudson Iron Co.

was obliged, in her work, to use a hotel freight elevator, which was a movable platform with iron guards on the sides which did not reach to the floor, but left been equal; joints were loose and infirm, where they should have been tight and steady; and grip iron was so it had swayed to one side and tilted over, and she was thrown down, and "Sim v. Dominion Fish Co. (1901) 2 her foot passed under the guard, and she was injured, the defendant is liable, the elevator being unfitted for the safe sine was injured, the defendant is liable, 

1 Biddiscombe v. Cameron (1900) 161 the elevator being unfitted for the safe 
N. Y. 637, 57 N. E. 1104, Affirming transportation of human beings. Mo(1898) 35 App. Div. 561, 55 N. Y. Supp. Kinnie v. Kilgallon (1887; Pa.) 11 Atl. 
127; Baltimore Boot & Shoe Mfg. Co. 614. For other cases where injuries 
v. Jamar (1901) 93 Md. 404, 49 Atl. caused by defective elevators were held 
cationally and Phillip v. Phina (1959) actionable, see Phillip v. Dixon (1852) <sup>2</sup> As where it suddenly jumps up sev-eral inches after being brought to a level law v. Moffatt (1849) 12 Sc. Sess. Cas. eral inches after being prought to a form with a floor. Meyers Sons v. Falk 2d series, 434; Ross v. Cross (1901) 99 Va. 385, 38 S. E. 178. Or Ont. App. Rep. 29; McGregor v. Reid, 1901) 99 Va. 385, 38 S. E. 178. Or Ont. App. Rep. 29; McGregor v. Reid, 1901) 178 Ill. 464, 53 N. E. Trick Show Case Co. v. Blindauer the supporting cable or chain is defective. Bruce v. Beall (1897) 99 Tenn. 323; Union Show Case Co. v. Blindauer 303, 41 S. W. 445; Mulvey v. Rhode Is- (1898) 75 Ill. App. 358; Wilson v. Willard Locomotive Works (1885) 14 R. liams (1900) 22 Ky. L. Rep. 567, 58 S. (1898) 75 III. App. 358; Wilson v. Williams (1900) 22 Ky. L. Rep. 567, 58 S. W. 444; Bartley v. Trorlicht (1892) 49

the defective condition of a boiler, or of a valve, or of the steam drum supplied by the boiler,3 or of a barrel which is cleaned by turning steam into it.4

That an exhaust steam pipe was turned so as to point in a dangerous direction warrants a finding of negligence.5

- 93. Miscellaneous appliances.— Employers have been held liable for injuries caused by the softness of the timber furnished for a maulhead; by shears with a cracked surface; by a defective rollway and defective chock-blocks in a sawmill;3 by the defective quality of the spurs furnished for climbing electric-light poles.4
- 94. Imperfect attachment of parts of apparatus.— (See also § 97, note 1, subd. (1), infra.)—Negligence is inferable where the means used for holding together the several parts of instrumentalities are so defective that one of these parts is detached, or otherwise changes its position, to the injury of the servant.1

<sup>4</sup> Crowell v. Thomas (1897) 18 App. Div. 520, 46 N. Y. Supp. 137 (explosion was caused by the insertion of a plug in the vent).

<sup>5</sup> Russell v. Pacific Can Co. (1897)

116 Cal. 527, 48 Pac. 616.

<sup>1</sup> Daly v. Lee (1901) 167 N. Y. 537, 60 N. E. 1109, Affirming (1899) 39 App. Div. 188, 57 N. Y. Supp. 293.

<sup>2</sup> Pacheco v. Judson Mfg. Co. (1896)
113 Cal. 541, 45 Pac. 833.

<sup>8</sup> Foley v. Webster (1892) 2 Brit. Col.

1 Lehigh Valley Coal Co. v. Kiszel jury where a heavy cylinder fell owing (1897) 25 C. C. A. 566, 51 U. S. App. to the giving way of the bolts which 265, 80 Fed. 470; Glossen v. Gehman kept it in place. Weems v. Mathieson (1892) 147 Pa. 619, 23 Atl. 843; Bal- (1861) 4 Macq. H. L. Cas. 215. Where lard v. Hitchcock Mfg. Co. (1895) 145 a pin securing a tackle block to the N. Y. 619, 40 N. E. 163, Affirming mast of a derrick worked out, and al- (1893) 71 Hun, 582, 24 N. Y. Supp. lowed the block to fall on plaintiff. 1101; Johnson v. Boston & M. Consol. Houston v. Brush (1894) 66 Vt. 331, 29 Copper & S. Min. Co. (1895) 16 Mont. Atl. 389. Where the devices by which 164, 40 Pac. 298; Jones v. Malvern Lumber Co. (1893) 58 Ark. 125, 23 S. W. proved defective. Dyer v. Pittsburg 679; Woods v. Chicago & G. T. R. Co. Bridge Co. (1901) 198 Pa. 182. 47 Atl. (1896) 108 Mich. 396, 66 N. W. 328; 979; McMahon v. McHale (1899) 174 Egan v. Dry Dock, E. B. & B. R. Co. (1896) 12 App. Div. 556, 42 N. Y. Supp. 200 Columbia Constr. Co. (1900) 50 App. 188. See also cases as to locomotives, in § 88, note 1, subd. (1), supra. 400. Where a pin which prevented a hoisting apparatus from falling out of gear became loose and fell out. Bridge Co. v. Teehan (1900) 92 III. App. 259. Where the shackle which held the block of a hoisting apparatus proved inadequate. The Para (1893) 56 Fed. 241. Where a clamp, if it had been made of proper material, would have borne a strain twice as great as that under which it broke. Welsh v. Cronell (1900) 49 App. Div. 203, 63 N. 138, Affirmed in 21 Can. S. C. 580.

138, Affirmed in 21 Can. S. C. 580.

108 Affirmed in 21 Can. S. C. 580.

109 Affirmed in 21 Can. S. C. 580.

109 Affirmed in 21 Can. S. C. 580.

109 Affirmed in 21 Can. S. C. 580.

110 Affirmed in 21 Can. S. C. 580.

1110 Affirmed in 21

- 95. Abnormal movements of machinery.— (See also § 78, note 1, subds. (4), (12), and § 88, note 1, subd. (1), supra.)—An employer fails in his duty if he allows machinery to fall into such a condition that it is apt to start automatically, or some part of it to move further in a certain direction than it should do,2 or if it fails to move smoothly.3
- 96. Changes in the parts of machines.— A servant may recover damages for an injury caused by the removal or alteration of some essential part of a machine, when the danger of using it is thereby materially increased.<sup>1</sup> Hence, whatever doctrine may be entertained as to the existence of a duty on the part of the employer to keep dangerous machinery covered (see §§ 76, 77, supra), the employer is prima facie liable for an injury resulting from the entire or partial removal of a cover which had been provided. The conditions thus created are clearly more dangerous, because misleading, than those to which the servant is exposed when there has never been a cover at all. In such cases, therefore, the right to maintain the action is complete, and can only be defeated by showing that he understood and deliberately encountered the specific risks arising from the changed circumstances.2

a heavy piece of shafting fell out of its sive depression of a mould plunger on supports. Copithorne v. Hardy (1899) a brick-making machine).

173 Mass. 400, 53 N. E. 915. Where a "Swift v. Foster (1896) 163 Ill. 50, nut which kept an eye bolt in place was 44 N. E. 837 (the broken tooth of a cogmissing. Monmouth Min. & Mfg. Co. wheel caused tackle to jerk and throw v. Erling (1894) 148 Ill. 521, 36 N. E. out a load of lumber which was being 117. Where a defect in a water spout hoisted); Atchison, T. & S. F. R. Co. used for filling engines, whether caused v. McKee (1887) 37 Kan. 592, 15 Pac. by the need of having the nuts in the 484 (a frame in which a saw was set apparatus for lowering and raising it did not hold it firmly, but allowed it loosened, or from a broken pulley, to vibrate, the consequence being that caused it to fall suddenly after it had a block of wood was "kicked," and been raised. Texas & P. R. Co. v. threw the servant's wrist against the Crow (1893) 3 Tex. Civ. App. 266, 22 saw). S. W. 928.

ber Co. (1891) 154 Mass. 408, 28 N. E. 352; Donahue v. Drown (1891) 154 609. Mass. 21, 27 N. E. 675; Blanton v. Dold <sup>2</sup> V Mass. 21, 27 N. E. 675; Blanton v. Dold <sup>2</sup> Wuotilla v. Duluth Lumber Co. (1891) 109 Mo. 64, 76, 18 S. W. 1149 (1887) 37 Minn. 153, 33 N. W. 551 (belting was liable to slip, and thus set (covering left off for two weeks); Mulmachinery in motion without a move-lin v. Northern Mill Co. (1893) 53 ment of the apparatus provided for that Minn. 29, 55 N. W. 1115 (some of covpurpose); Hencke v. Babcock (1901) 24 ering removed); Carver v. Christian Wash. 556, 64 Pac. 755; Donovan v. (1887) 34 Minn. 397, 26 N. W. 8, 36 Overman & S. Cordage Co. (1900) 22 Minn. 413, 31 N. W. 457 (similar Ky. L. Rep. 770, 58 S. W. 798.

[Additional Content of Content

1. W. 928.

1 Plefka v. Knapp-Stout Lumber Co.
1 Mooney v. Connecticut River Lum- (1897) 72 Mo. App. 309; Mirick v.
2 Co. (1891) 154 Mass. 408, 28 N. E. Morton (1901) 62 Kan. 870, 64 Pac.

<sup>2</sup> McMillan v. Union Press-Brick Kan. 36, 27 Pac. 122 (cover left off of Works (1879) 6 Mo. App. 434 (excescogs that were usually covered).

Still more clearly is negligence inferable where the cover of the machinery had itself become defective.3

97. Structures.— (See also § 79, supra.)—Structures are considered to be defective if, either by reason of the bad quality of the materials, or the unskilful manner in which they are put together or secured in their position, they are unable to support the pressures and other strains to which they are subjected, while they are being erected, or after they have been put into use as a part of the master's plant. But the right of recovery in cases of this type is greatly

W. 249.

1 (1) Scaffolds, stagings, platforms, etc.—Roberts v. Smith (1857) 2 Hurlst. Mines Co. (1900) 41 C. C. A. 193, 101 5, 21 Am. Rep. 573, but not on this point; Chapman v. Southern P. Co. (1895) 12 Utah, 30, 41 Pac. 551; Twomey v. Swift (3) Bridges, gangways, etc.—Buzzell (1895) 163 Mass. 273, 39 N. E. 1018 v. Laconia Mfg. Co. (1861) 48 Me. 113, Works V. Roujosse (1893) 57 N. J. L. 700, 32 Atl. 373 (a railing on a platform gave way); Smizel v. Odanah Iron Co. (1898) 116 Mich. 149, 74 N. W. 488; Hatton v. Hilton Bridge Constr. Co. (1899) 42 App. Div. 400, 59 N. Y. Supp. 272; Chicago & A. R. Co. v. Maroney (1897) 170 III. 520, 48 N. E. 953, Affirming (1896) 67 Ill. App. 618; Doyle v. Missouri, K. & T. Trust Co. (1897) 140 Mo. 1, 41 S. W. 255; Cochran v. Sess (1900) 49 App. Div. 223, 62 N. Y. Supp. 1088 (liable to colfacts).

<sup>8</sup> Kelley v. Silver Spring Bleaching & (2) Posts, poles, etc.—McDonald v. Dyeing Co. (1878) 12 R. I. 112, 34 Am. Postal Teleg. Co. (1900) 22 R. I. 131, 46 Rep. 615; Swift & Co. v. Holoubek Atl. 407 (telegraph pole with defective (1901; Neb.) 86 N. W. 900, Reversing cross arm); Essex County Electric Co. judgment in (1900) 60 Neb. 784, 84 N. v. Kelly (1897) 60 N. J. L. 306, 37 Atl. 619, Affirmed in 61 N. J. L. 289, 41 Atl. 1 (1) Scaffolds, stagings, platforms, 1115 (similar condition); Jarvis v. etc.—Roberts v. Smith (1857) 2 Hurlst. Northern N. Y. Marble Co. (1900) 55 & N. 213, 3 Jur. N. S. 469, 26 L. J. Exch. App. Div. 272, 67 N. Y. Supp. 78 (the N. S. 319; Webb v. Rennie (1865) 4 mast of a derrick was composed of rot-Fost. & F. 615; Westland v. Gold Coin ten timber); Trainor v. Philadelphia & ten timber); Trainor v. Philadelphia & R. R. Co. (1890) 137 Pa. 148, 20 Atl. Fed. 59; Manning v. Hogan (1879) 78 632 (tall pole not sufficiently guyed); N. Y. 615; Benzing v. Steinway (1886) Riker v. New York, O. & W. R. Co. 101 N. Y. 547, 5 N. E. 449; Malone v. (1901) 64 App. Div. 357, 72 N. Y. Supp. Hathaway (1875) 6 Thomp. & C. 1, 3 168 (telegraph pole not properly fixed Hun, 553, Reversed in (1876) 64 N. Y. in the ground); McLean County Coal Co. v. McVey (1890) 38 Ill. App. 158 (imperfectly secured post in a mine).

(hemlock boards supplied in cold 77 Am. Dec. 212; Bennett v. Standard (hemlock boards supplied in cold 77 Am. Dec. 212; Bennett v. Standard weather, a time when they are very apt Plate Glass Co. (1893) 158 Pa. 120, 27 to be brittle); Haworth v. Seevers Mfg. Atl. 874 (a barrier on a plank walk Co. (1892) 87 Iowa, 765, 51 N. W. 68, over a pit not replaced after it had been 62 N. W. 325; Arkerson v. Dennison taken away); Louisville & C. Packet (1875) 117 Mass. 407; Eddy v. Aurora Co. v. Samuels (1900) 22 Ky. L. Rep. Iron Min. Co. (1890) 81 Mich. 548, 46 979, 59 S. W. 3 (eight steamboat hands N. W. 17; Flynn v. Union Bridge Co. required to go out over a river on a (1890) 42 Mo. App. 529; Johnson v. poplar plank 11 inches wide, 3½ inches Bellingham Bay Improv. Co. (1896) 13 thick, and 16 feet long); Lafayette Wash. 455, 43 Pac. 370; Alexander Dye Bridge Co. v. Olsen (1901) 47 C. C. A. Works v. Roufosse (1895) 57 N. J. L. 367, 54 L. R. A. 33, 108 Fed. 335 (un. 700. 32 Atl. 373 (a railing on a plat-safe timbers furnished for a. false required to go out over a river on a poplar plank II inches wide, 3½ inches thick, and 16 feet long); Lafayette Bridge Co. v. Olsen (1901) 47 C. C. A. 367, 54 L. R. A. 33, 108 Fed. 335 (unsafe timbers furnished for a false work) work).

(4) Ice slide.-Fink v. Des Moines Ice Co. (1892) 84 Iowa, 321, 51 N. W. 155 (defective supports).

(5) Window casing.—Hencke v. Ellis (1901) 110 Wis. 532, 86 N. W. 171.

(6) Room built out from the wall of a factory.—Ryan v. Fowler (1862) 24 N. Y. 410, 82 Am. Dec. 315.

(7) Roof.—Garety v. King (1896) 9 App. Div. 443, 41 N. Y. Supp. 633 (servlapse): Lechman v. Hooper (1890) 52 ant fell through skylight while shovel-N. J. L. 253, 19 Atl. 215 (similar ing off the snow); Engstrom v. Ashland Iron & S. Co. (1894) 87 Wis. 166, 58

qualified by the doctrine to be discussed in a later chapter (xxxII.), as to the nonliability of the master for the negligence of servants in executing the details of the work. In designing them he is bound to take into account the action of the elements.2 Sce, generally, §

98. Injuries caused by falling rocks, earth slides, etc. — Negligence is inferable where a trench is not adequately shored or sheathed in cases where the nature of the soil which is being excavated requires such a precaution, or where the roofs or sides of shafts, passages, tunnels, or entries in mines are in such a condition that they are liable to fall at any moment; or where adequate measures are not taken

414, 48 N. W. 712. And where a rail-ging a ditch alongside of a timber, by way company constructed a signal tower the giving way of the bank from the not capable of bearing wind pressures weight of the timber, where the work which might be anticipated. Hesketh was done precisely as it was marked

App. Div. 78, 55 N. Y. Supp. 898.

1 Baird v. Reilly (1899) 35 C. C. A. dent would have been provided against. 78, 63 U. S. App. 157, 92 Fed. 884; Texas & P. R. Co. v. French (1893; Kranz v. Long Island R. Co. (1890) 123

Tex. Civ. App.) 22 S. W. 866.

N. Y. 1, 25 N. E. 206; Wanamaker v. Rochester (1892) 44 N. Y. S. R. 45, 17

C. A. 433, 10 U. S. App. 439, 53 Fed. 65; N. Y. Sapp. 321. Submit v. Civiler Convolidated Coal Co. v. Scheher. N. Y. Supp. 321; Schmit v. Gillen Consolidated Coal Co. v. Scheiber (1899) 41 App. Div. 302, 58 N. Y. Supp. (1896) 65 Ill. App. 304; Quincy Coal

N. W. 241 (refuse had not been cleared away).

(8) Stairway or steps.—Ferris v. Hernsheim Bros. (1899) 51 La. Ann. 1075; Ross v. Shanley (1900) 185 III. 178, 24 So. 771; Krampe v. St. Louis 390, 56 N. E. 1105, Affirming (1899) 86 Brewing Asso. (1894) 59 Mo. App. 277. III. App. 144; Lasalle v. Kostka (1901) (9) Floor.—Cooper v. Hamilton Mfg. 190 III. 130, 60 N. E. 72, Affirming Co. (1867) 14 Allen, 193; Flynn v. Harlow (1892) 46 N. Y. S. R. 872, 19 N. Y. Supp. 705; Kirk v. Scally (1898) 79 III. App. 67; Chicago General R. Co. v. McNamara (1901) 94 III. App. 188.

(10) Covers of dangerous openings.—O'Brien v. Sullivan (1900) 195 Pa. the walls of the trench); Van Steendrak 46 Atl. 130 (opening in floor covered over with a thin packing-box lid. not supported by joists); The Yoxford (1897) 20 R. I. 261, 38 Atl. 700; Finnigham v. Peters (1861) 2 Sc. Sess. Cas. cover gave way under a seaman); W. C. 2d series, 260. Whether it was negligence, under the circumstances, to leave without shoring a trench about 31 feet deep and 4 feet wide is for the jury, where it is dug through hardpan, but ograph Mfg. Co. (1898) 171 Mass. 242, 59 N. E. 804; Breen v. Field (1892) 135 N. E. 804; Breen v. Field (1892) 132 II. App. 61; Ross v. Shanley (1900) 185 III. App. 185 N. E. 1105, Affirming (1899) 86 Brewing Asso. (1894) 59 Mo. App. 144; Lasalle v. Kostka (1901) (9) Floor.—Cooper v. Hamilton Mfg. 190 III. 130, 60 N. E. 72, Affirming (1900) 92 III. App. 91; Ft. Wayne v. App. 312 (here blasting close by enhanced the danger, and made it more obligatory upon the defendant to brace obligatory upon the defendant to brace (1897) 20 R. I. 261, 38 Atl. 700; Finnigham v. Peters (1861) 2 Sc. Sess. Cas. Cover gave way under a seaman); W. C. 2d series, 260. Whether it was negligence, under the circumstances, to leave without shoring a trench about 31 feet deep and 4 feet wide is for the jury, where it is dug through hardpan, but of the disintegrating effect of water that has percolated through it. Finn ograph Mfg. Co. (1896) 171 Mass. 271, the soil has been in some time exposed 50 N. E. 543 (liable to tip up when to the disintegrating effect of water servant's weight came upon it).

\*Recovery has been allowed where a v. Cassidy (1901) 165 N. Y. 584, 53 L. roof, not being strong enough to bear R. A. 877, 59 N. E. 311, Affirming the snow which accumulated upon it, (1899) 39 App. Div. 641, 57 N. Y. broke down and fell on a servant. Johnson v. First Nat. Bank (1891) 79 Wis. injuries to a workman engaged in digv. New York C. & H. R. Co. (1899) 37 out for such workman to perform, and App. Div. 78, 55 N. Y. Supp. 898. by proper care and foresight the acci-

to protect servants from the dangers created by a bank of earth, gravel, etc., which is in process of being excavated.3

But the servant's right of recovery for injuries due to negligence of this description is in some courts very considerably qualified by the construction put upon the doctrine that a master is not liable for negligence in the execution of the details of the work. See chapter XXXII., post.

99. — by other heavy substances.— An action may be maintained, where, owing to the negligence of the employer, a heavy object is put or left in such a situation that, as a result either of physical laws or of the action of employees which may reasonably be anticipated under the circumstances, it is liable to be set in motion, and thus imperil the safety of persons working under or near it.1

Co. v. Hood (1875) 77 III. 68; Hanley \*O'Driscoll v. Faxon (1892) 156 v. California Bridge & Constr. Co. Mass. 527, 31 N. E. 685; Elledge v. Na-(1899) 127 Cal. 232, 47 L. R. A. 597, tional City & O. R. Co. (1893) 100 Cal. Corson v. Coal Hill Coal Co. (1897) 101 Iowa, 224, 70 N. E. 185 (rocks fell on car track and obstructed it); Freeman

v. San Coulee Coal Co. (1901; Mont.)

gray was caused by the fall of the fol64 Pac. 347; Kearney Electric Co. v. lowing objects: Boards used to cover

Laughlin (1895) 45 Neb. 401, 63 N. W. the coping of a building in course of

(1899) 127 Cal. 232, 47 L. R. A. 597, thond City & O. R. Co. (1893) 100 Cal. 59 Pac. 577; Sampson Min. & Mill Co. 282, 34 Pac. 720; Pantzar v. Tilly Fosv. Schaad (1890) 15 Colo. 197, 25 Pac. ter Iron Min. Co. (1885) 99 N. Y. 368, 89 (roof not timbered); Rogers v. Ley- 2 N. E. 24; Deppe v. Chicago, R. I. & den (1891) 127 Ind. 50, 26 N. E. 210; P. R. Co. (1892) 36 Iowa, 52; Chicago Linton Coal & Min. Co. v. Persons Anderson Pressed Brick Co. v. Sobko- (1896) 15 Ind. App. 69, 43 N. E. 651; wiak (1892) 45 Ill. App. 317 (bank was Corson v. Coal Hill Coal Co. (1897) 101 undermined to a greater extent than usual).

Laughin (1895) 45 Neb. 401, 63 N. W. the coping of a building in course of 941 (supports of roof inadequate); erection, and left in a loose condition. Tetherton v. United States Tale Co. Whitney & S. Co. v. O'Rourke (1898) (1899) 41 App. Div. 613, 58 N. Y. Supp. 172 Ill. 177, 50 N. E. 242. A large 55; Wellston Coal Co. v. Smith (1901) stone not adequately propped. Blondin 65 Ohio St. 70, 55 L. R. A. 99, 61 N. E. v. Oolitic Quarry Co. (1894) 11 Ind. 143 (roof fell into disrepair, and was App. 395, 37 N. E. 812. A dress form 143 (roof fell into disrepair, and was App. 395, 37 N. E. 812. A dress form brought down by the concussion of a sometimes exposed to a strong draught blast); Vanesse v. Catsburg Coal Co. on the top of a show case, which was (1893) 159 Pa. 403, 28 Atl. 200; Tri- not protected by a railing. Cavanagh hay v. Brooklyn Lead Min. Co. (1886) v. O'Neill (1900) 161 N. Y. 657, 57 N. 4 Utah, 468, 11 Pac. 612 (want of proper timbering); Cunningham v. Union P. E. 1106, Affirming (1898) 27 App. Div. er timbering); Cunningham v. Union P. 48, 50 N. Y. Supp. 207. A board laid R. Co. (1885) 4 Utah, 206, 7 Pac. 795 upon a scaffolding, which was gradually (pillars supporting roof were cut away shaken off by the jar of machinery near till they were smaller than was customit. Pilkey v. Harrower (1901) 59 App. ary); Fowler v. Pleasant Valley Goal Div. 378, 69 N. Y. Supp. 243. A wood-Co. (1898) 16 Utah, 348, 52 Pac. 594; en beam placed in a position of unstable Severance v. New England Tale Co. equilibrium. Sackewitz v. American Severance v. New England Tale Co. equilibrium. Sackewitz v. American (1900) 72 Vt. 181, 47 Atl. 833 (mine-Biscuit Mfg. Co. (1899) 78 Mo. App. owner, when sinking the shaft of a tale 144. The frame of a window which mine, failed to take out the mixture of fell out while a piece of machinery was tale and quartz which separated the tale being moved through it. Chicago v. from the adjacent rock); Davis v. Nut-Edson (1891) 43 Ill. App. 417. Stones tallsburg Cool & Coke Co. (1890) 34 on a coping, which, not being properly W. Va. 500, 12 S. E. 559; Strahlendorf attached, fell off. Gibson v. Sullivan v. Rosenthal (1872) 30 Wis. 674. (1895) 164 Mass. 557, 42 N. E. 110.

If the plant itself, or the things handled or manufactured, are of such a nature, or in a condition so defective, as to create a risk of injury from flying or falling bodies, a duty arises to protect the servants, either by altering the plant, or by devising some safeguard which will minimize the perils of the employment as far as is reasonably possible.2

Posts not securely braced when girders Mill Co. (1900) 27 Ont. App. Rep. 155. are about to be set on them. Herdler McAleen v. Walter (1901) 3 Misc. 474, v. Buck's Stove & Range Co. (1896) 70 N. Y. Supp. 335 (needle-bar of sew-136 Mo. 3, 37 S. W. 115. Projecting ing machine was so loose that the needle rocks in a quarry. McMillan Marble struck the side of the plate through Co. v. Black (1890) 89 Tenn. 118, 14 which it passed, the result being that it S. W. 479. A box imperfectly secured. broke, and a fragment lodged in plain-Indiana Stone Co. v. Stewart (1893) 7 tiff's eye); Dempsey v. Sawyer (1901) Ind. App. 563, 34 N. E. 1019. Wheat 95 Me. 295, 49 Atl. 1035 (teeth of a which had accumulated on the side of saw were filed so thin that they broke a bin in which the servant was working. and flew off, when they came in contact a bin in which the servant was working.

McGovern v. Central Vermont R. Co. with the wood); Littlefield v. Edward (1890) 123 N. Y. 280, 25 N. E. 373. P. Allis Co. (1900) 177 Mass. 151, 58 An accumulation of ice and snow on a N. E. 692 (contrary to the common roof. Dugal v. People's Bank (1899) practice, a piece of iron pipe was used 34 N. B. Rep. 581. Fragments of ore in a pile, portions of which were being bar by which bolts were being driven removed. Illinois Steel Co. v. Schymanowski (1896) 162 Ill. 447, 44 N. E. 876. Bags of cement which slipped Atl. 924 (grind-stone burst); De La down owing to the irregular surface of the floor. Page v. Naughton (1901) 63 (1900) 24 Tex. Civ. App. 471, 60 S. W. App. Div. 377, 71 N. Y. Supp. 503. 319 (splinter flew off of a cracked and Ties not properly stacked. Texas & N. Co. v. Echols (1897) 17 Tex. Civ. tion as to whether the cutting of wires App. 677, 41 S. W. 488. A mining company is liable for injury to a workman by the fall of a stone from a slope under which he is set to work, where he does not known that pebbles and stones in unusual numbers have been falling there Odell Mfg. Co. (1890) 123 N. C. 248, 31 unusual numbers have been falling there Odell Mfg. Co. (1898) 123 N. C. 248, 31 during the day, but this fact is known S. E. 495 (a servant was injured in the to the superintendent of the mine, who eye by a flying piece of wire. The con-orders him to work there, without first tention was that defendant was negliorders him to work there, without first tention was that defendant was neglihaving the stones raked off, or taking gent in allowing the wire to be cut close gent to the passway used by employees). The master's liability is for the jury Co. (1895) 128 Mo. 423, 31 S. W. 110, where proper arrangements are not Affirming, without comment (1893) 54 made to prevent the workmen on the Mo. App. 476. It has been held not to be negligent to pile boards of unequal length so that the ends are even on the face of the pile, and they project over each other on the back of the pile. (1901) 189 Ill. 123, 59 N. E. 535. Evwetterbee v. Partridge (1900) 175 idence tending to show that deceased was killed, while mixing mortar in a "Richlands Iron Co. v. Elkins (1893) cellar, by the falling of some hard sub-

series, 540; Choate v. Ontario Rolling tain a verdict that the covering was de-

<sup>2</sup>Richlands Iron Co. v. Elkins (1893) cellar, by the falling of some hard sub-90 Va. 249, 17 S. E. 890; Smith v. stance from the upper portion of the Lidgerwood Mfg. Co. (1900) 56 App. building, and that there was no secure Div. 528, 67 N. Y. Supp. 533; M'Guire covering to protect persons required to v. Cairns (1890) 5 Sc. Sess. Cas. 4th prepare such mortar, is sufficient to sus-

100. Unguarded openings.— (See § 80, supra.)—For injuries caused by unguarded and uncovered openings of a merely temporary nature, a servant would doubtless be held, in every jurisdiction, entitled to recover damages, irrespective of the doctrine which happens to prevail respecting the master's right to maintain such openings as a permanent part of his arrangements.<sup>1</sup> But the action has sometimes failed in cases of this class on the ground that the conditions were incidental to the work in progress,2 or justified by the usages of the business.3

usual method of safeguarding the workman was engaged, and that no such rule had men. Van Orden v. Acken (1898) 28 been there laid down as that a workman App. Div. 160, 50 N. Y. Supp. 843. The on a ship under construction can never question whether the failure to cross recover damages for any accident bolt the "head block" of a pile driver caused by falling into an unfenced employed in pulling piles was negligence which rendered the master liable 2 In Wannamaker v. Burke (1886) gence which rendered the master liable 2 In Wannamaker v. Burke (1886) for the death of an employee from being 111 Pa. 423, 2 Atl. 500, the court, while struck by a piece of the block split off conceding that, if the hole in question while a pile was being pulled, was held had been in the middle of the room,

fective, and that defendant had been neglegent. Ford v. Lyons (1886) 41 Hun, 512. beams of the orlop deck of a steamer, Whether the defendant was negligent in was struck by a descending sling of not providing a proper covering for the flour bags, and thrown into the hold workmen engaged in digging a trench through an opening which was usually in the basement of a building, the walls kept covered. The case is for the jury, of which were being taken down, is a where it is averred that the plaintiff's question for the jury, where the only decedent was killed by falling into an protection was a platform on to which open tank on a ship under construction, the bricks were discharged as they were and that the tank was usually covered the bricks were discharged as they were and that the tank was usually covered detached, and this did not extend up to and lighted, but was neither covered nor the walls. Wilcowski v. George W. lighted at the time when the accident Carter & Sons Co. (1901) 60 App. Div. occurred. Jamieson v. Russell (1892) 577, 70 N. Y. Supp. 232. Negligence 19 Sc. Sess. Cas. 4th series, 898, disis not inferable, where the ladder well-tinguishing Forsyth v. Ramage (1890) hole and the elevator wellhole are both 18 Sc. Sess. Cas. 4th series, 21, on the protected by planking for the purpose ground that the facts there disclosed protected by planking for the purpose ground that the facts there disclosed of preventing the fall of materials in a nothing more than an ordinary risk of building under erection, this being the the work in which the injured servant

to be for the jury, upon the testimony near a passageway, or where persons of a witness who constructed the pile were accustomed to pass and repass in driver that he considered it unsafe to the regular course of business, it would draw piles with the machine without have been, perhaps, a question for the such cross bolting, and of another expury whether leaving it uncovered, or pert that he always used cross bolts for insufficiently protected, even for a short safety, and evidence that of the six pile space of time, was not negligence, but drivers in the harbor at the time of the denied that there could be any recovery accident all except the one in question for an injury caused by a hole in the were cross bolted. McAlpine v. Laydon floor on the extreme side of the build-(1896) 115 Cal. 68, 46 Pac. 865. See ing, within 1 inch of the wall, outside also the cases cited in note 4, § 207.

Frye v. Bath Gas & Electric Co. had always been carefully guarded un(1900) 94 Me. 17, 46 Atl. 804 (hole til the work of making certain alteraleft open in front of the boiler of which tions rendered it necessary to take the the plaintiff was fireman). In Hogan guards away; which was being used v. Smith (1890) 31 N. Y. S. R. 798, 9 constantly during the alterations to get N. Y. Supp. 881, recovery was allowed rid of the sweepings; which was only where the servant, who was standing on open for from two to four days while

100a. Surface of paths, floors, etc.—In some cases the servant has been allowed to recover for the reason that the surface on which he was required to stand or walk, while engaged in the performance of his duties, or while going to or returning from the place of work, furnished an unsafe footing.<sup>1</sup> In others the position taken was that the conditions created a normal and visible risk, and therefore implied no negligence as regards employees.<sup>2</sup>

An employer is liable if the ways used by his servant, either in driving or walking, are encumbered with obstructions which render them abnormally dangerous.3

the alterations were in progress, and footing and let it fall on the plaintiff); only open then when not in actual use; American Dredging Co. v. Walls (1898) which was intended to be, and was, per-28 C. C. A. 441, 55 U. S. App. 460, 84 manently covered as soon as the altera- Fed. 428 (want of cleats on an inclined tions were finished. "The defendants," table from which machinery had to be it was said, "could not have anticipated oiled); Armour v. Czischki (1895) 59 such an accident as this as likely to Ill. App. 17 (a servant slipped on glue flow from the condition of the hole at scattered on the floor, and fell through that time, and they are not to be held an unguarded opening into a crushing to a rule which would prevent the posmachine). See also Smith v. Peninsusibility of an accident. If they took realer Car Works (1886) 60 Mich. 501, 27 sonable care to provide a safe room for N. W. 662, the facts of which are stated their employees to work in, it was all the in § 103, note 6 infra; Fitzgerald v. law requires. It would be unreasonable Connecticat River Paper Co. (1891) 155 to hold them to the same degree of strict- Mass. 155, 29 N. E. 464 (ice-covered ness during alterations to the building steps). as might be required after such alterasome sort, and of the necessity of exercising greater caution."

s In The Louisiana (1896) 21 C. C. A.

60, 41 U. S. App. 324, 74 Fed. 748, it was held that a vessel was not liable for an injury to a stevedore who walked into an open hatchway, where it is not customary to protect or guard such hatchways, and it is usual to leave them 159 Mass. 266, 34 N. E. 268. open till the hold is fully stored. Compare Smith v. Occidental & O. S. S. Co. may recover for injuries caused by ob-(1893) 99 Cal. 462, 34 Pac. 84, where structions in the street. Farley v. New (1893) 99 Cal. 462, 34 Pac. 84, where structions in the street. Farley v. New the case turned on the question whether York (1897) 152 N. Y. 222, 46 N. E. the servant had constructive notice of 506, Reversing (1896) 9 App. Div. 536, the fact that the hatchway was open on 41 N. Y. Supp. 622 (obstructions in such occasions as that on which he was street endangering driver of fire eninjured.

smooth); New Orleans Ice Co. v. O'Mallong its sides, is in a condition which ley (1899) 34 C. C. A. 233, 92 Fed. 108 implies negligence. Bogenschutz v. (fellow servants, having nothing to Smith (1886) 84 Ky. 330, 1 S. W. 578. walk on but slippery beams, while they were shifting heavy tackle, lost their

It is not negligence to leave all the tions were completed. The fact that al- hatchways of a vessel open while it is terations were being made in the pres- being loaded, although some of them are ence of the employees was notice to not constantly in use, especially where them of the possibility of danger of the cargo consists of several different kinds of goods, and it cannot be known when any particular one of the hatchways may be required. Tully v. New York & T. S. S. Co. (1896) 10 App. Div. 463, 42 N. Y. Supp. 29.

<sup>2</sup> Feely v. Pearson Cordage Co. (1894) 161 Mass. 426, 37 N. E. 368; Murphy v. American Rubber Co. (1893)

3 The driver of a municipal fire engine gine). A gangway, along which the Weber Wagon Co. v. Kehl (1892) plaintiff's duty requires him to carry 139 Ill. 644, 29 N. E. 714 (floor worn molten metal, obstructed with articles

101. Conditions exposing a servant to risk of injury from fire.— Injuries caused by fire are actionable where they are due to conditions which, either in consequence of the manner in which the business is carried on, or of an intrinsic defect in an instrumentality, create abnormal perils.1

102. - from currents of electricity. Negligence is inferable, where a wire carrying a current of electricity is not properly insulated so that servants who have to handle or work near it may do so without danger. The want of such insulation is also culpable where the wire is so strung that it may come into contact with another, and so endanger a servant who may take hold of the latter in the belief that it is dead.<sup>2</sup> An employer is also liable for the defective insulation of a part of an apparatus into which there is danger that a current of electricity may pass.3

103. — from explosions.— (See also § 81, supra.)—An injury caused by blasting powders which are of a defective quality is actionable. So, also, the servant may recover where he is injured because improper appliances are provided for manipulating such powders,2 or

slabs in a slab burner engendered exports show any negligence on the employ-treme heat, and thereby caused the er's part, but merely a breach of duty structure to fall. Facrber v. T. B. by a fellow servant.

Scott Lumber Co. (1893) 86 Wis. 226,

56 N. W. 475. Where a blast furnace (1896) 67 Conn. 445, 35 Atl. 341. See was in such a condition that there was also Kraatz v. Brush Electric Light Co. a recurrent danger of a rush of flame (1890) 82 Mich. 457, 46 N. W. 787; from the door. Henderson v. Carron Jones v. Union R. Co. (1897) 18 App. Co. (1889) 16 Sc. Sess. Cas. 4th series, Div. 267, 46 N. Y. Supp. 321. But in 633. Where an appliance in a chute both the last-cited cases the point which in a malt grinding mill. for preventing was more particularly emphasized was

633. Where an appliance in a chute in a malt grinding mill, for preventing the spread of fire from one floor to another, was allowed to get out of order. Wiedeman v. Everard (1900) 56 App.

Div. 358, 67 N. Y. Supp. 738.

1 Junior v. Missouri Electric Light & P. Co. (1895) 127 Mo. 79, 29 S. W. 988 (a lineman had to handle the wire); (1899) 21 R. I. 386, 45 L. R. A. 267, 43 Myhan v. Louisiana Electric Light & Atl. 874.

P. Co. (1889) 41 La. Ann. 964, 7 L. R. A. 172, 6 So. 799 (a servant had to stand astride the wire to do his work); (1890) 21 R. I. 386, 45 L. R. A. 267, 43 Myhan v. Louisiana Electric Light & Atl. 874.

P. Co. (1889) 41 La. Ann. 964, 7 L. R. A. 172, 6 So. 799 (a servant had to stand astride the wire to do his work); (1890) 44 C. C. 151 (powder liable to explode when A. 484, 51 L. R. A. 389, 104 Fed. 119 Ellsworth v. Metheney (1900) 44 C. C. 151 (por A. 484, 51 L. R. A. 389, 104 Fed. 119 tamped). A. 484, 51 L. R. A. 389, 104 Fed. 119 tamped).

(a miner was passing along an entry where the wire was strung). In Dixon in furnishing to employees engaged in v. Winnipeg Electric Street R. Co. blasting rock with dynamite an iron rod (1897) 11 Man. 528, it was held that a for tamping, where the danger is finding that there was no defect in the system on which the business of an electric street railway company was con-Kinley (1895) 17 Ky. L. Rep. 1028, 33 ducted, but that a certain cut-off ought S. W. 186. The use of an iron spoon

Actions have been held maintainable to have been used to intercept the curwhere an excessive accumulation of rent which injured the plaintiff, does slabs in a slab burner engendered ex- not show any negligence on the employ-

where insufficient precautions are taken to prevent their being set off when not in use;3 or where they are used in such a manner as to expose the servants to unnecessary perils.4

An employer is prima facie liable for injuries caused by the explosion of gas which has accumulated in the chamber of a mine; or by the inadequacy of the arrangement made to prevent the contact of water with substances so hot as to convert it suddenly into steam.6

104. - from dangerous fluids. - An employer is liable if he fails to keep in proper condition the vessels by which dangerous substances of

mite out of a hole is negligent. Grim- (1858) 3 Macq. H. L. C. 290, 4 Jur. N. aldi v. Lane (1901) 177 Mass. 565, 59 S. 767, this case was reconciled with the N. E. 451.

<sup>3</sup>A quarry master is negligent in not ment on the express ground that the providing the furnace of an engine used facts showed the violation of the masto work a derrick for hoisting the stones ter's personal duty, and not merely the with an ash pan or other device for negligence of a fellow servant. with an ash pan or other device for preventing the escape of live cinders which may alight upon the powder used (1897) 9 N. M. 49, 49 Pac. 807. The for blasting. Grant v. Drysdale (1883) master is bound to see that a sufficient 10 Sc. Sess. Cas. 4th series, 1159. A amount of pure air is forced into his complaint is good which alleges, in effect, that a railway company did not render harmless or expel the gases. take proper precautions to keep out of Mosgrove v. Zimbleman Coal Co. (1899) reach of the sparks of an engine certain 110 Iowa, 169, 81 N. W. 227. But stoppowder which was being carried in the page of ventilating machinery in a mine was defective, where the complaint of gas in the mine. Morgan v. Carbon shows that the powder was stored in a Hill Coal Co. (1893) 6 Wash. 577, 34 magazine about five minutes' distance Pac. 152, 772. magazine about five minutes' distance Pac. 152, 772.

from the work in small barrels; that when it was desired to fire a charge, a hot slag on a piece of ground in which barrel was carried from the store and opened at the work; and that while the plaintiff was firing a charge a gust of Co. (1901) 59 App. Div. 79, 69 N. Y. wind carried a piece of the fuse to a barrel from which powder had been not removed from holes in castings taken, thus causing the powder to explode and injure him. Such allegations disclose, rather, the occurrence of Div. 89, 71 N. Y. Supp. 623. Or where a servant has to throw hot slag on a piece of ground in which are numerous cracks partially filled with water. Kiras v. Nichols Chemical Co. (1901) 59 App. Div. 79, 69 N. Y. Supp. 44. Or where restricted in the problems of the problem

ries, 493. In Bartonshill Coal Co. v. face. Western Tube Co. v. Polobinski McGuire (1858) 3 Macq. H. L. C. 300, (1901) 94 Ill. App. 640. 4 Jur. N. S. 773 (per Lord Chelmsford)

to take an unexploded charge of dyna- and in Bartonshill Coal Co. v. Reid English doctrine of common employ-

powder which was being carried in the page of ventilating machinery in a mine caboose of a construction train. Al-from Saturday night until Sunday night lend v. Spokane Falls & N. R. Co. is not sufficient to establish negligence (1899) 21 Wash. 324, 58 Pac. 244. A in respect to the employees in the mine, servant injured by an explosion of gun-where it is started and continuously powder is not entitled to go to the jury run for twelve or fourteen hours before on the issue that the system of work an accident occasioned by the explosion

an accident through the recklessness of a common laborer, not knowing that an the servant himself in not covering the explosion will follow if water comes 4 Sc. Sess. Cas. 4th series, 789. dered to carry a ladle filled with that system of blasting is defective substance along a passageway slippery which does not give workmen sufficient with accumulated ice and snow. Smith time to get out of reach of danger when v. Peninsular Car Works (1886) 60 a shot is about to be fired. Sword v. Mich. 501, 27 N. W. 662. Or where Cameron (1839) 1 Sc. Sess. Cas. 2d selive cinders are unloaded on a wet sur-

a fluid nature are handled; or allows such fluids to be in places where a servant is likely to be brought into contact with them in the course of his duties.2

105. Defective lighting.—Usually the negligence of the employer is a question for the jury, where the evidence tends to show that the place where the injury was received was inadequately lighted. But the inference of negligence in this regard is sometimes negatived by the character of the work in which the servant is engaged.2

106. Unseaworthy ships.—Questions arising out of the unseaworthiness of ships usually arise in dealing with the right of seamen to re-

quently goes out, and the work of reduty of the masters and crews of boats moving broken paper from the presses, engaged in the river trade to push their which are kept in motion while the employment, and, when called for, to relights are out, is much more dangerous ceive, deliver, and stow freight at night in the dark. Sawyer v. Rumford Falls as well as in the daytime. Red River Paper Co. (1897) 90 Me. 354, 38 Atl. Line v. Smith (1900) 39 C. C. A. 620, 318. In Price v. Hannibal & St. J. R. 99 Fed. 520.

<sup>1</sup>Stapf v. V. Loewer's Gambrinus Co. (1883) 77 Mo. 508, it was not de-Brewing Co. (1896) 1 App. Div. 405, 37 cided whether the want of light in a N. Y. Supp. 256 (pitch exuded through railway roundhouse, where men were in a crack in a kettle, and an explosion re- the habit of going to sleep on the sulted); Scherer v. Holly M/g. Co. ground, implied negligence, the plaintiff (1895) 86 Hun, 37, 33 N. Y. Supp. 205 being denied recovery on the ground of (apparatus employed to keep a ladle in his contributory negligence. It cannot which molten fron was conveyed, from tipping, was defective).

\*\*2Dunn v. Connell (1897) 21 Misc.\*\*
295, 47 N. Y. Supp. 185.

\*\*1 Nyback v. Champagne Lumber Co. (1899) 63 U. S. App. 519, 33 C. C. A. (1899) 63 U. S. App. 519, 33 C. C. A. (1899) 63 U. S. App. 519, 33 C. C. A. (1899) 63 V. S. App. 100 49 App. Div. 636, 63 N. Y. Supp. 1105 (1900) 47 App. Div. 311, 61 N. Y. Supp. 1043; and in which it is customary to place App. Div. 311, 61 N. Y. Supp. 1043; and in which it is customary to place material of such a character that involsansol v. Compagnie Générale Transatuntique (1900) 101 Fed. 390; The Guillermo (1886) 26 Fed. 921; Atchison, T. & S. F. R. Co. v. Lannigan (1895) 56 Kan. 109, 42 Pac. 343 (hand of brakeman was crushed while he was coupling, the light of his lantern being der construction is left in darkness. which molten iron was conveyed, from be said, as matter of law, that the duty

coupling, the light of his lantern being der construction is left in darkness. insufficient). The failure to have a There is no obligation to light such a light so that the fall of a winch, which was running after dark, could be seen building are presumed to understand the by a seaman walking along the deck, on risks involved, and to be able to protect account of which he stepped into a snarl themselves. Murphy v. Greeley (1888) in the fall and was injured, renders the 146 Mass. 196, 15 N. E. 654. The fact ship liable. The Manhauset (1893) 69 that the work of unloading cotton from Fed. 843, Affirming (1893) 13 C. C. A. a barge onto a steamboat engaged in 677, 14 U. S. App. 710, 53 Fed. 843. the river trade on the Mississippi was The proprietor of a paper mill which is carried on after dark, and while the kept running all night is not, as mat-boat was moving down the river, and ter of law, free from negligence in fail-that the mate was hurrying up the ing to have other available lights for work, does not show negligence on the use, where the means of lighting by electricity is defective so that the light fresince it is the common practice and pudiate their contract of service on account of that condition; but it is clear that defects of this kind will also constitute a cause of action in favor of any employee who may be personally injured as a result of their existence. The meaning of this expression "seaworthy" is, "that the ship shall be in a fit state, as to repair, equipment, crew, and in all other respects, to encounter the ordinary perils of the contemplated voyage," or, in the language of some of the authorities, "that the ship is in a condition in all respects to render it reasonably safe where it happens to be at the time referred to," or, as expressed by others, "that the ship was, at the commencement of the voyage, in such a state as to be reasonably capable of performing it."

- 107. Inadequate ventilation.— Negligence is inferable from evidence showing that there was no proper ventilation in a railway tunnel.<sup>1</sup>
- 108. Inadequate protection against severe cold.—A good cause of action is stated by a complaint which alleges that the master failed to supply proper lodging for a servant, the result being that the latter was exposed to cold, and was thereby rendered sick.

¹This summary of the effect of the decisions is taken from the opinion in of Abbott (1892) 75 Md. 152, 23 Atl. The Lizzie Frank (1887) 31 Fed. 477. 310 (but here the servant was held to A leaky ship is not seaworthy. Couch have understood and accepted the risk). v. Steel (1854) 3 El. & Bl. 402, 2 C. L. 1 Clifford v. Denver, S. P. & P. R. Co. Rep. 940, 23 L. J. Q. B. N. S. 121, 18 (1886) 9 Colo. 333, 12 Pac. 219. Jur. 515.

#### CHAPTER IX.

# MASTER'S OBLIGATIONS AS TO THE CONDITION OF HIS INSTRUMEN-TALITIES ARE CONTINUOUS.

- 110. Generally.
- 111. Duty to abandon the use of an abnormally dangerous instrumentality.
- 112. Duty to remedy defects in abnormally dangerous instrumentalities which are not disused.
- 113. Duty to change the positions of dangerous substances.
- 114. Duty to abstain from ordering servants to work in positions where the abnormal conditions will endanger them.
- 115. Duty to furnish appliances which will render the abnormal conditions less dangerous.
- 116. Liability of the master after the remedy has been applied.
- 117. Duty to warn the servant as to the existence of abnormal dangers.
- 118. Duty to alter improper methods.
- 110. Generally.— There is complete unanimity as to the doctrine that the degree of care which the law exacts from a master in respect to the maintenance of his instrumentalities in a safe condition is precisely the same as that which he is required to exercise in furnishing them.1 Clearly, it is impossible to suggest any logical ground upon

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¹ The duty of a master to keep appli- furnishing." Anderson v. Minnesota & ances in repair stands upon no different N. W. R. Co. (1888) 39 Minn. 523, 41 ground than does his obligation to fur- N. W. 104. The extent of the master's nish safe appliances in the first in- duty is "that the danger contemplated stance. Moore v. Wabash, St. L. & P. on entering into the contract shall not R. Co. (1885) 85 Mo. 588. "The duty of be aggravated by any omission on the a railroad company to use reasonable part of the master to keep the machincare to protect their employees from in- ery in the condition in which, from the jury embraces the obligation to use terms of the contract or the nature of such care both in furnishing suitable the employment, the servant had a right keeping it in repair." Bailey v. Rome, Clarke v. Holmes (1862) 7 Hurlst. & W. & O. R. Co. (1893) 139 N. Y. 302, N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. 34 N. E. 918. "It is the duty of the master to exercise reasonable care to furnish "The servant has no more control reasonably safe places in which, and apost the repairs than of the purchases." reasonably sate places in which, and apport the repairs than of the purchase, pliances with which, the servants are to work, and to exercise the same care to than for the other. The use of it is keep them in such condition." Pennsylfor him, and the risk of that use, vania Co. v. Witte (1896) 15 Ind. App. whatever it may be, he assumes. 583, 43 N. E. 319, rehearing denied in That comes within his contract. But, (1896) 15 Ind. App. 594, 44 N. E. 377. as part of the same contract, the em"The obligation of the master [as reployer provides the means of carrying spects due care] extends as well to the on the business; and as a matter of matter of examination and repair as to course he assumes the responsibility which a relaxation of vigilance should be deemed permissible after the instrumentalities have been brought into use.

In cases where the servant's injury was caused by abnormally dangerous conditions, which existed when he began to work, and continued to exist up to the time of his accident, his right to recover compensation is referable rather to the conception of a breach of the duty to furnish safe instrumentalities than to a conception of a breach of the duty to keep them in safe condition. The doctrine with which we are now concerned, therefore, finds its appropriate field of operation in cases where the instrumentality in question satisfied the obligatory standard of safety when the servant entered upon the performance of his contract, and afterwards fell below that standard. In this point of view it may be expressed in the form that "a duty rests upon the employer which requires him to exercise due care on his part that no risks and hazards to those in his employ shall be unnecessarily increased."2

care; and as the responsibility contin- R. Co. v. Blevins (1891) 46 Kan. 370, ues so long as the means are used, so 26 Pac. 687; Rice v. King Philip Mills must the same care be exercised in keep- (1887) 144 Mass. 229, 59 Am. Rep. 80, ing the required means in the same safe 11 N. E. 101; Babcock v. Old Colony R. condition as at first." Shanny v. Andros- Co. (1890) 150 Mass. 467, 23 N. E. 325; coggin Mills (1876) 66 Me. 420. Similar Hewitt v. Flint & P. M. R. Co. (1887) language is also found in the following 67 Mich. 61, 34 N. W. 659; Gibson v. cases, which are merely a few out of the Pacific R. Co. (1870) 46 Mo. 163, 2 Am. cases, which are merely a few out of the Pacific R. Co. (1870) 46 Mo. 163, 2 Am. very large number in which the doctrine Rep. 497; Rodney v. St. Louis S. W. R. is recognized: Smith v. Baker [1891] Co. (1895) 127 Mo. 676, 28 S. W. 887, A. C. 325, 362, 60 L. J. Q. B. N. S. 683, 30 S. W. 150; Clowers v. Wabash, St. L. 65 L. T. N. S. 467, 40 Week. Rep. 392, & P. R. Co. (1886) 21 Mo. App. 213, 55 J. P. 660, per Lord Herschell; Willer Miller Willer Miller Willer Miller Willer Wil 265, 80 Fed. 470; Eureka Co. v. Bass 226, 36 Atl. 473; Cullen v. National (1886) 81 Ala. 200, 8 So. 216; Jager v. Sheet Metal Roofing Co. (1887) 46 California Bridge Co. (1894) 104 Cal. Hun, 562; Wiedeman v. Everard (1900) 542, 38 Pac. 413; Wells v. Coe (1886) 9 56 App. Div. 358, 67 N. Y. Supp. 738; 542, 38 Pac. 413; Welts V. Coe (1880) 9 50 App. Div. 535, Of N. I. Supp. 138; Colo. 159, 11 Pac. 50; Indianapolis & Philadelphia, W. & B. R. Co. v. Keenan St. L. R. Co. v. Watson (1887) 114 Ind. (1883) 103 Pa. 124; Knoxville Iron Co. 20, 15 N. E. 824; Louisville, E. & St. L. v. Dobson (1881) 7 Lea, 367; Taylor, Consol. R. Co. v. Utz (1892) 133 Ind. B. & H. R. Co. v. Taylor (1890) 79 Tex. 265, 32 N. E. 881; Nall v. Louisville, N. 104, 14 S. W. 918; Baltimore & O. R. A. & C. R. Co. (1891) 129 Ind. 260, 28 Co. v. McKenzie (1885) 81 Va. 71; N. F. 122 611, Hancock v. Keene Goodman v. Richmond & D. R. Co. A. & C. R. Co. (1891) 129 Ind. 260, 28

N. E. 183, 611; Hancock v. Keene Goodman v. Richmond & D. R. Co. (1892) 5 Ind. App. 408, 32 N. E. 329;

Evansville & T. H. R. Co. v. Holcomb (1894) 9 Ind. App. 198, 36 N. E. 39;

Cooper v. Central R. Co. (1876) 44

Iowa, 134; Atchison, T. & S. F. R. Co. v. Holt (1895) 55 Kan. 401, 40 Pac. v. Napole (1895) 55 Kan. 401, 40 Pac. (1894) 40; Atchison, T. & S. F. R. Co. v. Holt (1894) 50; Atchison, T. & S. F. R. Co. v. Holt (1894) 50; Atchison, T. & S. F. R. Co. v. Holt (1894) 50; Atchison, T. & S. F. R. Co. v. Holt (1894) 50; Atchison, T. & S. F. R. Co. v. Holt (1894) 50; Atchison, T. & S. F. R. Co. v. Holt (1894) 50; Atchison, T. & S. F. R. Co. v. Holt (1894) 50; Atchison, T. & S. F. R. Co. v. Holt (1894) 50; Atchison, T. & S. F. R. Co. v. Holt (1894) 50; Atchison, T. & S. F. R. Co. v. Holt (1894) 50; Atchison, T. & S. F. R. Co. v. Holt (1894) 50; Atchison, T. & S. F. R. Co. v. Holt (1894) 50; Atchison, T. & S. F. R. Co. v. Holt (1895) 50; Atchison, T. & S. F. R. Co. v. Holt (1895) 50; Atchison, T. & S. F. R. Co. v. Holt (1895) 50; Atchison, T. & S. F. R. Co. v. Holt (1895) 50; Atchison, T. & S. F. R. Co. v. Holt (1895) 50; Atchison, T. & S. F. R. Co. v. Holt (1895) 50; Atchison, T. & S. F. R. Co. v. Holt (1896) 50; Atchison, T. & S. F. R. Co. v. Holt (1896) 50; Atchison, T. & S. F. R. Co. v. Holt (1896) 50; Atchison, T. & S. F. R. Co. v. Holt (1896) 50; Atchison, T. & S. F. R. Co. v. Holt (1896) 50; Atchison, T. & S. F. R. Co. v. Holt (1896) 50; Atchison, T. & S. F. R. Co. v. Holt (1896) 50; Atchison, T. & S. F. R. Co. v. Holt (1896) 50; Atchison, T. & S. F. R. Co. v. Holt (1896) 50; Atchison, T. & S. F. R. Co. v. Holt (1896) 50; Atchison, T. & S. F. R. Co. v. Holt (1896) 50; Atchison, T. & S. F. R. Co. v. Holt (1896) 50; Atchison, T. & S. F. R. Co. v. Holt (1896) 50; Atchison, T. & S. F. R. Co. v. Holt (1896) 50; Atchison, T. & S. F. R. Co. v. Holt (1896) 50; Atchison, T. & S. F. R. Co. v. Holt (1896) 50; Atchison, T. & S. F. R. Co. v. Holt (1896) 50; Atchison (1896) 50; At

that his work shall be done with due (1883) 29 Kan. 149; Chicago, K. & W. Co. v. McKenzie (1885) 81 Va. 71; Goodman v. Richmond & D. R. Co.

In so far as the increase of danger results from the manner in which the instrumentalities are used, the liability of the employer in those cases in which such use is not his own personal act (see § 10, ante) will depend upon the doctrines discussed in the subsequent chapters which deal with the defense of common employment in its various phases. In other words, the doctrine enunciated at the beginning of this section is to be taken as subject to the qualification that, where the servant's environment became more hazardous in consequence solely of the acts or omissions of a fellow servant of the injured person, a breach of the master's duty to exercise reasonable care cannot be enforced unless that fellow servant was a representative or vice principal of the master in the sense explained in those chapters.<sup>3</sup> It is sufficient to mention in this place that the limitation upon the doctrine which is thus introduced is greatly narrowed in its actual scope, as a result of the operation of the theory applied in all the American courts, that the obligation to see that the various instrumentalities do not fall below the legal standard of safety cannot be delegated to an agent so as to relieve the master from responsibility for its adequate performance.

The secondary obligations indicated by an analysis of the elements involved in the duty to keep the servant's environment reasonably safe are reducible to two main categories: (1) To exercise a proper supervision over the various instrumentalities, for the purpose of ascertaining whether the required standard of safety is still satisfied; (2) to take such precautions as may be appropriate under the circum-

553. "Where a servant is employed on unnecessarily sweeping language in re-

<sup>8</sup> In Wood v. Canadian P. R. Co. the directors, (1899) 6 B. C. 561, the court used some

machinery, from the use of which dan-jecting the theory of plaintiff's counsel, ger may arise, it is the duty of the mas-that there was a constantly recurrent ger may arise, it is the duty of the master to take due care to use all reasonable means to guard against and prevent any defects from which increased and unnecessary danger may occur." The American doctrine, that the maintenance of safe instrumentalities is a Clarke v. Holmes (1862) 7 Hurlst. & nondelegable duty, does not, as will be N. 943, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, per Cockburn, Ch. J. A master cannot, of course, be held liable on this ground where the changes in evidence do not, as a matter of fact, increase the dangers to which he is exposed. See Naylor v. New York cases by the operation of the defense of C. & H. R. R. Co. (1888) 33 Fed. 801, where the running direction of trains was altered,—an arrangement which, as the court pointed out, did not render the the court pointed out, did not render the ure of liability wherever the business in hazards from misplaced switches any question is managed by the master him-greater than before. question is managed by the master him-self, or, in the case of a corporation, by

stances, to the end that the servant may not suffer injury from an instrumentality which has fallen below that standard.

The first of these obligations will form the subject of chapter xI. The second will be discussed under its different aspects in the following sections.

It will be observed that these two obligations, although predicated independently of each other, are intimately connected in this respect —that no legal liability can exist on the score of a failure to remedy defects, unless and until the master has obtained knowledge, actual or constructive, of those defects. See chapter x., post.

The cases do not bring out as clearly as is desirable the fact that the master's liability depends upon different considerations, according as his failure to obtain knowledge is a specific issue in the case or not. If such failure is relied upon and demonstrated to be due to the want of proper care, it is evidently quite unnecessary to inquire into the character of the master's conduct after the time when he should have been in possession of the knowledge. The charge of negligence, operating as an efficient cause of the accident, is completely made out, and the action is thus shown to be maintainable without proceeding further.4

But, in a juridical point of view, it is also possible to treat a negligent failure to obtain knowledge as equivalent to actual knowledge (see chapter x., post), and the knowledge so imputed may be made the starting point of a complaint based upon the theory that the master was culpable in not doing certain things after he obtained notice of the conditions to be dealt with. This way of putting the logical situation shows that there is some want of precision in the assertion that the question whether the employer is negligent in furnishing an unsafe instrumentality does not depend solely upon the fact that the instrumentality is known by him to be a dangerous one, but must be determined by considering whether, having that knowledge, he failed to do what a person of ordinary care would have done under similar circumstances.<sup>5</sup> This statement is strictly correct only when applied to cases in which the obligations arising out of actual knowledge are in question.

111. Duty to abandon the use of an abnormally dangerous instrumen-

<sup>\*</sup>Negligence, as evidenced by the servants after the master has been inomission to investigate conditions, with formed of circumstances tending to a view to ascertaining whether active show that they are unfit for their posisteps for the protection of the servants should be taken, is discussed in the sections dealing with the duties of inspections dealing with the duties of inspections and of inquiry into the capacity of tion, and of inquiry into the capacity of

tality.— Failing the adoption of one or other of the methods by which, as indicated in the following sections, a master may discharge his duty to keep the servant's environment safe, he can relieve himself from responsibility only by discontinuing altogether the use of the defective instrumentality, and procuring a suitable substitute therefor.1

112. Duty to remedy defects in abnormally dangerous instrumentalities which are not disused.— Except in so far as it may be qualified by the operation of the rule noticed in § 117, post, the principle is well settled that a servant may recover for an injury received by reason of the fact that an instrumentality was allowed to remain in an abnormally dangerous condition for an unreasonable period after that condition was brought to the notice of the master, or by proper inspection might have been known by him. See chapters x.-xII.,

the defendant, the defendant is liable to ber (1856) 5 Ohio St. 541, 67 Am. Dec. 312; Honifius v. Chambersburg Engineering Co. (1900) 196 Pa. 47, 46 Atl. (1880) 35 Ark. 602.

259. In Louisville, N. A. & C. R. Co. v. Lynch (1896) 147 Ind. 165, 34 L. R. A. 293, 44 N. E. 997, 46 N. E. 471, it was said that the duty to discard an unsafe boiler was imperative. In Riley v. W. R. Co. v. Smock (1897) 23 Colo. 456, Baxendale (1861) 6 Hurlst. & N. 445, 48 Pac. 681; Krogg v. Atlanta & W. P. 30 L. J. Exch. N. S. 87, 9 Week. Rep. 347, the defendant had enlarged the size of trucks, and the plaintiff had been crushed while one of them was being turned on a turntable where there had originally been ample room to work. Pollock, C. B., thought that, apart from the question of the proper form of pleading, the action could not have been maintained. The other members of the court discussed the case merely from the standpoint of the correctness of the pleadings. But this dictum of the learned Chief Baron is inconsistent with other English cases, except in so far as it may be intended to assert a disability to recover, for the reason that the risk was presumably known to the

<sup>1</sup> Lake Shore & M. S. R. Co. v. Fitz- servant. It has been laid down that a patrick (1877) 31 Ohio St. 479; Atchi- tool or implement which has become son, T. & S. F. R. Co. v. Sadler (1887) worn and defective by use, but which 38 Kan. 128, 16 Pac. 46; Johnson v. still answers its purpose, need not be Armour (1883) 5 McCrary, 629, 18 Fed. cast aside as dangerous unless there is 490; Johnson v. Boston Tow-Boat\_Co. some apparent cause of danger in its (1883) 135 Mass. 209, 46 Am. Rep. continued use, and that it is therefore 458; Perry v. Ricketts (1870) 55 III. error to instruct the jury that, irre-234; Weiden v. Brush Electric Light spective of any probability of danger or Co. (1889) 73 Mich. 268, 41 N. W. 269; harm, if a tool was defective, and such Mason v. Richmond & D. R. Co. (1892) defect might have, by the use of ordi-111 N. C. 482, 18 L. R. A. 845, 16 S. E. nary care and diligence, been known by 698; Mad River & L. E. R. Co. v. Bar- the defendant, the defendant is liable to ber (1856) 5 Ohio St. 541, 67 Am. Dec. the plaintiff for the injury he received.

post, as to the scope and significance of this proviso as to the master's knowledge. What shall be considered an unreasonable period for the purposes of this rule is a question of fact which is primarily

determined that the rock fell from a in the premises. cause of which the defendant had no-

firming (1893) 54 Mo. App. 476; Steenburgh v. Thornton (1895) 58 N. J. L. A. 433, 10 U. S. App. 439, 53 Fed. 65, 160, 33 Atl. 380; Keegan v. Western R. 70, the roof in a dip slope, where the Corp. (1853) 8 N. Y. 175, 59 Am. Dec. accident happened, was composed of clay 476; Scherer v. Holly Mfg. Co. (1895) rock about 3 feet thick, which defended the ending that the control of the (car couplings injured in a wreck).

In Pantzar v. Tilly Foster Iron Min. through the greater part of this dip Co. (1885) 99 N. Y. 368, 2 N. E. 24, slope the roof had proved so poor that where a piece of a cliff fell upon the plaintiff, the evidence was conflicting. On the part of the defendant it tended to show that the cliff was composed of feet distant, where the two slopes gneiss, a mineral naturally marked by joined, this rock had so crumbled and seams, joints, and foliations, and that fallen that defendant had blasted it all defendant was in the frequent and continued habit of causing it to be examfore; there was also testimony that the ined, but that no appearances indicatroof at the place of the accident had ing immediate danger had been observed long been wet. It was held to be a fair before the accident. Plaintiff's eviing immediate danger had been observed before the accident. Plaintiff's evidence showed that a large crack parallel with and about 10 feet back from the upper angle of the face of the cliff, had long existed and was plainly visible; that the superintendent and foreman were warned of its dangerous character; that after an experiment which showed that it was increasing in width, they still took no precautions to support the rock while the workmen were engaged under it, although such precautions were practicable and frequently adopted in other mines,—such as the use of braces of timbers, or blasting off the overhanging rock; also, that a wall would have furnished a support to the projecting mass. The plaintiff's evidence also tended to show that the rock broke off at the place where the crack had been observed, and that, with the upheld a verdict for the plaintiff, saying. "It must therefore be assumed from the verdict of the jury that it was medet the place where the failure to protect this particular question for the jury whether or not the failure to protect this particular question for the jury whether or not the failure to protect this particular question for the jury whether or not the failure to protect this particular question for the jury whether or not the failure to protect this particular question for the jury whether or not the failure to protect this particular question for the jury whether or not the failure to protect this particular question for the jury whether or not the failure to protect this particular question for the particular portion of the roof by timbers, or to remove it by blasting, was a lack of ordinary care. In Carlson v. Oregon Short Line & U. N. R. Co. (1892) 21 Or. 450, 28 Pac. 497, it was held that in so far as the danger of making repairs in a sthe danger of making repairs in a stream of the track from natural causes, a trackman assumes the risk of such enhanced danger; but from the verdict of the jury that it was master from the discharge of his duty

In Quincy Coal Co. v. Hood (1875) tice, and that precautions which would 77 Ill. 68, it was said that if the defendhave prevented the injury were not ant company's superintendent had readopted, although they were practicable, ceived notice of the dangerous condition and of easy and safe application." In of the roof of one of the gangways in for the jury.2 The mere fact that the master may have provided for an effective system of inspection is wholly immaterial after any particular risk has been found to exist. Inspection is merely a preliminary proceeding which is necessary to enable the master to ascertain whether the instrumentalities are defective or not, and, when it has served its purpose by disclosing an imperfection, other obligations

If a foreign car comes to a company with defects visible, or discoverable by ordinary inspection, it should either refuse to receive it, or immediately repair it sufficiently to make it reasonably safe. Chicago, St. L. & P. R. Co. v. Fry York, O. & W. R. Co. (1893) 73 Hun, (1891) 131 Ind. 319, 28 N. E. 989; 270, 26 N. Y. Supp. 405, the plaintiff Atchison, T. & S. F. R. Co. v. Myers was held to be properly nonsuited for (1894) 11 C. C. A. 439, 24 U. S. App. the reason that there was no evidence 295, 63 Fed. 793; Gottlieb v. New York, that a car had been out of repair a suf-L. E. & W. R. Co. (1885) 100 N. Y. ficient length of time to justify the jury 462, 3 N. E. 344. See, further, chapter in finding that the defendant knew of

XII., post.

<sup>2</sup> A verdict finding a railroad company liable for the death of a brakeman killed while making a coupling, by steel derailment had been in the same condiderailment had been in the same condition for several weeks previously. Kan- In Norfolk & W. R. Co. v. Gilman sas City, M. & B. R. Co. v. Webb (1893) (1891) 88 Va. 239, 13 S. E. 475, a rail-

its mine, long enough before the acci- 97 Ala. 162, 11 So. 888. A verdict for dent to have given time to repair, this the plaintiff is warranted, where a was sufficient to make the company lia- spring, intended to automatically lower ble for an injury caused by the fall of a gate in front of the shaft of an elevator used by plaintiff while acting as porter for defendant, was left out of repair by defendant for three weeks after being notified thereof. Larkin v. Washington Mills Co. (1899) 45 App. Div. 6, 61 N. Y. Supp. 93. In Doing v. New York, O. & W. R. Co. (1893) 73 Hun, 270, 26 N. Y. Supp. 405, the plaintiff its condition, or was negligent in not ascertaining it. The court of appeals ([1897] 151 N. Y. 579, 45 N. E. 1028), however, said that, as the defendant rails which projected over the end of a had notice on Saturday that the car was fat car, will not be set aside, where the out of order, the fact that an accident conductor in charge of the train oboccurred from its use on the following served the position of the rails thirty Monday was some evidence of neglihours before the accident. Corbin v. gence. In Knapp v. Sioux City & P. R.
Winona & St. P. R. Co. (1896) 64 Co. (1887) 71 Iowa, 41, 32 N. W. 18,
Minn. 185, 66 N. W. 271. A railway a request of defendant for the following company which had actual notice of the instruction was held to have been defective condition of a foreign car, sevightly refused for the reason that it eral hours before a servant was injured failed to present the thought that dein handling it, may properly be found fendant's employees used proper care in liable. Denver, T. & Ft. W. R. Co. v. the inspection of the road, and, in the Smock (1897) 23 Colo. 456, 48 Pac. 681. exercise of such care, there was "an ap-An employer who knew that his machin-parent necessity" discovered by them ery was defective, several weeks before to make the repairs required: "If the an accident to an employee, is negligent, jury find from the testimony that the where he fails, without excuse, to make officers of the defendant employed skilthe necessary repairs. Romona Oolitic ful and competent men to look after and Stone Co. v. Phillips (1894) 11 Ind. keep in repair its track, and furnished App. 118, 39 N. E. 96. Two weeks is the requisite men and material to do an unreasonable time for a railroad the work and keep the track in good recompany to allow piles of gravel, used pair, and if you further find from the in ballasting, to remain between its testimony that the track was frequently tracks in its yards at a division station. inspected by them, and that the old ties Hurst v. Kansas City, P. & G. R. Co. were taken out and replaced by new ties (1901) 163 Mo. 309, 63 S. W. 695. It as often as there was any apparent neis not error to allow a plaintiff to prove cessity for so doing, you cannot find that a defective switch which caused a that the defendant was negligent in come into play. "It is not sufficient to be simply cautionary, when a manifest danger exists that may and ought to be removed."3

Some authorities have undertaken to apply the converse of this principle, in a form which would relieve the master from liability, unless his knowledge, actual or constructive, was obtained sufficiently long before the injury was received to have enabled him to adopt remedial measures.4 But these cases do not, it is submitted, take proper account of the fact that the servant is, for the purposes of the argument, to be considered as having no knowledge of the defective conditions, since it would otherwise be a controlling issue whether he would be precluded from recovering, on the ground of an assumption

sentially the same under that act as un-

road had, for four years, kept a chained log at the end of a wharf to arrest its ville & N. R. Co. [1887] 85 Ala. 269, 4 cars, instead of providing a stronger structure, fit for such a purpose. The court said: "Was not this negligence? of a defect in a machine or appliance, it The structure was temporary only, and not safe. This was known to the company, as better timbers were ordered; remedy it, unless he had reasonable and yet, knowing the danger, and advised of the need, days were allowed to run into weeks, weeks into months, weeks, weeks into months, and unsafe structure had not been replaced by the permanent and substantial contrivance in use elsewhere, and known to some person intrusted by the replaced by the permanent and substantial contrivance in use elsewhere, and known to some person intrusted by the which, if it had been in place on this wharf, would have arrested, without "ways, works, machinery, or plant were danger, these slowly moving cars. This was negligence, beyond question."

\*\*Bean v. Western North Carolina R.\*\* accident the defect was so known. In Co. (1890) 107 N. C. 731, 12 S. E. 600. United States Rolling Stock Co. v. Weir There the fact that a railroad company (1892) 06 Als 396 11 So 436 it was There, the fact that a railroad company (1892) 96 Ala. 396, 11 So. 436, it was employed a track walker, whose duty it held, following this case, that an instruction that passed a dangerous point, whether rock had fallen, was held to be no excuse for allowing a mass of rock to remain in such a position and condition that it fell upon the track and injured an employee, where the danger was obvious.

United States Rolling Stock Co. v. Weir (1892) 96 Ala. 396, 11 So. 436, it was held, following this case, that an instruction to the effect that the jury must find for the plaintiff if the defect which caused the injury was, or with proper diligence might have been, thought the defendant or his agents at the time the injury was suffered, is erroneous. The defendant must have had sufficient time to remedy the defect jured an employee, where the danger was obvious.

\*Common-law rulings to this effect are, Erskine v. Chino Valley Beet-Sugar Co. (1895) 71 Fed. 270; Johnson v. Armour (1883) 18 Fed. 490; Alabaster Co. v. Lonergan (1900) 90 Ill. App. 353; Pavey v. Effect the remedy. The same view reappears in the ruling that defects in a track, when they arise, do not at once fasten a liability upon the railroad company. It is only after they have extended, have been rendered in construing the employers' liability act of Alabama. But, as the measure of the employer's duty has been declared to be essentially the same under that act as unof the risk or of contributory negligence. That it is always a material question whether the master exercised reasonable care and diligence in removing a danger after he had knowledge of its existence may be conceded.<sup>5</sup> But it seems inequitable and unreasonable to declare that the servant should always be the one to suffer, simply because the employer has been reasonably prompt in taking the necessary steps for the repair of the defective instrumentality. The true rule, it is submitted, is that the duty of the master under these circumstances is not, as a matter of law, fully discharged, unless he at least sees that the servant is notified of the danger to which he will be exposed while the abnormal conditions to which that danger is owing are being rectified. See § 117, post. This would seem to be the rationale of a ruling by the supreme court of Pennsylvania that, where an employer is informed that certain machinery upon his premises, out of sight of his employees, is in a dangerous condition, and he takes steps to renew it, but, before such renewal is made, one of the employees, having no notice of the dangerous condition of the machinery, is injured by its breaking, in the ordinary course of his employment, the question of the employer's negligence is for the iurv.6

As to the duty of a master after he has become aware of facts tending to show that a servant is unfit for his duties, see chapter xIII., .. post.

As to the duty to remedy defects, under the employers' liability act, see chapter xxxvII., post.

113. Duty to change the positions of dangerous substances .-Under certain circumstances, the appropriate remedy which suggests itself is the transfer of some substance to a new position where, for various reasons determined by its properties and character, it will no longer expose the servant to undue hazard.1

<sup>&</sup>lt;sup>5</sup> Alton Lime & Cement Co. v. Calvey

<sup>&</sup>lt;sup>1</sup> This point of view is illustrated by (1893) 47 Ill. App. 343.

\*\*Such decisions as those in which the Murphy v. Crossan (1881) 98 Pa. master has been held liable for injuries 495. See also Indianapolis & C. R. Co. received by servants who have been put v. Love (1858) 10 Ind. 554, where the to work in places where there are uncourt remarked: "If a defect existed exploded charges of blasting powder. in the road, which was known to the Neveu v. Sears (1892) 155 Mass. 303, in the road, which was known to the Neveu v. Sears (1892) 155 Mass. 303, company, but which it was impossible 29 N. E. 472; Alton Lime & Cement Co. for them to immediately remove or remedy, and in consequence thereof the road who have fallen, when they were using was unsafe, but not impassable, and yet a stairway which had been moved, and they should place an employee upon the road, and suffer him, in ignorance of said defect, to attempt to operate it, and injury should thereby result to him, certainly there would be a liability."

Neveu v. Sears (1892) 155 Mass. 303, 203, 201, 26 Mass. 303, 29 N. E. 472; Alton Lime & Cement Co. Calrey (1893) 47 Ill. App. 343. Or edy, and in stairway which had been moved, and put in such a position as to be insecure for anyone who stepped on it. Tendrup v. John Stephenson Co. (1889) 51 Hun, jury should thereby result to him, certainly there would be a liability."

114. Duty to abstain from ordering servants to work in positions where the abnormal conditions will endanger them. To refrain from giving orders which will require a servant to put himself in such a position that he will be subjected to the risk of injury from a defective instrumentality is a duty the breach of which is no less culpable than the breach of the analogous duty of abandoning the use of the defective instrumentality. On the other hand, the master's duty is discharged if, pending the execution of repairs, he takes temporary measures which will prevent servants from having access to the dangerous instrumentality.2

115. Duty to furnish appliances which will render the abnormal conditions less dangerous.—Sometimes the duty to remove the cause of the danger may take the form of a duty to furnish special appliances, in view of the possibility that the servant may be occasionally exposed to dangers against which those appliances will be an adequate protection.1

Or who, while working on a train, have & O. R. Co. (1893) 100 Cal. 282, 34 Pac. come into collision with a structure or 720 (bank of earth caved in, defendant's other object in dangerous proximity to representative being fully aware of its a railway track. Chicago & I. R. Co. v. condition); Deweese v. Meramec Iron Russell (1887) 91 Ill. 298, 33 Am. Rep. Min. Co. (1895) 128 Mo. 423, 31 S. W. 54; Louisville & N. R. Co. v. Filbern 110, Affirming without comment (1893) (1869) 6 Bush, 574, 99 Am. Dec. 690; 54 Mo. App. 476 (laborer put to work Texas & P. R. Co. v. Hohn (1892) 1 under slope down which pebbles and Tex. Civ. App. 36, 21 S. W. 942. Or who have been struck by a mass of ice and snow which fell on them from a kiefer (1888) 26 Ill. App. 466. roof where it had accumulated. Dugal and snow which reli on them from a Kiefer (1888) 26 III. App. 466.
roof where it had accumulated. Dugal
v. People's Bank (1899) 34 N. B. 581.
If a railroad track is constructed in steps at the rear end of a sleeping car such a manner that rocks overhang it, or loose rocks are imbedded in the slopes of cuts through which it runs, in such a position that they may be displaced by the action of the elements and placed by the action of the elements and form gate in such a manner as entirely precipitated upon the track it is the to prevent the eggest of persons from placed by the action of the elements and precipitated upon the track, it is the duty of the company either to remove them or to take other adequate precautions to guard against danger and render the track reasonably safe. Clune v. Ristine (1899) 36 C. C. A. 450, 94 Fed. 745 (Sanborn, J., dissented). See also Bean v. Western North Carolina R. 60. (1899) 107 N. C. 731, 12 S. E. 600, eited in note 3 to preceding section. cited in note 3 to preceding section.

upon which girders are to be set are in- want of the crooked links which are necsecurely fastened is guilty of little less essary for the safe coupling of such cars than criminal negligence in sending caris one of the risks assumed by a brakepenters to work upon them, without bracing them. Herdler v. Buck's Stove & (1895) 84 Hun; 216, 32 N. Y. Supp.
Range Co. (1896) 136 Mo. 3, 37 S. W. 457. 115. See also Elledge v. National City

other dangers incident to the handling A master who is notified that posts of such cars, it is error to rule that the

116. Liability of the master after the remedy has been applied.— The extent of the master's liability for injuries caused by an instrumentality which, at the time of the accident, had been again brought into service after having been withdrawn from use for the purpose of restoring it to its normal condition will obviously depend upon

whether the remedial measures adopted by him or his agents have, as matter of fact, resulted in rendering it reasonably safe, in so far

as that can be effected by the exercise of ordinary care.1

As to the effect of the master's specific promise to remedy the dangerous conditions, see chapter xxII., post.

117. Duty to warn the servant as to the existence of abnormal dangers.—Where the servant is not safeguarded by immediate abandonment of the use of the defective instrumentality, or by its immediate restoration to a condition of normal safety, it is clearly the duty of the master to warn the servant of the danger to which he will be exposed, unless he is known to have received information as to this from other sources.1 See chapter xvi., post.

The obligations of remedying defects and of warning the servant of the existence of those defects are sometimes spoken of as being strictly alternative in their nature, as though the master could relieve himself of responsibility by discharging either of them.<sup>2</sup> But this

not on this point explicitly).

An employer is not, as matter of law, free from negligence toward an employee injured by the fall of a freight not appear to be weaker at the mended elevator, although it had just been repaired by an expert, where it was of a rather poor class of elevators, and the manager in charge knew of defects and the were not repaired at all. Goggin W. 357.

v. D. M. Osborne & Co. (1896) 115 Cal.

'It is negligent in requiring an employee to use a mended circular saw, where it had been worked for a month and did not appear to be weaker at the mended point than at any other, or to have broken at that point or in consequence of its mended condition. Law v. W. 357.

W. 357.

'It is negligent in requiring an employee to use a mended circular saw, where it is negligent in requiring an employee to use a mended circular saw, where it is negligent in requiring an employee to use a mended circular saw, where it is negligent in requiring an employee to use a mended circular saw, where it is appear to be weaker at the mended point than at any other, or to have broken at that point or in consequence of its mended condition. Law v. W. 357.

V. D. M. Osborne & Co. (1896) 115 Cal.

'It is negligent in requiring an employee to use a mended circular saw, where it is appear to be weaker at the mended point than at any other, or to have broken at that point or in consequence of its mended condition. Law v. hazards of the service of a driver therebe injured by a rain storm, without a in, where the employer, upon notice of guard for ten hours after the storm is the condition of the roof, had appointed over. Hardy v. North Carolina C. R. in, where the employer, upon notice of guard for ten hours after the storm is the condition of the roof, had appointed over. Hardy v. North Carolina C. R. a timberman to secure it, and the roof Co. (1876) 74 N. C. 734.

had been left in an insecure condition.

Consolidated Coal Co. v. Scheiber circumstances ought to have known, (1896) 65 Ill. App. 304. Where a locomotive boiler explodes, killing the fireand dangerous, it was his duty to see man, and there is evidence that the enthat it was put in proper repair, or to gine was frequently taken to the repair warn those using it of the danger, if shops for repairs, that it would not they were ignorant of it." Rice v.

1 Chicago & N. W. R. Co. v. Delaney hold water nor sustain a full head of (1897) 169 III. 581, 48 N. E. 476, Afsteam, the question of the employer's firming (1896) 68 III. App. 307; Pionegligence is one of fact for the jury. New Cooperage Co. v. Romanowicz Kirkpatrick v. New York C. & H. R. R. (1899) 85 III. App. 407, Affirmed Co. (1879) 79 N. Y. 240. The operator (1900) 186 III. 1, 57 N. E. 864 (but of a pulp mill is not, as a matter of not on this point explicitly).

An employer is not as matter of law.

roof of a mine is not one of the ordinary a gorge, where it is specially liable to

way of putting the case is not a strictly accurate one. In the first place, it involves the hypothesis that it is a matter of legal presumption that the effect of a warning is to transfer the responsibility to the servant, or disable him from recovering damages for the reason that his continuance of work after having thus acquired a knowledge of the conditions charges him with an acceptance of the risk or with contributory negligence. This hypothesis cannot be entertained as to all jurisdictions. See chapters xvII., xvIII., and xx., post. Another objection to the statement in question is that it involves the unwarrantable proposition that an employer who proceeds to remedy a defect with due diligence relieves himself thereby from all respon-

King Philip Mills (1887) 144 Mass. concerned, if the track is injured, and 229, 59 Am. Rep. 80, 11 N. E. 101; thereby becomes unsafe, the company is Louisville, N. A. & C. R. Co. v. Bates under no obligation to repair the same. (1897) 146 Ind. 564, 45 N. E. 108. To It must, however, give them due and same effect see Findlay Brewing Co. v. Line of the injury, so that danbauer (1893) 50 Ohio St. 565, 35 N. E. 55; Alton Lime & Cement Co. v. Calvey (1893) 47 Ill. App. 343; Denver, T. & may deem proper to repair the same. Ft. W. R. Co. v. Smock (1897) 23 Colo. 48 Pac. 681; Carlson v. Oregon vent the injury is such a one as to present the Line & U. N. R. Co. (1892) 21 Or. 450, 28 Pac. 497. In Henry v. Lake Shore & M. S. R. Co. (1882) 49 Mich. 495, 13 N. W. 832, the negligence relied upon and attempted to be proved was such interest. If the company may take such time to repair the same as it pleases, even an unreasonable time, and its employees cannot call it to account that a sufficient number of men was not employed upon a certain section of a railway to give proper notice to approaching trains in case of an accident, and to make the repairs within such reasonable time as, at that season of as charged, and if the company must,

proaching trains in case of an accident, and to make the repairs within such reasonable time as, at that season of the year, would be required by ordinary prudence, under all the existing circumstances and in view of the probable dangers of injury. The court said: "In behalf of the company owed no duty to its employees to repair this track within any specified time, or at all; that, as to its employees, it might leave the track in an impassable condition, while its duty to the public would be very different; and that the danger, so that they might not receive any injury in consequence thereof. This position would seem to be unasswerable. The company owes a duty to the public to keep its track in a safe and suitable condition, and also to run its trains with regularity and despatch over the same, for the carriage and trains of cars, as charged, and if the company must, at all times, have a sufficient force of men on hand to repair in case of casualties of this kind, within even a reasonable time, of the same and trains of cars, as charged, and if the company must, at all times, have a sufficient force of men on hand to repair in case of casualties of this kind, within even a reasonable time, the question at once arises, By what standard shall these things be determined? If a rail is broken, must the force be sufficient to repair the track before the arrival thereat of the next train? If so, then a much larger force must be employed where a train is approaching than in a case where several hours would intervene, although, in either event, the extent of the injury to ance to be made between slight and extensive injuries to the track. The injury might be such that a few men could make the necessary repairs in a very short time, or be of so serious a nature that a large force would necessarily be employed for days. Then how could the company know what force would be required? Should it anticipate slight,

sibility, whether he warns the servant or not. But it is plain that the circumstances may sometimes be such that a jury would be justified in inferring that he ought also to have given the servant such instructions as would have enabled him to protect himself more effectually, during the period which was to elapse before the dangerous conditions could be remedied.3 It is conceived, therefore, that the true principle in this connection is that, under the circumstances supposed at the commencement of this section, the master is always culpable if he does not warn the servant, and may or may not be subject to an ac-

ordinary, or severe damage to its track, <sup>a</sup> See Denver, T. & Ft. W. R. Co. v. and how and by whom should injuries Smock (1897) 23 Colo. 456, 48 Pac. 681, thereto be classified? Then, again, the where the duty of a railway company same rule could not be applied to all to put a distinctive mark on a foreign roads alike. Where the business of the car, discovered to be defective, was recroad is large, and many trains are ognized. In this particular class of daily running over the same, a much cases, however, the kind of warning more strict rule and larger force would thus given does not seem to be regarded more strict rule and larger force would thus given does not seem to be regarded necessarily be required than in a case by all courts as sufficient. In Rodney where but few trains were running. v. St. Louis S. W. R. Co. (1895) 127.

This is the best answer the name of the questions will admit of, although a dangerous one when we consider the claim made in this case that tiff by inspecting and marking the car. four men instead of three should have the duty to furnish reasonably safe appeen employed. But the duty to pliances and machinery for the use of promptly repair its track, or to repair its servants in the course of their empirical property was not only an importative promptly repair its track, or to repair its servants in the course of their em-within a reasonable time, grows out ployment was not only an imperative, of the duty to carry freight and pas-but a continuous, duty. It ran, so to sengers with promptness and despatch. speak, with the defective car from the This is the contract obligation which moment it was discovered to be defect-the company enters into with its pa-ive, continually calling upon the mas-trons, but which it has not entered into ter to repair it, or to warn those of its with its employees. As to them, it may servants whom it required in the course delay its trains, or it may stop them, of their employment to handle it of its temporarily or permanently and the dangerous character." In Cochin we temporarily, or permanently, and the dangerous character." In Corbin v. employee cannot complain or seek re-Winona & St. P. R. Co. (1896) 64 Minn. dress in damages in consequence there- 185, 66 N. W. 271, it was held that a of. Their claim, if any, would grow railroad company was not, as matter out of their contract relation with the of law, free from negligence towards a company for employment, and would brakeman killed by steel rails unnecnot be based upon a stoppage in the essarily projecting over the end of a running of trains, caused by delay in flat car while he was making a coupling, repairing the track, but for their where it was well known that this kind wages, to which they would be entitled, of freight was apt to slide backwards if employed for a definite period, or forwards, and where the conductor whether trains were run with regular in charge of the train observed the conity, or were not run at all. There could dition of the rails thirty hours before therefore be no such thing as a duty to the accident, so that there was an opthe employees to repair within a rea-portunity to remove the danger by side-sonable time, or to repair at all. The tracking the car, as was customary with duty to them is to furnish a reasonably those in bad order, or by adjusting the good and safe track, and, if an injury rails so that they would not project beoccurred thereto, to discover the same youd the end of the car. The fact that with reasonable diligence and promptly the conductor warned him to be careful give due and timely notice thereof to in making the coupling did not, it was its employees, so that they might be said, prevent his recovering under such protected from danger."

tion on other grounds, even though he may have given the servant adequate warning.

118. Duty to alter improper methods.— In the cases so far cited as illustrative of the general principle that the master's obligations are continuous in their nature, the subject-matter has been the material substances themselves which constitute portions of the plant. It is plain, however, that the principle is also applicable where the abnormal dangers were caused by improper methods of doing work. The obligation of altering these attaches to the master from the time they are known or ought to have been known to him.

Thus, a master is bound, by promulgating a proper rule, or otherwise, to change a practice which, to his knowledge, has for a long time been followed firemen, company's agents being aware by one set of his servants to the peril of another set. Doing v. New York, O. of operating engines in the absence of & W. R. Co. (1897) 151 N. Y. 579, 45 N. E. 1028, Reversing (1893) 73 Hun, 270, 26 N. Y. Supp. 405 (the practice for the engineers). So, a master who has notice of the violation of a rule adopted for the protection of an employee is complained of was the shunting of cars charged with the duty of taking the neconto tracks leading to a repair shop, without adopting proper precautions without adopting proper precautions for preventing the cars from running through doors of the shop, or for warn-find such employees as might be at work S. W. 266.

### CHAPTER X.

## KNOWLEDGE AS AN ELEMENT OF A MASTER'S LIABILITY.

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#### A. GENERAL PRINCIPLES.

119. Analysis of the conception of negligence with reference to the knowledge of the person charged therewith.— Before entering upon a detailed examination of the cases which bear upon the subject of this chapter, it will be advisable to insert a few introductory remarks, designed to elucidate the fundamental principles to which the propositions which we shall have occasion to state are referable.

That knowledge is a constituent element of negligence under any of its aspects will be sufficiently obvious to anyone who considers that a want of care can only be manifested in one of two ways, viz., either by a failure to make such inquiries as would have turned partial and merely constructive, into complete and actual, knowledge, or by a failure to act prudently with a full knowledge of the conditions. Any other theory would be inconsistent with that fundamental principle of jurisprudence which makes ignorance of facts a valid excuse for an injurious act, provided such ignorance is justifiable. In the ordinary analyses of negligence, this aspect of the tort is somewhat obscured, for the reason that they lay the chief stress upon the standards by which its existence or nonexistence is determined. In the two following well-known definitions, for instance, the element of knowledge is wholly ignored, so far as the actual words which they contain are concerned.

"Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the

conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

"Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. The essence of the fault may lie in omission or commission. The duty is dictated and measured by the exigencies of the occasion."

In other definitions the presence of this element is more apparent, but is not very distinctly insisted upon.

"Negligence, in its civil relations, is such an inadvertent imperfection, by a responsible human agent, in the discharge of a legal duty, as immediately produces, in an ordinary and natural sequence, a damage to another. The inadvertency or want of due consideration of duty is the *injuria*, on which, when naturally followed by the *damnum*, the suit is based."

Negligence is the want of such attention to the natural and probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns.<sup>4</sup>

In a third set of definitions the element of knowledge is put prominently forward.

"Negligence is practically synonymous with heedlessness or carelessness,—not taking notice of matters relevant to the business in hand of which notice might or ought to have been taken."<sup>5</sup>

"An actor is negligent when he is ignorant of the consequences of his act, if his ignorance proceeds from thoughtlessness, recklessness, carelessness, or want of due attention. Negligence is inadvertence to consequences to which a man might have adverted, and to which he would have adverted had he been desirous to obey the law and perform the obligations which it imposes."

"Of the three gradations of misconduct towards others, fault or negligence (culpa) is an unlawful act in ignorance of the subject, the degree, the instrument, the consequences, when it was reasonable to expect the mischief; unlawful intention (dolus) is breach of law with knowledge of these elements, but without premeditation; malice or

<sup>&</sup>lt;sup>1</sup> Alderson, B., in Blyth v. Birmingham Waterworks Co. (1856) 11 Exch. <sup>2</sup> Wharton, Neg. § 3. <sup>4</sup> N. Y. Penal Code, § 718, subsec. 1, 781, 25 L. J. Exch. N. S. 212, 2 Jur. Donnan's Ann. Code, 1884. N. S. 333. <sup>5</sup> 11 Stephen, History of Criminal

<sup>&</sup>lt;sup>2</sup> Swayne, J., in *Baltimore & P. R.* Law, p. 122. Co. v. Jones (1877) 95 U. S. 439, 24 L. Poste's Gaius, p. 13. ed. 506.

depravity is evinced by the resolution or deliberate intention of violating law."7

It can scarcely be said that any of these definitions indicate satisfactorily the true relation which the element of knowledge bears to that absence of care which constitutes the main element in the conception of negligence. The defect in such explanations is that they fail to take account of the case in which negligence is predicated of acts done by one who is fully aware of all the circumstances with reference to which he is called upon to choose a course of action, and who also knows that there is a probability, which in some instances approaches to a moral certainty, that the course of action which he does adopt will prove injurious to some one. Unless the familiar phrase "wilful negligence" is based upon a wholly false conception, no definition which fails to cover an act done by a person in this condition of enlightenment can be termed satisfactory.8

120. Same subject in its special application to the liability of a master.—Such expositions as the foregoing are peculiarly defective when considered with reference to the circumstances from which an employer's liability is predicated, for they cannot be made to comprehend the cases of actual or constructive knowledge of the existence of the dangerous conditions. It would be doing violence to common sense to say that the liability in this instance is based upon his blameworthy ignorance of consequences. His fault really consists in non-action or wrong action, with a full appreciation of the probable results of his conduct. In other words, the law requires him to indemnify the injured servant because he knows or is presumed to know that his instrumentalities are in a dangerous condition, and also knows or is presumed to know that this dangerous condition must, in the long run, cause injury to anyone who uses, or is brought into proximity to, those instrumentalities as frequently and as constantly as is the case with a servant.

The inadequacy of the ordinary definitions of negligence, as a measure and test of an employer's liability, results from the fact that the special duty which, above all others, is imposed by the law upon him, is the duty of maintaining the instrumentalities of his business in such a condition that his servants will not be exposed to unnecessary peril. This duty cannot be effectively discharged, unless he ex-

Aristotle's Eth. Nic. 3, 5, 8 (translated in Poste's Gaius, p. 15).

It has been well remarked by the is the absence of diligence, or the abwriter of the article on "Negligence" in sence of intention." the Encyclopædia Britannica: "Neglivol. I. M. & S.—17.

ercises reasonable care in seeing that the instrumentalities do not fall below a given standard of safety. The primary duty of an employer, therefore, is to obtain such knowledge as is necessary to enable him to decide whether that normal standard is or is not satisfied at any given moment, while his duty to raise the instrumentalities to that standard, after he ascertains that they come short of it, is a secondary duty imposed by the law, for the reason that he must be aware that, if this is not done, his servants will be likely to suffer injury. In short, the very essence of the principle upon which he is held liable is his knowledge, either of existing conditions, or of the probable consequences of the continuance of those conditions. The criticisms of Cotton and Bowen, L. JJ., upon the comprehensive rule which Brett, M. R., undertook to formulate in an oft-cited case<sup>1</sup> forbid us to lay it down as a universal proposition, applicable to all civil relations, that, as has been declared in a Kansas case, "where any voluntary act may naturally result in the injury of another, the actor must see to it, at his peril, that injury does not follow."2 But this doctrine undoubtedly expresses the conception which is the keynote of all the statements which we find in the books, respecting the extent and character of the master's obligations to secure his servant against personal injury, the conception, that is to say, of a duty to exercise a reasonably careful supervision, with a view to eliminating unnecessary perils from the business.3 Or, to view the matter from a somewhat different standpoint, the qualifications ingrafted on the original rule that a servant assumes the ordinary risks of his employment are that a master shall not employ his servant in a work which the master is aware is of such a nature that no man could engage in it without incurring liability to the injury complained of.4

# 121. — to other relations involving analogous responsibilities.—

36, 27 Pac. 122.

<sup>3</sup> A master must "exercise care and chapter. prudence that those in his employment tain by the use of suitable care and the dangerous nature of the employ-oversight; and if he fails to do so, he ment. is guilty of a breach of duty under his

<sup>1</sup>Heaven v. Pender (1883) L. R. 11 contract, for the consequences of which Q. B. Div. 503, 52 L. J. Q. B. N. S. he ought, in justice and sound reason, 702, 49 L. T. N. S. 357, 47 J. P. 709. to be responsible." Snow v. Housa-22, 49 L. T. N. S. 357, 47 J. P. 709. to be responsible." Snow v. Housa<sup>2</sup> Mastin v. Levagood (1891) 47 Kan. tonic R. Co. (1864) 8 Allen, 441, 85
3, 27 Pac. 122. Am. Dec. 720. See also the following

<sup>4</sup>In Potts v. Plunkett (1859) 9 Ir. be not exposed to unreasonable risks C. L. Rep. 290, it was pointed out by and dangers." Noyes v. Smith (1855) Lefroy, Ch. J., that this rational quali-28 Vt. 59, 65 Am. Dec. 222. "The lefication of the rule which exempts the gal implication is that the employer master from liability for injuries rewill adopt suitable instruments and sulting from accidents to those in his means with which to carry on his busi- employment involves the existence of ness. These he can provide and main- knowledge on the part of the master of

The obligation thus imposed upon the master is, it will be observed, the same in kind and degree as that incumbent upon all individuals or corporations who are under a duty towards a given class of persons to keep certain material substances in a safe condition. The most familiar example of this duty, apart from the relations of master and servant, is that which requires municipal corporations to maintain safe highways, etc., for the benefit of travelers. It is the accepted doctrine that no action can be maintained for a breach of this duty unless the corporation is proved to have had notice, actual or constructive, of the dangerous conditions which caused the injury. The same rule prevails as regards other relations in which a duty resembling that imposed on an employer is imposed on one of the parties, as, where the servant of an independent contractor is injured by defective instrumentalities furnished by the principal employer,2 or where the owner of premises is sued for damages by a licensee.<sup>3</sup> It also operates as a restriction upon the liability of carriers for injuries to passengers, the extent of their duty, where freight is concerned, being, of course, determined upon the peculiar considerations which render them practically insurers of the safety of the goods conveyed.4

122. Actual knowledge; liability inferred from.—It is well settled that a master must respond in damages for an injury resulting from abnormally dangerous conditions, of the existence of which he was ac-

<sup>1</sup> See 2 Dill. Mun. Corp. § 790. This bound to take steps to know, that the ¹ See 2 Dill. Mun. Corp. § 790. This bound to take steps to know, that the similarity of the principles involved, roof was not sufficiently strong to supard of the results to which those principles lead, has not escaped the notice of v. London & B. R. Co. (1869) L. R. 4 the courts. As was remarked in Huff-Q. B. 696, 38 L. J. Q. B. N. S. 241, 20 man v. Chicago, R. I. & P. R. Co. L. T. N. S. 743, 17 Week. Rep. 1065. (1883) 78 Mo. 50, "cases of this sort (i. 4 the sexual street in a standard work e., where masters are sued by injured that the established rule in regard to servants) are obviously analogous to the liability of a carrier to a passenger those where a municipal corporation is seems to be that the fact of the carrier's sued for an injury arising from a defect in one of its streets, where one of tractor to furnish the appliances or two things must be shown to hold the structures used in carrying on the busitwo things must be shown to hold the structures used in carrying on the busicity liable,-either notice of the defect ness of transportation will not warrant communicated to the city, or evidence him in trusting to the external appearthat the defect had continued so long as ance of the materials, or relieve him of to allow the inference to be drawn that the duty of carefully inspecting and

to allow the inference to be drawn that notice of such defect had been communicated."

2 See pp. 45 et seq. of the present Readhcad v. Midland R. Co. (1867) L. writer's note in vol. 46 L. R. A., Cleveland, C. C. & St. L. R. Co. v. Berry.

3 Thus, a person who is injured by Week. Rep. 831, Affirmed (1869) L. R. the fall of a plank of a roof, which gave yunder the weight of a man hired to do some repairs, cannot recover unless he shows, either that the hirer knew, or had the means of knowing, or was

tually aware. This doctrine is immediately deducible from the general principle that knowledge is an essential ingredient of negligence, and that a person is always held liable for the natural and probable consequences of his own want of care.

"If there is personal negligence in the master, he is liable, and if he knows the defects which cause the injury, that is evidence of personal negligence."1

In estimating the extent of the master's liability the essential point to be settled is not whether he knew that certain conditions existed, but whether he knew that those conditions involved danger to the servant.2

There are many cases in which the master may be held responsible for the reason that he understood the conditions which exposed the

<sup>1</sup> The judges were all agreed that the 152 (foreman here had been explicitly ruling in Priestley v. Fowler (1837) 3 warned as to the danger). Mees. & W. 1, Murph. & H. 305, 1 Jur. tackle to be used by the persons emdent, is admissible in an action by an ployed by him is improper or unsafe, employee injured by the breaking of the and, notwithstanding that knowledge, shears, for the purpose of showing that sanctions its use." Mellors v. Shaw the employer knew the shears to be dan(1861) 1 Best & S. 444, 30 L. J. Q. B. gerous. Pacheco v. Judson Mfg. Co.
N. S. 336, 7 Jur. N. S. 845. The case (1896) 113 Cal. 541, 45 Pac. 833. designated was Roberts v. Smith 1, 33 N. E. 702 (steps descending to (1857) 2 Hurlst. & N. 213, 3 Jur. N. S. cellar of house where plainting to 469, 26 L. J. Eyeb. N. S. 200 (1857) 2 Hurlst. & N. 213, 3 Jur. N. S. cellar of house where plainting to 469, 26 L. J. Eyeb. N. S. 200 (1857) 2 Hurlst. 469, 26 L. J. Exch. N. S. 319. Other cases recognizing the doctrine stated in the text are: Harder & H. Coal Min. Co. v. Schmidt (1900) 43 C. C. A. 532, 104 Fed. 282; Savannah & S. R. Co. v. Pughsley (1901) 113 Ga. 1012, 39 S. E. 473; Mahood v. Pleasant Valley Coal Co. (1892) 8 Utah, 85, 30 Pac. 149; Henke v. Babcock (1901) 24 Wash. 556, 64 Pac. 755; Strauss v. Haberman Mfg. 571, 57 N. E. 773, Affirming 86 Ill. App. 526, 71 N. W. 662.

Where there is evidence showing that 987, was to be taken as being subject to the master knows an appliance to be in the implied qualification that the mas- a defective condition, it is not error to ter would have been liable if he had submit to the jury the question whether known of the unsafe conditions. In he was guilty of negligence in not proreply to the contention of counsel, that viding suitable appliances. Glossen v. to render the master liable there must Gehman (1892) 147 Pa. 619, 23 Atl. be actual personal interference on his 843; Essew County Electric Co. v. Kelpart, so as to lay a trap for the servant ly (1897) 60 N. J. L. 306, 37 Atl. 619. in the particular matter from which he Evidence that an employer had directed received the injury, Crompton, J., said: that only quick and active men should "I do not agree to that; I think it is be employed in operating a pair of steel negligence for which the master is lia-shears weighing 12 tons, so that they ble, if he knows that the machinery or might get out of the way in case of acci-

not known to be unsafe, or likely to be unsafely placed by the owner of the premises). Compare the analogous rule by which the material question in cases where the defenses of contributory negligence or assumption of risks are raised is not whether the servant was aware of the abnormal conditions which produced the danger, but whether he comprehended that there was such dan-Co. (1898) 25 App. Div. 623, 48 N. Y. ger. Chapters XVII.—XXI. post. See Supp. 1116; Hancock v. Keene (1892) also Ray, Negligence of Imposed Duties, 5 Ind. App. 408, 32 N. E. 329; Chicago 134, cited with approval in Murphy v. Edison Co. v. Moren (1900) 185 III. Great Northern R. Co. (1897) 68 Minn.

servant to unnecessary danger, although, in other aspects of the case, the servant would have been unable to maintain his action. Thus, the action may be maintained on the ground of the master's actual knowledge obtained through any channel, even though he has duly fulfilled the duty cast upon him by the law to see that the instrumentalities of his business are properly examined by competent agents, if not by himself in person.<sup>3</sup> So, the rule that a servant, when he accepts a certain employment, impliedly contracts that he possesses a certain degree of skill, does not avail to absolve the master from responsibility for injuries to a servant whose inexperience is put forward as a material ingredient in his right of action, where the master has actual knowledge of the extent of the scrvant's skill.4 Here the governing principle is that it is negligence to set a servant to work at a special task, where the employer knows that he lacks the strength and skill necessary to enable him to do it safely.<sup>5</sup> So, although a master may have given instructions which would have been sufficient in the case of a servant of average intelligence, his liability remains absolute if he knows that the servant lacks capacity to understand the dangers of the work, however much he may have been instructed.<sup>6</sup> So, the right of an employee to recover for negligence of a corporation, in hiring an incompetent servant over the protest of some of its officers who are aware of his incompetence, is not affected by the failure of another employee to give notice of subsequent neglect and unfitness of such servant. 7 So, the servant's breach of a rule formulated for the safety of employees will not be imputed to him as contributory negligence,

<sup>3</sup> In Indiana, I. & I. R. Co. v. Snyder (1894) 140 Ind. 647, 39 N. E. 912, the defendant's counsel laid stress upon the fact that the lumber, out of which a defective car handle was constructed, was inspected before it went into the shops, and found to be clear and free of knots; the mere fact that the agent of the embut the court said: "An inspection is ployer, who hired a brakeman, knew but the means employed by the master the means employed by the master the means employer is as in the employer liable as for negligence, this case, he obtains notice through another representative agent of the insufficiency of the appliances in time to remediate the means of the insufficiency of the appliances in time to remediate the means of the insufficiency of the appliances in time to remediate the means of the insufficiency of the appliances in time to remediate the means of the insufficiency of the appliances in time to remediate the means of the insufficiency of the appliances in time to remediate the means of the means of the insufficiency of the appliance in hiring other representative agent of the insufficiency of the appliances in time to remedy the same, then the fact that an inspection was made by another of his agents, and nothing as to the defectiveness in question ascertained, would not be available in favor of the master. Where there is actual knowledge, the matter of inspection is not controlling."

\*\*Goins v. Chicago, R. I. & P. R. Co. (1894) 86 Tex. 708, 24 L. R. A. 642, 26 (1889) 37 Mo. App. 221; Missouri P. S. W. 1075, Affirming (1894) 7 Tex. R. Co. v. King (1893) 2 Tex. Civ. App. Civ. App. 169, 24 S. W. 520.

where such rule has been habitually violated, with the knowledge and consent of the master or his representative.8 And, in general, it may be laid down that the law imposes responsibility whenever a master is aware of the existence of the abnormally dangerous conditions, although those conditions may be due originally to some cause, for the operation of which he is prima facie not liable. See cases cited in § 129, post.

123. Absence of actual notice not always decisive in the master's favor.—Under some special state of the evidence it may be apparent that the master was not negligent unless he had actual knowledge of the defect which caused the injury. The servant's inability to establish the fact of such knowledge will, then, prevent his maintaining the action. Usually, however, the converse of the rule stated in the preceding section does not hold good in all respects; for, as will presently be shown, the employer may be held liable, although 20 actual knowledge on his part is established, if it appears that, by the use of ordinary care, he could have ascertained that the conditions which caused the servant's injury existed.2 The only result of its being proved that the master had no actual knowledge is that the burden of proving that his ignorance was culpable is cast upon the servant.3 It is true that statements of the courts as to the effect of a want of knowlege on the master's part sometimes omit a formal reference to constructive knowledge, but with very few exceptions such statements were not made in cases in which the question whether there was any difference between the legal consequences of actual and constructive knowledge was fairly raised. No special importance, therefore, is to be attached, in the present connection, to the fact that we find in the books such remarks and rulings as those mentioned in the subjoined note.4

Supp. 848, and cases cited in § 232, blocking of guard rail).

\*\*post.\*\*

\*\*Geroth v. Thomann (1901) 110 Wis.\*\*

4\*\*As the declaration contains no thange that the defendant knew any of the defects mentioned, the court is not N. Y. Supp. 926 (railroad company not called upon to decide how far such chargeable with negligence in allowing a team and wagon, used by other parties knowledge on his part, of a defect unin drawing coal from its cars, to stand is not the servant, would make him in drawing coal from its cars, to stand so near the track that there is not sufficient room for a brakeman to stand between the wagon and a car after makbeen supplied by a master to a man they ing a coupling, where such wagon had may well become unsafe to the knowlactual notice).

<sup>\*</sup>Boess v. Clausen & P. Brewing Co. \*Paine v. Eastern R. Co. (1895) 91 (1896) 12 App. Div. 366, 42 N. Y. Wis. 340, 64 N. W. 1005 (defective Supp. 848, and cases cited in § 232, blocking of guard rail).

ing a coupling, where such wagon had may well become unsafe to the knowl-not previously been left so near the edge of the man and without the knowl-track except on one occasion, two weeks edge of the master, and so it is that before, of which the company had no each issue must, in such a case, be established by the man when he sues his

124. Constructive knowledge; how related to the master's absolute duties.—The principle that the obligations of the master to the servant can be fulfilled only by the exercise of due care in providing suitable instrumentalities for the operation of his business is applied in a somewhat different manner, according as the plaintiff's theory and the evidence adduced to support it bring into greater prominence the question whether the master was negligent in allowing certain abnormal conditions to remain unremedied, or the question whether he was negligent in remaining ignorant that such abnormal conditions existed.

In cases in which the former is the main issue presented, the essential object of the investigation is to ascertain whether the instrumentality which produced the injury was abnormally dangerous to persons using it or working in proximity to it; and the master's knowledge or ignorance of its dangerous condition is treated as material, only for the reason that the existence of that condition cannot be imputed to him as negligence unless it was known to him, either actually or constructively. To this conception are referable such statements of the extent of the master's liability as those mentioned below.1

master." Williams v. Birmingham v. England (1866) L. R. 2 Q. B. 33, 36
Battery & Metal Co. (1899) 2 Q. B. 338, L. J. Q. B. N. S. 14, 15 Week. Rep. 151, 68 L. J. Q. B. N. S. 918, per Smith, L. 7 Best & S. 676, Reversing (1865) 4
J. It is not negligence in the master if a tool or machine breaks, whether (1884) 14 III. App. 498; Mahoney v. from an internal, original fault, not apparent when the tool or machine was 28 N. Y. Supp. 196; Fisk v. Central P. first provided, or from an external, apparent one, produced by time and use, and not brought to the master's knowledge. Baker v. Allegheny R. Co. (1887) 72 Cal. 43, 13 Pac. 144; parent one, produced by time and use, and not brought to the master's knowledge. Baker v. Allegheny R. Co. (1887) 72 Cal. 43, 13 Pac. 144; Johnson v. Armour (1883) 5 McCrary, and not brought to the master's knowledge. Baker v. Allegheny R. Co. (1887) 72 Cal. 43, 13 Pac. 144; Johnson v. Armour (1883) 5 McCrary, and not brought to the master's knowledge. Baker v. Allegheny R. Co. (1887) 72 Cal. 43, 13 Pac. 144; Johnson v. Armour (1883) 5 McCrary, and not brought to the master's knowledge. Baker v. Allegheny R. Co. (1887) 72 Cal. 49, 13 Pac. 144; Johnson v. Armour (1883) 5 McCrary, and not brought to the master's knowledge. Baker v. Allegheny R. Co. (1887) 72 Cal. 43, 13 Pac. 144; Johnson v. Armour (1883) 5 McCrary, and not brought to the master's knowledge. Baker v. Allegheny R. Co. (1893) 51 III. App. 456; Acme (1880) 95 Pa. 211, 40 Am. Rep. 634. Coal Mim. Co. v. McIver (1894) 5 Colo. A seaman cannot recover damages from the owner of his ship on the ground of (1883) 58 Wis. 1, 15 N. W. 806; North her being unseaworthy, unless he alcoal Mim. Co. v. McIver (1894) 5 Colo. A seaman cannot recover damages from the owner of his ship on the ground of (1883) 58 Wis. 1, 15 N. W. 806; North her being unseaworthy, unless he alcoal Mim. Co. v. McIver (1894) 5 Colo. A seaman cannot recover damages from the owner of his ship on the ground of (1883) 58 Wis. 1, 15 N. W. 806; North her being unseaworthy, unle rightly directed where there is no evidence of knowledge on the employer's whatever, in which it has been explicit-part. Skellenger v. Chicago & N. W. R. ly held that the master cannot be found Co. (1883) 61 Iowa, 714, 17 N. W. 151. liable unless he is shown to have had The evidence is insufficient to sustain actual knowledge of the conditions, are a verdict for the plaintiff, where it does McMillan v. Saratoga & W. R. Co. the defendant knew of (1855) 20 Barb. 450; Anderson v. New the defect. Arcade File Works v. Jersey S. B. Co. (1867) 7 Robt. 611; Juteau (1896) 15 Ind. App. 461, 40 N. and, perhaps, Kunz v. Stuart (1865) 1 E. 818, 44 N. E. 326. Other examples Daly. 431.

of a similar want of precision in the of a similar want of precision in the office of the control phraseology may be found in Feltham nary care in providing suitable struc-

The only cases, now of no authority

In another class of cases the essence of the negligence imputed to the master is his failure to adopt such measures as a man of ordinary prudence would have adopted under the circumstances, for the purpose of keeping himself acquainted with the condition of the instrumentalities of his business. The main problem to be then solved is whether the master has discharged his duty of inspection, and his duty to maintain in safe condition is relegated to the background. following chapters.

"Ignorance itself is negligence in a case in which any proper inquiry would have obtained the necessary information, and where the duty to inquire was plainly imperative."2

Confining our attention for the present to the first class of cases,

suitable instruments and means with New York, L. E. & W. R. Co. [1884] 95 which to carry on their business. They N. Y. 546). can provide all these by the use of the

tures and engines and proper servants ton v. Missouri, K. & T. R. Co. [1896] to carry on his business, and is liable 14 Tex. Civ. App. 222, 39 S. W. 174), to carry on his business, and is hable 14 fex. Civ. App. 222, 39 5. W. 114), to any of their fellow servants for his and that the duty of a master to pronegligence in this respect. This care he vide for the safety of his servant incan and must exercise, both in procurcludes the obligation to protect him ing and in keeping or maintaining such from latent or unseen defects, so far as servants, structures, and engines. If that end can be attained by reasonable he knows, or in the exercise of due care care (Edward Hines Lumber Co. v. might have known, that his servants are Ligas [1896] 68 Ill. App. 523); and incompetent or his structures or entitled a master over his servants the duty incompetent, or his structures or enthat a master owes his servants the duty gines insufficient, either at the time of "to place them under no risks from improcuring them, or at any subsequent perfect or inadequate machinery, or time, he fails in his duty." Gilman v. other material means or appliances, Eastern R. Co. (1866) 13 Allen, 433, known, or which, but for their neglities of the companies will sentence to the companies of the companies o cation is that "railroad companies will (Salters v. Delaware & H. Canal Co. have and keep a safe track, and adopt [1874] 3 Hun, 338, approved in Ellis v.

<sup>2</sup> Davis v. Detroit & M. R. Co. (1870) requisite care and foresight, and, if they 20 Mich. 124, 4 Am. Rep. 364, per fail to do so, they are guilty of a Cooley, J. The same learned jurist has breach of duty, and are liable for the laid it down in his work on Torts, p. consequences. . . . Under this rule 556, that "the master may also be negit is held that the companies are liable ligent in not exercising ordinary care for the existence of all defects which to provide suitable and safe machinery they knew, or by reasonable care and or appliances, or in making use of those diligence might have known." Lewis which he knows have become defective, v. St. Louis & I. M. R. Co. (1875) 59 but the defects in which he does not ex-Mo. 495, 21 Am. Rep. 385. The liabil- plain to the servant, or in continuing plain to the servant, or in continuing ity of an employer for defective machin- ignorantly to make use of those which ery does not depend on the fact that the are defective, where his ignorance is due defects are latent or patent, but on the to a neglect to use ordinary prudence defects are latent or patent, but on the to a neglect to use ordinary prudence question of proper care in selecting the and diligence to discover defects" machinery and keeping it in repair. (quoted with approval in Louisville & Gunter v. Graniteville Mfg. Co. (1881) N. R. Co. v. Orr [1882] 84 Ind. 50). 15 S. C. 443. Compare the statements Compare the statements to the effect that the employer is not liable for an injury caused by a "latent" defect; that is to say, one which is not discoverable created danger, or was "culpably ignoby a reasonable inspection (Essex rant" thereof (Huffman v. Chicago, R. County Electric Co. v. Kelly [1894] 57 I. & P. R. Co. [1883] 78 Mo. 50), and N. J. L. 100, 29 Atl. 427; Throckmorthal ignorance of a defect, in a case viz., those in which the knowledge which the master ought, as a prudent man, to have acquired, is treated merely as a factor of the comprehensive duty to use proper care in providing reasonably safe instrumentalities, we find that the cases turning upon the existence or absence of constructive notice stand on lines very nearly parallel to those involving actual notice.

125. Constructive knowledge; liability inferred from.—The doctrine that knowledge of abnormal dangers, which a master might have acquired by the exercise of reasonable care, stands, as an element of liability, upon precisely the same footing as actual knowledge, is well established.

"It is the master's duty to be careful that his servant is not induced to work under a notion that tackle or machinery is staunch and secure, when in fact the master knows, or ought to know, that it is not so, and if, from any negligence in this respect damage arises, the master is responsible."1

The question is not whether the master believes that the materials furnished by him are free from defects, but whether he is justified in such a belief.2

It is the duty of the employer to "furnish appliances free from defects discoverable by the exercise of ordinary care."3

"The master is chargeable, not only with such knowledge as he actually has, but also with that which he ought to have, by the exercise of reasonable care and diligence on his part in the performance of his duties as master."4

"Where knowledge is essential to charge the master, negligent ignorance is equivalent to knowledge."5

The implied agreement of a master is that the implements and machinery furnished for the use of his servants "are sound and fit for the purpose intended, so far as ordinary prudence can discover."6

"Knowledge may be established by showing actual cognizance of the defect, or knowledge imputed from the opportunities for actual

where there was a duty to inquire, and proper inquiry would have procured in-

proper inquiry would have procured information, constitutes negligence. Chessapeake & N. R. Co. v. Venable (1901) 23 Ky. L. Rep. 427, 63 S. W. 35.

1 Paterson v. Wallace (1854) 1 Macq.

H. L. Cas. 748, 751 (quoted as "recognized law" in Herdler v. Buck's Stove & Range Co. [1896] 136 Mo. 3, 37 S. & Co. v. Matthews (1890) 86 Ga. 418, 12 W. 115).

2 Reheater v. Smith (1857) 2 Hurlet

<sup>2</sup>Roberts v. Smith (1857) 2 Hurlst. <sup>6</sup>Lake Shore & M. S. R. C & N. 213, 26 L. J. Exch. N. S. 319, 3 Cormick (1881) 74 Ind. 440. Jur. N. S. 469.

<sup>3</sup> Texas & P. R. Co. v. Archibald (1897) 170 U. S. 665, 42 L. ed. 1188,

\*Lake Shore & M. S. R. Co. v. Mc-

knowledge, arising from the duty to observe its machinery and appliances for the safety of its workmen."7

<sup>7</sup> Evansville & T. H. R. Co. v. Duel (1866) 13 Allen, 433, 90 Am. Dec. 210; (1892) 134 Ind. 156, 33 N. E. 355. See Holden v. Fitchburg R. Co. (1880) 129 also the following cases, to the same ef—Mass. 268, 37 Am. Rep. 343; Arkerson 687; Ashland Coal & I. R. Co. v. Wal-Rehearing reported in (1897) 101 Ky. subdivisions of the present chapter. 644, 43 S. W. 207; Kentucky C. R. Co. The cases dealing with the master. Carr (1897) 19 Ky. L. Rep. 1172, 43 constructive knowledge of the servan V. University of the v. Bell (1897) 19 incompetency are collected in chapter Ky. L. Rep. 267, 38 S. W. 702; Shanny XIII., post. v. Androscoggin Mills (1876) 66 Me. It has been expressly determined that v. Androscoggin Mills (1876) 66 Me. It has been expressly determined that 420; Norfolk & W. R. Co. v. Hoover where the instrumentality which causes (1894) 79 Md. 253, 25 L. R. A. 710, 29 the servant's injury is a vicious animal

fect: Feltham v. England (1865) 4 v. Dennison (1875) 117 Mass. 407; Fost. & F. 460; Webb v. Rennie (1865) Davis v. Detroit & M. R. Co. (1870) 20 4 Fost. & F. 608; Union P. R. Co. v. Mich. 105, 4 Am. Rep. 364; Cook v. St. Daniels (1893) 152 U. S. 684, sub nom. Paul, M. & M. R. Co. (1885) 34 Minn. Union P. R. Co. v. Snyder, 38 L. ed. 45, 24 N. W. 311; Thiel v. Kennedy 597, 14 Sup. Ct. Rep. 756; Northern P. (1901) 82 Minn. 142, 84 N. W. 657; R. Co. v. Herbert (1885) 116 U. S. 642, Doyle v. Missouri, K. & T. Trust Co. 29 L. ed. 755, 6 Sup. Ct. Rep. 590; Union (1897) 140 Mo. 1, 41 S. W. 255; Bull-P. R. Co. v. O'Brien (1896) 161 U. S. master v. St. Joseph (1897) 70 Mo. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618 App. 60; Laning v. New York C. R. Co. P. R. Co. v. O'Brien (1896) 161 U. S. master v. St. Joseph (1897) 70 Mo. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618 App. 60; Laning v. New York C. R. Co. Affirming (1892) 1 C. C. A. 354, 4 U. S. (1872) 49 N. Y. 521, 10 Am. Rep. 417; App. 221, 49 Fed. 538; Louisville & N. Benzing v. Steinscay (1886) 101 N. Y. R. Co. v. Johnson (1897) 27 C. C. A. 547, 5 N. E. 449; Hesketh v. New York 367, 53 U. S. App. 381, 81 Fed. 679; C. & H. R. R. Co. (1899) 37 App. Div. Jones v. Yeager (1872) 2 Dill. 64, Fed. 78, 55 N. Y. Supp. 898; Dunn v. Concas. No. 7,510; Ocean S. S. Co. v. Matthews (1890) 86 Ga. 418, 12 S. E. 632; Supp. 185, Affirming (1897) 20 Misc. Chicago & A. R. Co. v. Shannon (1867) 727, 46 N. Y. Supp. 684; Cielfield v. 43 Ill. 338; Illinois Steel Co. v. Schymanowski (1896) 162 Ill. 447, 44 N. E. Supp. 710; Chesson v. John L. Roper 876; Whitney & S. Co. v. O'Rourke Lumber Co. (1896) 118 N. C. 59, 23 (1898) 172 Ill. 177, 50 N. E. 242, Affirming (1896) 68 Ill. App. 487; Pioneer Cooperage Co. v. Romanowicz (1899) Co. v. McAtee (1884) 61 Tex. 695; S5 Ill. App. 407, Affirmed in (1900) 186 Ill. 497, 37 Atl. 574; Texas & P. R. Cooperage Co. v. Romanowicz (1899) Co. v. McAtee (1884) 61 Tex. 695; S5 Ill. App. 407, Affirmed in (1900) 186 (67 Texas & P. R. Co. v. Wisenor (1886) 11. 57 N. E. 864; Consolidated Coal 66 Tex. 674, 2 S. W. 667; Bertha Zinc Co. v. Haenni (1893) 146 Ill. 614, 35 Co. v. Martin (1895) 93 Va. 791, 22 S. N. E. 162; Goff v. Toledo, St. L. & K. E. 869; Missouri P. R. Co. v. Henry C. R. Co. (1887) 28 Ill. App. 529; Lake (1889) 75 Tex. 220, 12 S. W. 828; Shore & M. S. R. Co. v. Conway (1896) 64 (1889) 175 Tex. Civ. App. 677, 41 S. W. Polobinski (1900) 94 Ill. App. 640; 488; Paine v. Eastern R. Co. (1895) 91 Chicago & A. R. Co. v. Merriman (1900) Wis. 340, 64 N. W. 1005; Purcell Mill 95 Ill. App. 628; Louisville, N. A. & C. & Elevator Co. v. Kirkland (1898) 2 R. Co. v. Buck (1888) 116 Ind. 566, 2 L. Ind. Terr. 169, 47 S. W. 311; Alabama & Min. Co. v. Persons (1894) 11 Ind. 459; New Orleans. J. & G. N. R. Co. v. R. A. 520, 19 N. E. 453; Linton Coal & F. R. Co. v. Waller (1872) 48 Ala. 6 Min. Co. v. Persons (1894) 11 Ind. 459; New Orleans, J. & G. N. R. Co. v. App. 264, 39 N. E. 214; Salem Stone Hughes (1873) 49 Miss. 258; Tewas & & Lime Co. v. Tepps (1894) 10 Ind. P. R. Co. v. Harrington (1884) 62 Tex. App. 516, 38 N. E. 229; Indiana Nat- 597; Texas & P. R. Co. v. Mallon (1885) App. 516, 38 N. E. 229; Indiana Nat- 597; Texas & P. R. Co. v. Mallon (1885) ural & Illuminating Gas Co. v. Marshall 65 Tex. 115; American Wire Nail Co. (1898) 22 Ind. App. 121, 52 N. E. 232; v. Connelly (1893) 8 Ind. App. 398, 35 Locke v. Sioux City & P. R. Co. (1877) N. E. 721; Neilon v. Kansas City, St. 46 Iowa, 109; Chicago, K. & W. R. Co. J. & C. B. R. Co. (1885) 85 Mo. 599; v. Blevins (1891) 46 Kan. 370, 26 Pac. Kerlin v. Chicago, P. & St. L. R. Co. (1892) 50 Fed. 185, and the cases genlace (1897) 101 Ky. 626, 42 S. W. 744, erally which are cited in the following

The cases dealing with the master's constructive knowledge of the servant's

Atl. 994; Gilman v. Eastern R. Co. belonging to the category known as "do-

The instructions to the jury, in an action for injuries caused by abnormal dangers, should be in conformity with this doctrine.8

The boundary line between the constructive knowledge which may be attributed to the master from the standpoint adverted to in the foregoing paragraph, and from the standpoint of his duty in regard to the actual examination of the instrumentalities, is not always easy to define. But the exigencies of a logical classification seem to render it expedient that the duty to observe the daily operation of the instrumentalities, and to estimate the relation of certain extraneous, scientific facts to that operation, should be distinguished from the duty to institute a minute investigation into the actual condition of those instrumentalities with a view to ascertaining whether they are efficient or are not efficient. The necessity for some such differentia-

mestic," the master cannot avail him- er such notice to repair the same, inas-

self of the rule which disables strangers much as such an instruction entirely from recovering damages from the ownomits to refer to the liability of the deer of such an animal unless he is shown fendant, supposing that the latter
to have had actual knowledge of its evil might, by the exercise of reasonable
propensities. That rule is based on the care, have known of the defect. Sweat propensities. That rule is based on the care, have known of the defect. Sweat fact that the owner was not instrumenvectors. Boston & A. R. Co. (1892) 156 Mass. tal in placing the injured party in danger, and does not apply to a servant, because he is not a mere volunteer. He as ervant has a right to recover on is required by his master to assume the danger which the existence of vicious the use of defective machinery, and that and uncurbed propensities implies, and the master was aware of the defect, or if the master could, by the exercise of that the exercise of reasonable care and uncurbed propensities implies, and if the master could, by the exercise of reasonable care reasonable care, know of the existence of such propensities, his actual ignorance of them is no excuse in law. George H. Hammond Co. v. Johnson (1893) 38 Neb. 214, 56 N. W. 967.

\*An instruction is erroneous which absolves an employer from liability "unless he knew of the defects" which caused the injury. Bier v. Standard Mfg. Co. (1889) 130 Pa. 446, 18 Atl. and in the exercise of redefendant, caused the injury. Bier v. Standard Mfg. Co. (1889) 130 Pa. 446, 18 Atl. and in the exercise of ordinary care and diligence the defendant could have 637; Houston v. Brush (1894) 66 Vt. Standard & N. W. R. Co. (1878) 44 Wis. 44; Chicago & A. R. Co. v. Shannon (1867) 43 Ill. 33. A requested charge, to the effect that negligence cannot be inferred from the existence of a defect "not brought to the notice" of the defendant, should not be given without informing the jury that this is only true if "no-tice" is meant to include "constructive" as well as "actual" notice. Newton v. Vulcan Iron Works (1901) 199 Pa. 646, 49 Atl. 339. It is not error to refuse an instruction asked by the defects and could not have known of them by the use of ordinary care and could not have known of them by the use of ordinary prudence would have used under similar circumstantes.

The master was aware of the defect, or that the exercise of reasonable care would have disclosed it. Elliott v. St. Louis & I. M. R. Co. (1878) 67 Mo. 272. That, if the jury "believe from the evidence that the defendant knew of such defects, or stituted megligence on the part of the defendant, who megligence on the part of the defendant, and in the exercise of ordinary care and diligence the defendant could have lexicance of such defects in question; that the employer from the existence of such defects on the part of the defendant is liable therefor." Peoria, the province of the interest of the interest of such defects in question; that the existence of such defects on the part of

tion is shown by the fact that the law will sometimes deduce an obligation to make an inspection from the fact that the employer, availing himself of the sources of information to which the former duty requires him to have recourse, has arrived at the knowledge of certain matters which would put a careful man upon further inquiry.9 attempt has accordingly been made in this chapter and the next to distribute the decisions reviewed, with due reference to the distinct obligations just mentioned.

126. Absence of constructive knowledge; liability negatived by .-The correlative of the proposition stated in the preceding section is that a servant cannot recover for injuries caused by abnormally dangerous conditions, unless he proves that the existence of those conditions was either actually known to the master, or would have been known to him if he had exercised that degree of watchfulness which he was bound, as a prudent man, to exercise under the given circumstances. Manifestly, this is merely one of the forms in which it is

Take, for example, such statements but that it was known, or might by the as the following: "Where it is proved exercise of due skill and attention have that there was a defect, and that defect been known, to the "defender." Weems was obvious, and on its face showed v. Mathieson (1861) 4 Macq. H. L. Cas. that it had existed long enough before 215 (p. 222). If the injury arises from the injury to have been discovered by a defect or insufficiency in the machinthe master in the exercise of ordinary ery or implements furnished to the service of the master did not know of it he might feet or insufficiency must be brought. the master did not know of it, he might fect or insufficiency must be brought have known, and that he failed in his home to the master, or proof given that duty to inspect and know." Ocean S. S. he was ignorant of the same, through Co. v. Matthews (1890) 86 Ga. 418, 12 his own negligence and want of proper S. E. 632. It is not error to refuse to care; in other words, it must be shown direct a verdict for a defendant, where that he either knew or ought to have the plaintiff has offered evidence to the known of the defects which caused the effect that the timbers of a bridge which injury. Wright v. New York C. R. Co. gave way were decayed on the surface (1862) 25 N. Y. 562. "It is not neglito such an extent that a reasonably gence in the master if the tool or macareful inspection ought to have discovchine breaks, whether from an internal, ered the weakness. Chicago G. W. R. original fault not apparent when the Co. v. Healy (1898) 30 C. C. A. 11, 57 tool or machine was at first provided, U. S. App. 513, 86 Fed. 245. See also, or from an external, apparent one pro-as illustrating this aspect of the sub-duced by time and use, not brought to ject, St. Louis, I. M. & S. R. Co. v. the master's knowledge. These are the Higgins (1890) 53 Ark. 458, 14 S. W. ordinary risks of the employment which

gence on the part of the employer with 211, 40 Am. Rep. 634. "If the servant reference to insufficient strength or construction of some portion of a machine, juries received on account of defective and its being unskilfully applied to the premises, buildings, machinery, or appurpose of sustaining a weight, "it pliances, he must allege and prove that would be necessary, not only to show the unfitness or the defect which caused that this machine had been insufficient, the injury was known to the master, or but to show that this deficiency did not was such as, with reasonable diligence arise from any inherent, secret defect, and attention to his business, he ought

the servant takes upon himself." Ba
'To support an allegation of negligence on the part of the employer with 211, 40 Am. Rep. 634. "If the servant

possible to state the comprehensive principle that the master is not liable if the instrumentality which caused the injury would have been

151, 5 N. E. 187. "When there is no the work, to another place, although the notice to the master of defects, and no latter was apparently reluctant to leave blame imputable in not discovering the hole, the defendant having no reathem, he is not liable if injury results son to suppose that the safety of anyto his employee therefrom." Št. Louis, one was dependent on his continuing

character has been recognized. In those rior one); Girard v. Griswold (1900) cited below, it has been applied in statements relating to dangerous instrumengauge on boiler burst; Doyle v. St. talities of an inorganic nature. Honner Paul, M. & M. R. Co. (1889) 42 Minn. v. Illinois C. R. Co. (1854) 15 Ill. 550 79, 43 N. W. 787 (employee's foot engine); Myers v. American Steel ott v. St. Louis & I. M. R. Co. (1878) Barge Co. (1896) 64 Ill. App. 187; 67 Mo. 272; Hollenbeck v. Missouri P. substance on the brass work of a car (defective bridge); Hoskins v. Stewart wheel); Atchison, T. & S. F. R. Co. v. (1890) 57 Hun, 380, 10 N. Y. Supp. Wagner (1885) 33 Kan. 660, 7 Pac. 833 (contractor for the building of a 204 (defective spring in drawbar); sewer is not liable for the death of a Atchison, T. & S. F. R. Co. v. Swarts workman, caused by the caving-in of a (1897) 58 Kan. 235, 48 Pac. 953; Cherbank, which resulted from the bursting okee & P. Coal & Min. Co. v. Britton of one or other of two water pipes run(1896) 3 Kan. App. 292, 45 Pac. 100 ning parallel with and within 2 feet of
(rock fell from roof of mine tunnel); the sewer, filling the trench with water,
Nason v. West (1886) 78 Me. 253, 3 where the existence of one of such pipes Atl. 911 (recently built oven fell in); was altogether unknown to the defend-Cowan v. Umbagog Pulp Co. (1897) 91 ant, and he was not aware that the Me. 26, 39 Atl. 340; O'Neil v. O'Leary other, although laid by him, was de (1895) 164 Mass. 387, 41 N. E. 662 fective, and there was no negligence in (master not liable for injuries to an the manner of bracing the bank); Moemployee from an explosion of a blast ran v. Racine Wagon Co. (1893) 74 which he was justified in believing had Hun, 454, 26 N. Y. Supp. 852 (defective been before exploded, because he sent clevator); White v. Eidlitz (1897) 19 the employee to work about the hole App. Div. 256, 46 N. Y. Supp. 184 (ele-

to have known." Pittsburgh, C. & St. which was being excavated, and sent an-L. R. Co. v. Adams (1886) 105 Ind. other employee, who had supervision of I. M. & S. R. Co. v. Harper (1884) 44 the work); Johnson v. Holmes (1899)
 Ark. 524.
 173 Mass. 514, 53 N. E. 1000 (remedy It is unnecessary to attempt to make applied to a sailor's frostbite proved inout a complete list of all the cases in effective; ship owner not chargeable which a principle of this elementary with knowledge that there was a supe-(iron bar used to operate turntable caught by a splinter on the inside of a broke); Chicago & A. R. Co. v. Platt railroad track or rail); Murphy v. (1878) 89 Ill. 141 (defective ladder on Great Northern R. Co. (1897) 68 Minn. railway car); Chicago & N. R. Co. v. 526, 71 N. W. 662 (servant's foot Scheuring (1879) 4 Ill. App. 533; caught by loose block in an angle of the Louisville, E. & St. L. Consol. R. Co. track braces); Doyle v. St. Paul, M. & v. Allen (1893) 47 Ill. App. 465 (de- M. R. Co. (1889) 42 Minn. 79, 43 N. W. fective tool, originally in good condi-787 (defective rail); Memphis & C. R. tion); Peoria, D. & E. R. Co. v. Hard-Co. v. Thomas (1875) 51 Miss. 637 (dewick (1893) 53 Ill. App. 161 (loose fective switch); Covey v. Hannibal & plank in crossing struck footboard of St. J. R. Co. (1885) 86 Mo. 635; Elli-Chicago & E. R. Co. v. Binkopski (1897) R. Co. (1897) 141 Mo. 97, 38 S. W. 723, 72 Ill. App. 22 (defective roadbed); 41 S. W. 887 (small ditch in track, Pittsburgh, C. & St. L. R. Co. v. Adams dangerous to couplers); Krampe v. St. (1885) 105 Ind. 151, 5 N. E. 187 (de-Louis Brewing Asso. (1894) 59 Mo. fective rail); Kitteringham v. Sioux App. 277; Essex County Electric Co. v. City & P. R. Co. (1883) 62 Iowa, 285, Kelly (1894) 57 N. J. L. 100, 29 Atl. 17 N. W. 585 (use of a certain kind of 427 (electric light pole broke); Faulkoil caused the formation of a poisonous ner v. Eric R. Co. (1867) 49 Barb. 324 considered by a careful man a proper one to use at the time when the accident happened.<sup>2</sup> A master, accordingly, is said not to be liable

vator fell, owing to fact that planks Barge Co. (1896) 64 Ill. App. 187; were lying across the well); Riker v. Bannon v. Sanden (1896) 68 Ill. App. New York, O. & W. R. Co. (1901) 64 164; Columbus, C. & I. C. R. Co. v. App. Div. 357, 72 N. Y. Supp. 168 (tele-Troesch (1873) 68 III. 545, 18 Am. graph pole fell); Schorning v. Knicker-Rep. 578; Ohio Valley R. Co. v. McKinbocker Ice Co. (1891) 38 N. Y. S. R. ley (1895) 17 Ky. L. Rep. 1028, 33 S. 27, 13 N. Y. Supp. 434 (slat in wooden W. 186; Wells v. Coe (1886) 9 Colo. ladder gave way); Stuber v. McEntee 159, 11 Pac. 50; Doing v. New York, (1892) 47 N. Y. S. R. 294, 19 N. Y. O. & W. R. Co. (1893) 73 Hun, 270, Supp. 900; Prentice v. Wellsville 26 N. Y. Supp. 405; Prentiss v. Kent (1893) 50 N. Y. S. R. 557, 21 N. Y. Furniture Mfg. Co. (1886) 63 Mich. (1893) 50 N. Y. S. R. 557, 21 N. Y. Furniture Mfg. Co. (1886) 63 Mich. Supp. 820 (composition of explosive 478, 30 N. W. 109; Smyly v. Glasgow changed by manufacturer); Geoghegan & L. Steam Packet Co. (1868) 16 Week. v. Atlas S. S. Co. (1893) 3 Misc. 224, Rep. 483; North Shenandoah Co. v. 22 N. Y. Supp. 749 (want of proper ap-Fallover (1873) 4 A. J. Rep. (Victorpliance to close opening in ship's side); ia) 109; Dugal v. People's Bank Maitland v. Cleveland, L. & W. R. Co. (1899) 34 N. B. 581. Maitland v. Cleveland, L. & W. R. Co. (1896) 3 Ohio Legal News, 289 (injuries caused by poisonous gases); Wad- ter was a servidell v. Simoson (1886) 112 Pa. 567, 4 ter XIII., post. Atl. 725 (defective construction of bed); Pippin v. Sherman, S. & S. R. Co. (1900; Tex. Civ. App.) 58 S. W. 961 (lever of turntable broke); Schultz v. Chicago & N. W. R. Co. (1887) 67 Wis. 616, 58 Am. Rep. 881, 31 N. W. 321 (railway company not bound to discontinue a certain method of loading a tender, when there is no reason to re- these cases is to be explained by the gard it as unsafe); Hobbs v. Stauer fact that no question was raised as to (1885) 62 Wis. 108, 22 N. W. 153; the master's possession of the knowl-Loonam v. Brockway (1864) 3 Robt. edge demanded by the law, and the at-74, 28 How. Pr. 472; Goltz v. Milwau tention of the court was therefore fixed kce, L. S. & W. R. Co. (1889) 76 Wis. more particularly upon the material re-136, 44 N. W. 752; Klupp v. United sults of his negligence. Ice Lines (1891) 39 N. Y. S. R. 782, 15 See McAvoy v. Pennsylvania Woolen Supp. 597; Myers v. American Steel Co. (1891) 140 Pa. 1, 21 Atl. 246.

The cases in which the subject-matter was a servant are collected in chap-

Cases are not wanting in which the gangway in mine); Clough v. Hoffman principle that fault cannot be imputed (1890) 132 Pa. 626, 19 Atl. 299 (well-to the master unless he had notice of hole left uncovered); Mixter v. Impethe existence of the conditions from rial Coal Co. (1893) 152 Pa. 395, 25 which the servant's injury resulted Atl. 587 (defective brake); Moore v. seems to have been ignored, and liabil-Pennsylvania R. Co. (1895) 167 Pa. ity imposed upon evidence which merely Pennsylvania R. Co. (495, 31 Atl. 734 (timber of trestle which showed that those plaintiff was taking down gave way); See, for example, the following: McCray Toohey v. Equitable Gas Co. (1897)179 v. Galveston, H. & S. A. R. Co. (1896) Pa. 437, 36 Atl. 314; Corcoran v. Wana-89 Tex. 168, 34 S. W. 95; Bonner v. maker (1898) 185 Pa. 496, 39 Atl. Glenn (1891) 79 Tex. 531, 15 S. W. 1108 (proprietor of a laundry is not lise for the damages accruing to a servant for loss of her sight by poisoning Texas P. R. Co. v. White (1891) 82 from fumes of acids used in the laundry, Tex. 543, 18 S. W. 478; Texas & P. R. where he did not know that the use of Co. v. Crow (1893) 3 Tex. Civ. App. the acids would produce such results); 266, 22 S. W. 928; Engstrom v. Ash-Houston & T. C. R. Co. v. Dunham land Iron & S. Co. (1894) 87 Wis. 166, 130 (1896) 1896. 58 N. W. 241; Kennedy v. Lake Superior Terminal & Transfer R. Co. (1896) 93 Wis. 32, 66 N. W. 1137; Darling v. New York, P. & B. R. Co. (1892) 17 R. I. 708, 16 L. R. A. 643, 24 Atl. 462; Gorham v. Kansas City & S. R. Co. (1892) 113 Mo. 408, 20 S. W. 1060.

But doubtless the language used in

where the defect was "secret," or "latent," or "occult," or "not apparent,"6 or "not visible,"7 or " not discoverable on inspection,"8 or "not visible on examination." It has also been laid down that no culpability is predicable, "where the most careful scrutiny would not have disclosed the defect;"10 or "where the appliance was apparently in sound or good condition;" 11 or "where no weakness was apparent to ordinary observation;"12 or "where there were no indications of danger;"13 or where there was nothing to "suggest a suspicion" of unsoundness;14 or "to lead the master to suppose that there was any abnormal danger."15 Injuries due to conditions of this character

Macq. H. L. Cas. 215.

4 Probst v. Delamater (1885) 100 N.

Y. 266, 3 N. E. 184; McClain v. Henderson (1898) 187 Pa. 283, 40 Atl. 985;

Herson (1898) 187 Pa. 283, 40 Atl. 985;

Graden v. Corbin (1890) 132 Pa. 341,

19 Atl. 141; Sanden v. Bannon (1899)

85 Ill. App. 17 (concealed knot in time Knowles (1893; Cal.) 32 Pac. 883

ber); Martin v. Highland Park Mfg.

Co. (1901) 128 N. C. 264, 38 S. E. 876

Co. (1901) 128 N. C. 264, 38 S. E. 876

(sliver of steel flew off a hammer);

Jones v. Chicago, St. P. M. & O. R. Co.

(1900) 80 Minn. 488, 49 L. R. A. 640,

83 N. W. 446. According to one court,

"latent the cable was placed in the soeket).

\*Texas & P. R. Co. v. Patton (1894)

\*\*Nowles (1893; Cal.) 32 Pac. 883

(hook broke, owing to crystallization of co. (1901) 128 N. C. 264, 38 S. E. 876

(1891) 140 Pa. 1, 21 Atl. 246 (defect caused the handle of a fork on which plaintiff was leaning to break). As to "latent defects are such as the master, the sufficiency of the inspection or ex-"latent defects are such as the master, the sufficiency of the inspection or ex-by the exercise of care, might have dis-amination which will absolve the mascovered, and must not be confounded ter, see next chapter.

"be Essex County Electric Co. v. Kelly care on the part of the master would not disclose to him." Flynn v. Union Bridge Co. (1890) 42 Mo. App. 531.

"The Flowergate (1887) 31 Fed. 762 But this seems to be a wholly unnecessary, and perhaps unwarrantable, refinement.

<sup>5</sup> Walden v. Finch (1872) 70 Pa. 460. Nelson v. Allen Paper Car-Wheel

Co. (1886) 29 Fed. 840.

The standbury v. Kingston Coal Co. (1893) 157 Pa. 231, 27 Atl. 400 (recovery denied where the breaking of a wire pin caused an engineer to lose control of the throttle of his engine, resulting indirectly in an injury to a miner descending the shaft of a mine; but the wire pin had for seven years continuously and successfully served its in mine fell). use without any change, repair, substitution. or visible defect, and it gave no Co. (1895) 71 Fed. 270 (rope); Kelley external indication of defect up to the time of the accident, and no defect R. Co. (1890) 58 Hun, 93, 11 N. Y. therein was visible or known to the engineer, the mine inspector, or the emv. Toy (1879) 91 Ill. 474, 33 Am. Rep. ployer. Quintana v. Consolidated Kan 57.
sas City Smelting & Ref. Co. (1896) 14 <sup>15</sup>Wright v. Dunlop (1893) 20 Sc.
Tex. Civ. App. 347, 37 S. W. 369 (break-Sess. Cas. 4th series, 363 (scaffold). ing of the cable was due to a defect Simpler phraseology is found in Regan

<sup>8</sup> Weems v. Mathieson (1861) 4 which could not be seen either before or Macq. H. L. Cas. 215.

(eyebolt countersunk in the deck of a ship gave way owing to a fracture below the surface of the deck); Kelley v. Forty-Second Street, M. & St. N. Ave. R. Co. (1890) 58 Hun, 93, 11 N. Y.

R. Co. (1890) 58 Hun, 93, 11 N. Y. Supp. 344 (defective force pump).

<sup>12</sup> Doyle v. White (1899) 159 N. Y. 548, 54 N. E. 1090, Affirming (1896) 9 App. Div. 521, 41 N. Y. Supp. 628.

<sup>13</sup> M'Intyre v. Reily (1859) 22 Sc. Sess. Cas. 2d series, 347 (brick work connected with a boiler fell); Southwest Virginia Improv. Co. v. Andrew (1889) 86 Va. 270, 9 S. E. 1015 (rock in mine fell)

are sometimes described as "unforeseen accidents." As to the conception implied in this and similar epithets, see, further, subdivision C of this chapter.

A similar doctrine is, of course, also available in the master's favor, where the negligence alleged is in regard to the mere use or management of the instrumentalities by any coservant for whose defaults the master is responsible in the jurisdiction where the cause of action arose.17

As to the rule that an employer cannot be held liable as for a breach of his duty to instruct unless he knew, actually or constructively, that the servant was unable to comprehend the danger of his work without instruction, see the cases cited in chapter xvi., post. The propriety of refusing to predicate a breach of the duty to warn a servant of a danger in a case where no notice of the existence of that danger can be imputed to the master or his representative results from the very nature of this duty.18

Other decisions illustrating the universality of the doctrine that negligence cannot be charged unless knowledge of the conditions, actual or constructive, is established, will be found in that part of the treatise which relates to the master's statutory duties. See, especially, chapter xxxvII., post.

No instruction which takes due account of the doctrine just explained is subject to exception. 19 On the other hand, it is a misdirec-

(nonsuit proper where the defendants, defect was obvious. on learning that a machine needed repairing, acted promptly in securing a 23 Ky. L. Rep. 637, 63 S. W. 596 (where

down by a blast). A master is not liable for an injury sustained by a servant while oiling a machine which suddenly started owing to the unexplainable and sudden displacement of a bolt, a wiper was run over).

18 See Moules v. Delaware & H. Canal Co. (1891) 141 Pa. 632, 21 Atl. 733.

19 Hull v. Hall (1886) 78 Me. 114, 3 able and sudden displacement of a bolt, Atl. 38. A charge is not erroneous

v. Donovan (1893) 159 Mass. 1, 33 N. where reasonable inspection could not E. 702 (movable steps on premises have guarded against the accident, since where servant was sent to work were in- such contingency is one of the risks as-R. Co. v. Maier (1893) 9 Ohio C. C. Coyle v. A. A. Griffing Iron Co. (1898) 268 (horses became excited; no notice 62 N. J. L. 540, 41 Atl. 680, Affirmed that this was likely to occur); O'Donin (1899) 63 N. J. L. 609, 47 L. R. A. nell v. Baum (1889) 38 Mo. App. 245 147, 44 Atl. 665, on the ground that the

competent machinist to put it in order, the question was whether an engineer and there was no reason to suppose that saw or ought to have seen that a switchand there was no reason to suppose that saw or ought to have seen that a switchhe had not done his work effectively). man had fallen from the running

10 Kelley v. Forty-Second Street, M. & board); Know v. Southern R. Co. (1898)

St. N. Ave. R. Co. (1890) 58 Hun, 93, 101 Tenn. 375, 47 S. W. 491 (where it

11 N. Y. Supp. 344; Kelley v. Cable Co. was held that the foreman of a gang of
(1889) 8 Mont. 440, 20 Pac. 669 (inengine wipers was not negligent in omitjuries received by a miner through
striking his pick against a piece of
giant powder in the loose rock thrown
roundhouse, the consequence being that
down by a blast). A master is not liaa wiper was run over).

tion to tell the jury that the master is liable for the injury if it was caused by the abnormally dangerous condition of the instrumentalities in question, unless it is at the same time made perfectly clear to them that the servant cannot recover unless it is a reasonable deduction from the evidence that the master knew, or ought to have known, of those conditions.<sup>20</sup> Compare § 25, ante.

No complaint which alleges in substance that the servant received an injury owing to the existence of conditions which exposed the servant to extraordinary risks, and that these conditions were known, either actually or constructively, to the master, can be successfully demurred to.<sup>21</sup> But the authorities are not entirely unanimous as to the question whether a complaint is formally sufficient where it merely alleges an injury resulting from a breach of duty, and does not specifically aver notice on the master's part. See chapter xxv., post.

127. Relation of this doctrine to that which declares the master not to be an insurer.—The doctrine that a master cannot be held liable unless it is shown that he had knowledge of the defect which caused the injury is sometimes treated as being deducible from the doctrine (see §§ 24, 25, ante) that he does not insure the servant against injury from the perils of the employment. The scope of the latter

which states that, in determining the setting aside the verdict; although the question whether the master has exer-important considerations that, to encised the care of an ordinarily prudent title the plaintiff to recover, he was man under like circumstances, the jury bound to show that the engine was demust consider whether there was a defective, and that the defendant knew, or fect in the machinery, of which the suin the exercise of ordinary care would perintendent had notice, and which have known, that it was defective, caused the injury (Wiedeman v. Evermight, perhaps, have been more disard) [1900] 56 App. Div. 358, 67 N. Y. tinctly presented to the jury." ard) [1900] 56 App. Div. 358, 67 N. Y. Supp. 738); or that a master is not liable for injuries to a servant, resulting from a latent defect in an appliance (Throckmorton v. Missouri, K. & T. R. Co. [1896] 14 Tex. Civ. App. 222, 39 S. Jacob Dold Packing Co. (1900) 84 Mo. W. 174). In Durgin v. Munson (1864) App. 451. In Durgin v. Munson (1864) App. 451. Solving charge was objected to: "But lowing charge was objected to: "But twas gross negligence in the defendant to employ such an engine. If the employer is continued to the jury."

\*\*National Enameling & Stamping Co. v. Berdy (1901) 93 Md. 646, 49 Atl. 845; Chicago & A. R. Co. v. Merriman (1899) 86 Ill. App. 454; Hester v. Jacob Dold Packing Co. (1900) 84 Mo. App. 451.

\*\*Indiana Stone Co. v. Stewart (1893) 10. App. 563, 34 N. E. 1019; Miller v. Itasca Cotton Seed Oil Co. (1897; Tex. Civ. App.) 41 S. W. 366.

\*\*Text. reaction lies. If the employer is (1887) 94 Mo. 468, 7 S. W. 476; Nelthat it was gross negligence in the defendant to employ such an engine. If
not, no action lies. If the employer is
careful and does his duty, if he employs son v. Allen Paper Car-Wheel Co.
skilful men to buy and run his machinery, if he is not negligent in learning Pridge Co. (1890) 42 Mo. App. 531;
whether that machinery is safe or not, O'Donnell v. Baum (1889) 38 Mo. App.
if in all things he does his duty, then he
245; Couch v. Steel (1854) 3 El. & Bl. is not liable for the consequences if un- 402. "The rule is settled that, while a safe machinery is employed without his railway is bound to use the degree of fault." The court, however, said: "We diligence just stated (i. e., ordinary) in do not think that there was any such furnishing to the public a safe roadbed, error or insufficiency in the charge of yet it is not an absolute insurer, and the judge as would give a reason for cannot be held liable for defects of Vol. I. M. & S.—18.

doctrine, however, is obviously much wider than that of the former, and it seems preferable, in a logical point of view, to regard the necessity of proving the existence of actual or constructive knowledge on the master's part as being an evidential requirement which is the consequence of the fact that, as explained in the earlier sections of the chapter, such knowledge is one of the essential elements in the conception of negligence, irrespective of the relations of the parties by whom and to whom it is charged.

128. Doctrine considered with reference to the burden of proof .-The doctrine that knowledge, actual or constructive, must be brought home to the master is also treated in some cases as an offshoot or corollary of a doctrine which will be referred to in a later chapter (XLIII., post), viz., that negligence cannot be inferred from the mere fact that the servant was injured. The connection thus traced is less open to ex-

which such diligence would not inform A. 438, 20 U. S. App. 334, 59 Fed. 990; it. Actual knowledge of the defect is Ocean S. S. Co. v. Matthews (1890) 86 not necessary. It is sufficient if the Ga. 418, 12 S. E. 632; Sack v. Dolese company might have been informed by the use of such diligence as the law im-Ncw York C. & H. R. R. Co. (1879) 76 poses upon it; but where it did not N. Y. 125; Hooper v. Snead Iron Works know and could not have informed it-(1890) 12 Ky. L. Rep. 483, 14 S. W. self of the defect, we do not see how 542; Chicago Edison Co. v. Moren it can be held responsible." Toledo, P. (1899) 86 Ill. App. 152, Affirmed & W. R. Co. v. Conroy (1871) 61 Ill. (1900) 185 Ill. 571, 57 N. E. 773, but 162. "An employer does not undertake this point was not referred to; Klupp absolutely with his employees for the v. United Ice Lines (1891) 39 N. Y. S. sufficiency or safety of the implements R. 782, 15 N. Y. Supp. 597 (wooden and facilities furnished for their work, tower fell, owing to rotten condition of but only for the exercise of reasonable sill); Dillon v. Sixth Ave. R. Co. which such diligence would not inform A. 438, 20 U. S. App. 334, 59 Fed. 990;

but only for the exercise of reasonable sill); Dillon v. Sixth Ave. R. Co. care in that respect; and where injury (1882) 16 Jones & S. 283. In The to an employee results from a defect in France (1894) 8 C. C. A. 185, 20 U. S. the implements furnished, knowledge of App. 212, 59 Fed. 479, Reversing (1893) the defect must be brought home to the 53 Fed. 843, a steamship was held not employer, or proof given that he omit-liable for injuries to a fireman engaged ted the exercise of proper care to dis- in filling and hooking bags of ashes to cover it." Devlin v. Smith (1882) 89 a chain for removal from the stokehole, N. Y. 470, 42 Am. Rep. 11. "The imfrom the giving way of the handle of perfect connection of the track might an ash bag, where the bag was new, aphave existed in consequence of internal parently sufficiently strong, and no de-and invisible defects in the materials feet had been observed in it by anyone, employed, which had escaped the closest scrutiny, and set at naught the exercise of the utmost care and diligence of the company." Indianapolis & C. the chain, without any reason why the R. Co. v. Love (1858) 10 Ind. 554. hook should not be passed through "When there is no actual notice of defects in an engine of that character, and no personal blame exists on the part of the master, there is no implied obligation or contract on his part that the engine is free from defects, or that it can safely be used by the servant."

Noyes v. Smith (1856) 28 Vt. 59, 65 Am. Dec. 222.

1 Reilly v. Campbell (1894) 8 C. C. defeat we handle sthrough the other and hooking that handle to the chain by passing one of its two handles through the other and hooking that handle to other and hooking that handle to other and hooking that handle to the chain, without any reason why the fects in an engine of that character, drum of the winch, jerking the bag violently so that the handle gave way. The court based its decision on (1) the general principle that the existence of the failure of the appliance; (2) the failure of the plaintiff to prove that the defendant knew that there was any danger, and (2) that the same of the chain by passing one of its two handles through the other and hooking that handle to other and hooking th Reilly v. Campbell (1894) 8 C. C. danger; and (3) that the cause of the

ception than that noticed in the last section, as the doctrine which is thus taken as the starting point is merely one of the forms in which it is possible to state the principle that the servant has the burden of establishing the requisite knowledge, for the reason that it is one of the essential elements of negligence.<sup>2</sup>

129. Abnormal conditions originally created by causes for which the master is not responsible; application of foregoing principles to .-Where the abnormal conditions which caused the injury are shown to have been originally produced by a cause for which the master was not responsible, the action is or is not maintainable, according as it may appear that he was or was not guilty of a subsequent and distinct breach of duty in having failed to ascertain the existence of those conditions, or in having omitted, after discovering them, to take such steps as might be appropriate for the protection of his servants. This principle is applicable where the abnormal conditions resulted from the act of a stranger; or of a fellow servant who is not a vice prin-

accident was apparently the unnecessary strain put upon the appliance by the plaintiff's coservants.

The rule that the servant's action cannot be maintained unless he produces evidence which goes to show that they would attempt to load it, the defendant cannot be maintained unless he produces evidence which goes to show that they would attempt to load it, the defendant cannot be considered negligible to the master's want of proper care is recognized in Gavin v. Rogers (1889) 128 N. C. 387, 38 S. E. 914. But the defendant, 488, 49 L. R. A. 640, 83 N. W. 446; Ohio & M. R. Co. v. Dunn (1893) 138 Ind. 18, 36 N. E. 702, 37 N. E. 546; Mood v. Argonaut Cottom Mill. Co. 4 Argonaut Cottom Mill. Co. 4 Co. v. Russell (1878) 91 Ill. 298, 33 (1901) 23 Ky. L. Rep. 460, 62 S. W. 1043; Columbus & X. R. Co. v. Webb (1861) 12 Ohio St. 475; Purdy v. & N. E. R. Co. (1896) 49 La. Ann. 86, Westinghouse Electric & Mfg. Co. 21 So. 153 (railway company held neg-(1900) 197 Pa. 257, 51 L. R. A. 881, ligent in permitting an electric street over its tracks a guy wire in such a position that it endangered the lives of better (1885) 34 Kan. 326, 8 Pac. 411; the former's servants and employees); O'Donnell v. Baum (1889) 38 Mo. App. Burnes v. Kansas City, Ft. S. & M. R. 245; McClain v. Henderson (1898) 187 Co. (1895) 129 Mo. 41, 31 S. W. 347 Pa. 283, 40 Atl. 985 (so far as evidence went, chain which broke might have given way owing to latent defects); Artis v. Buffalo, R. & P. R. Co. (1896) 180 No. 191, 37 N. Y. Supp. 977. 38 (1880) 8 Ill. App. 13, kirk v. Scally given way owing to latent defects); (1898) 79 Ill. App. 67 (defective floor). Artis v. Buffalo, R. & P. R. Co. (1896) (1898) 79 Ill. App. 133, the court, waiventy appears of the defendant railway company were at the former's servants and employees); (1898) 79 Ill. App. 133, the court, waiventy for the defendant railway company were at the former's servants and employees o

repair or to prevent its coming into appellant's yard in a damaged and danand without his knowledge or that of gerous condition, if these duties were the company. Newsom v. Kimball neglected, and the car permitted to come (1897) 23 C. C. A. 669, 35 L. R. A. 135, into appellant's yard for so many con- 42 U. S. App. 282, 78 Fed. 94, rejectfault of their own."

without its knowledge or consent, unless its negligence has in some way inthe track); Richmond v. New York C. & H. R. R. Co. (1896) 8 App. Div. 382, 40 N. Y. Supp. 812 (railroad company not subject to an action by a brakeman sagging wire maintained by a third person over its tracks, where it has not consented to nor taken any part in the stringing of the wire across its property, and there is no evidence sufficient to charge it with notice that the wire had been insecurely strung in the first instance, or that it was in such a posi-tion at the time of the accident as to be dangerous to trainmen); Marcom v. Raleigh & A. Air Line R. Co. (1900) 126 N. C. 200, 35 S. E. 423 (defect in track caused by malicious act of trespasser); Connors v. Elmira, C. & N. R. Co. (1895) 92 Hun, 339, 36 N. Y. Supp. 926 (wagon left by shipper close to railway track); Martin v. Louisville & N. R. Co. (1894) 95 Ky. 612, 26 S. W. 801 (cars left by engineer of another company on a siding close to main track); Houston & T. C. R. Co. v. Gaither (1897; Tex. Civ. App.) 43 S. W. (charge properly refused which simply told the jury that the defendant was not liable if the misplacement of a switch was due to the act of a stranger); Gulf, C. & S. F. R. Co. v. Wittig (1896; Tex. Civ. App.) 35 S. W. 857 (signal flag removed). A railroad company is not liable for injury to an employee, due to the faulty construction of a cattle pen built by a third person owning land adjoining the right of way, jected a little upon its right of way by foreseen in the light of attending cir-

secutive days that appellant, in the ex- ing the contention that it was the duty ercise of a high degree of care, might of the railroad company to provide and have known of its damaged and danger- maintain a safe roadway, and a safe ous condition in time to avoid any in- place to work in, as well as safe instrujury therefrom, then appellant would ments to work with, and that, by perbe liable to its employees for any dam- mitting the use of a defective pen, and age occasioned thereby without any by hauling cattle thereto, and allowing them to be unloaded therein, the com-In the following cases the action pany failed in its duty to its employee. failed: Atchison, T. & S. F. R. Co. v. A railway company is not liable for Slattery (1896) 57 Kan. 499, 46 Pac. personal injuries which a man employed 941 (railroad company is not liable for to assist in laying a railway track rethe unlawful acts of third parties in ceived, in consequence of an attack upplacing obstructions upon its track on the servants of such company, made by the employees of a hostile company in an attempt to prevent it from layduced the placing of obstructions on ing its tracks, where the employing company did not know, or have reason to believe, that any such attack was contemplated. Kelly v. Shelby R. Co. (1893) 15 Ky. L. Rep. 311, 22 S. W. injured by coming in contact with a 445. A railroad company is not negligent in leaving an ordinary push car a safe distance from the track, and blocking it there in the ordinary method to prevent its moving towards the track, although some boys not connected with the company afterwards attempted to put it on the track, and left it so close to the track that an employee riding on a switch engine was injured by a collision therewith. A push car is not an object specially attractive to children, in such a sense that the company is bound to take precautions against their meddling with it. Atchison, T. & S. F. R. Co. v. Slattery (1896) 57 Kan. 499, 46 Pac. 941.

Where a servant is suing for injuries received through the collapse of a staging, the supports of which have been weakened by a collision with a wagon, driven by a person for whose acts the employer is not responsible, it is error to give an instruction authorizing the jury to find for the plaintiff if they believe the staging to have been improperly constructed, and that such improper construction contributed in any degree to his injuries. Such an instruction ignores the principle that the employer is not liable for the consequences resulting from the acts of third persons in breaking down the platform, unless in consequence of which cattle escaped those consequences naturally followed upon the track and caused the wreck- from the manner in which the platform ing of a train, although such pen pro- was constructed, and ought to have been cipal (see chapters xxvIII. to xxXII., post); or to the operation of extraordinary physical force; or to some circumstance which is left wholly unexplained by the evidence.4

B. CIRCUMSTANCES BEARING UPON THE QUESTION WHETHER NOTICE OF THE CONDITIONS SHOULD BE IMPUTED TO A MASTER.

129a. Character of danger as being a normal incident of the business.—It is well settled that an employer is presumed to be familiar

cumstances. Selleck v. Langdon (1889) The manner in which iron castings are

cumstances. Selleck v. Langdon (1889)
55 Hun, 19, 8 N. Y. Supp. 573.

Laronger v. Lake Shore & M. S. R.
Co. (1895) 104 Mich. 80, 62 N. W. 137;
Baldwin v. St. Louis, K. & N. R. Co.
(1885) 68 Iowa, 37, 25 N. W. 918; Cregur v. Marston (1891) 126 N. Y. 568,
they were in a dangerous position, but
27 N. E. 952; Crowell v. Thomas (1897)
18 App. Div. 520, 46 N. Y. Supp. 137;
18 App. Div. 520, 46 N. Y. Supp. 137;
19 App. Div. 520, 46 N. Y. Supp. 137;
10 N. Y. Supp. 503; Cooper v.
193; Robinson v. Houston & T. C. R.
Co. (1877) 46 Tex. 540; Texas & P. R.
193; Robinson v. Houston & T. C. R.
Co. v. Hohn (1892) 1 Tex. Civ. App.
36, 21 S. W. 942; Mansfield Coal &
193; Robinson v. MacEnery (1879) 91 Pa.
185, 36 Am. Rep. 662; Rice & B. Malting Co. v. Paulsen (1893) 51 Ill. App.
1923; Romona Oolitic Stone Co. v. Phillaging Co. v. Paulsen (1893) 51 Ill. App.
193; Romona Oolitic Stone Co. v. Phillaging Co. v. Paulsen (1893) 51 Ill. App.
194; Hood v. Argonaut Cotton Mill Co.
194; Hood v. Argonaut Cotton Mill Co.
195; Hood v. Argonaut Cotton Mill Co.
196; Hood v. Argonaut Cotton Mill Co.
197; Hood v. Argonaut Cotton Mill Co.
198; Hood v. Argonaut Cotton Mill Co.
199; Hood v. tion. Babcock v. Old Colony R. Co. were not in good order). (1890) 150 Mass. 467, 23 N. E. 325.

remain upon the roof, although such culpability, where a proper light had débris was originally placed there by been placed in position, and had unexhis coservants. The master is not repectedly and without fault been extinlieved in such a case by the fact that guished when it was apparently in good the shed was well built, or that he ex- order). A street railway company owes creased was well built, of that he exorder). A street larway company owes
creased no supervision over its construcno duty to the driver of a car to keep
tion, and employed good materials and a man constantly watching a switch
skilled workmen in erecting it. Johnleading towards the stable, but only
son v. First Nat. Bank (1891) 79 Wis. while the switches are in use to take
414, 48 N. W. 712. A jury may propthe cars out of and into the stable. Donerly find that a railway company is nelly v. New York & H. R. Co. (1896) bound to supervise the work of its serv- 3 App. Div. 408, 38 N. Y. Supp. 709 ants in repairing tracks so as to see (the plaintiff had been thrown off by that a pile of sleepers 3 or 4 feet wide the sudden turning of the car, and there is not left within 18 inches of the rails was no evidence to show how the switch in the freight yard of an important sta-became open, or that the track and car

with the dangers, latent as well as patent, ordinarily accompanying the business in which he is engaged. Such knowledge is imputed to him on the ground that a person who combines with the ordinary measure of intelligence which the law assumes every responsible citizen to possess the special acquirements of persons engaged in the given occupation cannot, supposing him to have made a reasonably careful use of his faculties, fail to understand the extent and nature of the perils normally incident to that occupation. This doctrine requires him to take notice of the normal characteristic properties of the material substances which he uses, and the physical and mechanical laws which operate upon them. See § 140, post.

130. Notoriety of defect.— The principle that evidence of the notoriety of the fact that an instrumentality was unfit for the use of a servant is admissible against the master presents itself in the cases under two aspects. One of these exhibits the master in the position of a person who still retains as a part of his plant some appliance which has been abandoned by all or nearly all the other employers in the same line of business. The obligations deducible from this sort of notoriety are virtually identical with those which are referable to the conception that a master may be found guilty of negligence if he does not conform to general usage. See § 52, ante. Another sort of notoriety is that which is predicated from the common knowledge of the servants themselves who have to handle the instrumentality in question that it is an improper one for the purposes for which it is furnished. The admissibility of such evidence, it should be observed, is limited to the function of establishing notice on the em-It is not competent to prove the ultimate fact that the ployer's part. instrumentality was actually an unsuitable one.2

Most of the cases which illustrate both the general principle and its limitation, as above stated, relate to the master's duty in regard to the

<sup>1</sup>Wagner v. H. W. Jayne Chemical <sup>1</sup>Toledo, W. & W. R. Co. v. Freder-Co. (1892) 147 Pa. 475, 23 Atl. 772; icks (1874) 71 Ill. 294 (radical defect Smith v. Peninsular Car Works (1886) in construction of coupling); Chicago 60 Mich. 501, 27 N. W. 662; Consolidate A. R. Co. v. Shannon (1867) 43 Ill. dated Coal Co. v. Haenni (1893) 146 338, 339 (reputation of a certain loco-lll. 614, 35 N. E. 162 (rule applied motive among employees for unsafety, where the work to be done was the rais- competent as evidence to charge master

ing of a large smokestack). The master must keep pace with scientific development and knowledge as it affects (1888) 87 Ala. 708, 4 L. R. A. 710, 6 his business, and must keep himself informed of latent danger, even though over a railway track had ever been the it be scientific information, if it be readily attainable. Hysell v. Swift proved by general notoriety). (1899) 78 Mo. App. 39. ing of a large smokestack). The mas- mechanic with notice of its condition).

employment of servants, and will be collected in the chapter on that subject (XIII., post).

- 131. Obvious nature of defect.—The courts have frequently had occasion to recognize the principle that a master is chargeable with notice of defects which may be described as "obvious," or by some equivalent term which embodies the conception that they ought to have been observed by anyone making even a casual examination of the defective instrumentality.1 The standard applied in cases where the evidence shows that he ought, at some time prior to the accident, to have subjected the instrumentality to one of those formal periodical inspections which, as will presently be shown, the law requires him to make, is, of course, much higher. See next chapter.
- 132. Length of time during which defect has existed.—In considering whether the dangerous condition of an instrumentality should have been discovered, the length of time during which that condition had existed is obviously a material question, and is constantly adverted to in cases of the type under review, as a fact tending to show that the master's ignorance was excusable or culpable. His liability, in this point of view, frequently, but not invariably, resolves itself into the determination of the question whether he had inspected the instru-

<sup>1</sup> Settle v. St. Louis & S. F. R. Co. from a previous excessive strain, where (1895) 127 Mo. 336, 30 S. W. 125 (de its unsafe character was evident). In fective hand-hold on a railway car); Erskine v. Chino Valley Beet-Sugar Co. Holden v. Fitchburg R. Co. (1880) 129 (1895) 71 Fed. 270, the court used Mass. 268, 37 Am. Rep. 343 (overhangsome language which would, if taken ing bank of earth fell; danger might literally, justify the inference that it have been readily seen by anyone who supposed that the converse of the prinhad "casually examined" the place of ciple stated in the text also held good, had "casually examined" the place of ciple stated in the text also held good, work on the day before the accident); for it denied the right of the plaintiff Elledge v. National City & O. R. Co. to recover, on the ground that the decision bank which was being excauted; danger, upon any proper examination, was "conspicuous"); Crowell the rule which imposes on the master v. Thomas (1897) 18 App. Div. 520, 46 the duty of active inspection. But pre-N. Y. Supp. 137 (superintendent negligent in failing to observe that a plug the theory that this duty had actually had been inserted in a pipe from which seem descaped from a harrel, where fore the rope gave way. In Kearney had been inserted in a pipe from which steam escaped from a barrel, where such plug is in plain view); Wedgwood Electric Co. v. Laughlin (1895) 45 Neb. v. Chicago & N. W. R. Co. (1878) 44 391, 63 N. W. 941, it is said that it canwis. 44 (bolt in brake beam projecting to an unnecessary extent); King v. ble on the ground that the danger was Ohio & M. R. Co. (1882) 11 Biss. 362, obvious, where the evidence on behalf 14 Fed. 277 (deadwood worn so short of a defendant company is to the effect, and dangerways). The Para (1893) and company is to the effect, and dangerways. 14 Fed. 277 (deadwood worn so short of a defendant company is to the effect, as to be dangerous); The Para (1893) not only that the support made in a 56 Fed. 241 (vessel held liable to an tunnel which collapsed was not obvious-employee of a stevedore for injuries ly defective or imperfect, but that, in suffered by the giving way of a shackle the opinion of the superintendent, it holding a block used in unloading the was amply sufficient, and that it was a superintendent, it was a superintendent of its pressel and its pressel and machinely constructed

vessel, because of its unsafe condition skilfully and mechanically constructed.

mentality which caused the injury as frequently as a prudent person would have done. The section (156), which deals with that question should, therefore, be read in connection with the present one.

The positive branch of the rule, which expresses the significance of the fact that the abnormal conditions had existed previously to the accident, may be stated as follows: Where the instrumentality which caused the injury was in an unsafe condition so long before the accident happened that the master would have discovered such unsafety if he had been in the exercise of reasonable care, he stands, as regards liability, in the same predicament as if he had actually known of the defects. The servant's right to recover is, therefore, a question for the jury to decide wherever the evidence fairly tends to show that the machinery which caused the injury was defective, and that the defect had existed so long that the employer should have known of it.2 For the purposes of this rule it is manifestly immaterial by whose negligence the defective condition was originally produced.3

Viewed as embodying a principle which is exculpatory in its operation, the rule is sometimes stated in the form that the master is not liable for an injury caused by defects, unless he had actual knowledge of such defects, or they had existed for such a length of time that knowledge might be inferred.4 This way of stating the situation, however, is not strictly accurate, inasmuch as the existence of the de-

¹ Ocean S. S. Co. v. Matthews (1890) Tramway Co. v. Crumbaugh (1897) 23 86 Ga. 418, 12 S. E. 632; Lake Erie & Colo. 363, 48 Pac. 503. So Ga. 418, 12 S. E. 632; Lake Erie & Colo. 363, 48 Pac. 503.

W. R. Co. v. McHenry (1894) 10 Ind.

App. 525, 37 N. E. 186; Rice v. King
Co. (1890) 78 Wis. 22, 47 N. W. 97;
Philip Mills (1887) 144 Mass. 229, 59
Am. Rep. 80, 11 N. E. 101; Pittsburgh, 118, 41 N. W. 1094. In Paine v. EastC. & St. L. R. Co. v. Adams (1885) 105
ern R. Co. (1895) 91 Wis. 340, 64 N.
Ind. 151, 5 N. E. 187; Atchison, T. &
W. 1005, the case was held to be one
S. F. R. Co. v. Holt (1883) 29 Kan.
for the jury, the evidence being that the
149; Burnes v. Kansas City, Ft. S. &
blocking of a frog had become defectM. R. Co. (1895) 129 Mo. 41, 31 S. W. ive by wear, the reasonable inference
347; Clough v. Hoffman (1890) 132 Pa.
being that the defect had existed for
626, 19 Atl. 299; Ashman v. Flint & P.
Morgan (1892) 132 Ind. 430, 31 N. E.
W. 645; McDonald v. Chicago, St. P. 601, an instruction to the jury as to noM. & O. R. Co. (1889) 41 Minn. 439, 43
tice on the part of the defendant, that
N. W. 380; Monmouth Min. & Mfg. Co.
they might find such notice to be proved
v. Erling (1894) 148 Ill. 521, 36 N. E.
if it might be rightfully and reasonably
117, Affirming (1892) 45 Ill. App. 411;
hurphy v. Great Northern R. Co. case, although there might be no direct
(1887) 68 Minn. 526, 71 N. W. 662;
testimony as to such notice, was held
O'Mellia v. Kansas City, St. J. & C. B.
proper where there was an averment in O'Mellia v. Kansas City, St. J. & C. B. proper where there was an averment in R. Co. (1893) 115 Mo. 205, 21 S. W. the complaint that the defendant had 503. Evidence of defective condition of long known of the defect. See also cases car prior to date of an accident alleged cited in notes 6 to 11, infra. to have been due to such defect is admissible for the purpose of showing (1880) 8 Ill. App. 133. See also cases knowledge of the condition of the car cited in § 129, ante. by the company operating it. Denver

\*Atchison, T. & S. F. R. Co. v. Swarts

fect for a certain period is obviously not the only circumstance from which constructive notice may be inferred. In any categorical enunciation of the rule, this alternative possibility should not be ignored.<sup>5</sup> How long a defect must have existed before a master can be charged with a knowledge of it is primarily a question of fact for the jury, to be determined with reference to the character of the instrumentality, the difficulty of discovering the conditions constituting the defect, and the master's opportunities for observation, due account being taken of the nature and extent of the obligations which the law imposes on him with respect to regular periodical inspections in the case of the particular instrumentality. See next chapter.<sup>6</sup> In some cases, where the period which elapsed between the accident and the earliest moment when the instrumentality was proved to have been in an unsafe condition was quite brief, the courts have deemed themselves warranted in saying, as matter of law, that notice could not be imputed to the master. The essence of such rulings is that the master cannot be ex-

master. The essence of such rulings is that the master cannot be ex
(1897) 58 Kan. 235, 48 Pac. 953; Loringer v. Lake Shore & M. S. R. Co. (1895) 104 Mich. 80, 62 N. W. 137; the lapse of a certain time, under all Reed v. Boston & A. R. Co. (1895) 164 eight of a coservant, after (1895) 104 Mich. 80, 62 N. W. 137; the lapse of a certain time, under all Reed v. Boston & A. R. Co. (1895) 164 circumstances. The doctrine of consumant (1890) 132 Pa. 626, 19 Atl. 299; sonable and just considerations, and the Baldwin v. St. Louis, K. & N. R. Co. (1895) 68 Iowa, 37, 25 N. W. 918; test of negligence on the part of the Corruthers v. Chicago R. I. & P. R. Co. (1895) 55 Kan. 600, 40 Pac. 915; Hashing v. New York C. & H. R. R. Co. (1895) 145 N. Y. 400, 40 kins v. New York C. & H. R. R. Co. (1895) 145 N. Y. 400, 40 kins v. New York C. & H. R. R. Co. (1894) 95 Ky. 612, 26 S. W. 801 (railway company is not responsible for injuries to its employees, caused by the ordinary way company not liable for injuries quested instruction that a railroad company in the dear of cars, until it has been notified of the defects caused thereby, not had time and opportunity to learn thereof and to have the same repaired, was modified by adding "or such defects shall have existed for such a feeted of the time of the continuance of the defect, in implying notice, and expressed the idea in the instruction as drawn, in a more wordy form.

See Union P. R. Co. v. James (1896) 163 U. S. 485, 41 L. ed. 236, railment of a train; Gulf; O. & S. F. Co. v. Outhern R. Co. (1897) 10 App. D. C. 600.

"There is no arbitrary rule of law that charges the master with construct-

pected, as a reasonably careful man, to supervise his business so closely or make such frequent inspections that he ought to discover the dangerous conditions within the given period. Proof that the appliance which caused the injury had been properly examined a short time before the accident and found secure is regarded as being conclusive in his favor unless the servant can show that something had occurred since the inspection to put him on inquiry.8 But the limits of the power of a court to interfere with the finding of a jury are extremely ill-defined, and a verdict in favor of the servant has been sustained in at least one instance where the period available for acquiring knowledge of the conditions was shorter than in some of the cases just cited.<sup>9</sup> All that can, with safety, be affirmed in this connection is that the longer the period, the more conclusive will the

the cinders and the defect are of recent existence); Murphy v. Great Northern R. Co. (1897) 68 Minn. 526, 71 N. W. 662 (constructive notice of the presence of a block of wood on a rail upon which a transfer table travels cannot be inferred from evidence which tends to show that it had been placed tends to show that it had been placed 10 App. D. C. 560. there by some unknown person a few hours before it caused an injury); (1897) 169 III. 581, 48 N. E. 476, Af-Mickee v. Walter A. Wood Mowing & firming (1896) 68 III. App. 307 (rail-Reaping Mach. Co. (1894) 77 Hun, 559, way company not, as matter of law, 28 N. Y. Supp. 918 (employer not liable for an injury to a servant caused ployee riding on the pilot of an engine, by the falling of a post, where the post in failing to discover that a drawbar had been put in place only two days behas been broken and is lying on the fore, and was well stayed and secured in its position. On the former appeal the break occurs? in its position. On the former appeal the break occurs).

of the next preceding train); Central ([1893] 70 Hun, 456, 24 N. Y. Supp. R. & Bkg. Co. v. Kent (1889) 84 Ga. 501) it had been held that, as there was 351, 355, 10 S. E. 965 (knowledge of a no evidence to show that the post had washout, due to a sudden and unprecedented rainfall, not necessarily imputed to railway company within two hours after the storm); Goodrich v. Kansas (60, 11 N. Y. Supp. 347 (absence of safe-City, C. & S. R. Co. (1899) 152 Mo. ty clutch on elevator not one of those 222, 53 S. W. 917 (railway company obvious defects of which a tenant, who held not liable for the derailment of a train, caused by its collision with a be held to be aware from the cursory horse which had strayed on the track through a gap in the fence at a place about 1 mile from the nearest station, idated Coal Co. v. Scheller (1891) 42 the evidence being that one of the planks had been gone about fifteen must have known that the roof of one hours before the accident); Welch v. of its tunnels was in a dangerous con-R. & Bkg. Co. v. Kent (1889) 84 Ga. 501) it had been held that, as there was Nours before the accident); Welch v. of its tunnels was in a dangerous con-New York C. & H. R. R. Co. (1892) 43 dition, held not to be a necessary infer-N. Y. S. R. 958, 17 N. Y. Supp. 342 ence from the fact of its having been (railroad company not liable to an em- in that condition for two weeks before ployee for injuries received in attempt- the accident). It is not error to pering to make a coupling, by stumbling mit defendant's foreman to testify as over a pile of cinders on its track, or to what he knew of the condition of a from a defective drawhead, where both scaffold three hours before it gave way, for, in the absence of evidence to the contrary, the presumption must be in-dulged that it remained in the same condition up to the time of the accicondition up to the time of the accident. Doyle v. Missouri, K. & T. Trust Co. (1897) 140 Mo. 1, 41 S. W. 255.

<sup>8</sup> McCauley v. Southern R. Co. (1897) 10 App. D. C. 560.

<sup>9</sup> Chicago & N. W. R. Co. v. Delaney (1897) 169 Ill. 581, 48 N. E. 476, Affirming (1896) 68 Ill. App. 307 (rail-way company not as matter of law

finding a jury be deemed. 10 The right of the jury to infer negligence from the length of the period during which the defect has existed is, of course, conditional upon the defect in question being one which a proper inspection would have disclosed.<sup>11</sup>

133. Repairs and alterations; inference from. — The fact that all the appliances of a pattern similar to that which caused the injury were being altered at the time of the accident tends to show that the master was aware of the fact that they were dangerous to servants. 1 But evidence that repairs or alterations were made after the accident, al-

was held to be maintainable on the alignment, and three former conductors ground that the defendant had constructive notice of the conditions: Richmond & D. R. Co. v. Moore (1883) 78 one and two years before, and that he va. 93 (ladder handle on railway car had been broken so long that the break defendant's predecessor, the question of was weather-beaten); St. Louis, I. M. defendant's negligence was for the & S. R. Co. v. Higgins (1890) 53 Ark. jury); Monmouth Min. & Mfg. Co. v. 458, 14 S. W. 653 (car repeatedly condemned and marked "out of repair"); 117 (nut which kept an eyebolt in place Bridges v. St. Louis, I. M. & S. R. Co. had been missing two weeks); Meyer's (1879) 6 Mo. App. 389 (period described here as "considerable"); Consolidated Coal Co. v. Maehl (1888) 31 Ill. App. 252 (attention of the corporate officers had been called to the defect (1896) 1 App. Div. 405, 37 N. Y. Supp. "some time previous" to the accident); Seese v. Northern P. R. Co. (1889) 39 had existed for six or eight weeks); Fed. 48 (defect in drawhead was "old"); Bradshaw v. Chicago, R. I. & Co. (1891) 154 Mass. 407, 28 N. E. 352 P. R. Co. (1897) 58 Kan. 618, 50 Pac. (foreman knew, several days before the accident, that the carriage of a sawing machine had started up when no one was near it).

"In Fay v. Minneapolis & St. L. R. allow it to push past the projections of was near it). the castings on the tender to which the car was coupled); Chicago, B. & Q. R. Co. (1883) 30 Minn. 231, 15 N. W. Co. v. Avery (1880) 8 Ill. App. 133 241, it was held proper to find construct-(foreign car was permitted to come into ive knowledge of a defect in couplings a ward in a damaged condition on save of foreign car where it had been in the couplings. (foreign car was permitted to come into a yard in a damaged condition on several consecutive days); Chicago & E.

R. Co. v. Branyan (1894) 10 Ind. App. 570, 37 N. E. 190 (evidence was that the floor of a car had been in an unsafe condition for several years, and that a reasonably careful inspection would have disclosed the defect); Chicago & I. R. Co. v. Russell (1878) 91 possession of a railway company for III. 298, 33 Am. Rep. 54 (telegraph pole which has stood for three years within 18 inches of a passing car); Bessea v. Chicago & N. W. R. Co. (1878) 45 Wis. 477 (obstruction which remained near a railroad track for more than a year previous to the accident); Coughlin v. Brooklyn Heights R. Co. (1901) 59 (where street railway track at the point where a conductor was thrown from his where a conductor was thrown from his

<sup>10</sup> In the cases cited below, the action car and injured was dangerously out of

though competent to show that a defect existed at the time of the accident,2 is not admissible to prove that the defendant had notice of the defect before the accident.3

134. Failure of servant himself to observe the dangerous conditions.— In later chapters (XVII.-XXII.), the effect of evidence showing that the servant had or had not the same means or opportunities as the master of knowing the risks to which he was exposed will be discussed, in so far as it bears upon the defenses of assumption of risks and contributory negligence. But there is another aspect of such evidence which is material in the present connection.

There are numerous cases which proceed upon the theory that, in certain states of the testimony, the master's nonliability may be deduced, as a conclusion of law, from the fact that the servant himself, especially where he possessed special skill and experience in regard to the subject-matter, was ignorant of the risk in question. In other

\*Harter v. Atchison, T. & S. F. R. 94 Fed. 73. An employer is not liable Co. (1895) 55 Kan. 250, 38 Pac. 778. for an injury to an employee, caused by \*Harter v. Atchison, T. & S. F. R. the falling of a brick from the top of a Co. (1895) 55 Kan. 250, 38 Pac. 778; tall chimney, the upper part of which St. Louis & S. F. R. Co. v. Weaver had fallen over a few weeks before as the (1886) 35 Kan. 412, 57 Am. Rep. 176, result of a fire, where no one knew that 11 Pac. 408; Missouri, K. & T. R. Co. any of the bricks were loose, and plain-v. Young (1896) 4 Kan. App. 219, 45 tiff had as much knowledge of any dan-Pac. 963; O'Donnell v. Baum (1889) 38 ger as anyone possessed. Pilucki v. De-Mo. App. 245; Cherokee & P. Coal & troit Steel & Spring Works (1898) 117 Min. Co. v. Britton (1896) 3 Kan. App. Mich. 111, 75 N. W. 295. A telegraph 292, 45 Pac. 100. As to the inference company cannot be held negligent in which it is permissible to draw, in acmaintaining a crossarm on a telegraph which it is permissible to draw, in ac- maintaining a crossarm on a telegraph which it is permissible to draw, in accordance to hamiltaning a crossain of a telegraph of repairs or the taking of precautions it broke, was not negligent in placing after the accident, see, generally, 3 Elliott, Railroads, § 1177.

11'If the defect [in a car] was such as perfectly well the extent of its sufficient of the strength of the extent of its sufficient of the strength to deceive human judgment, the company, as well as himself [i. e., the plain-ern U. Teleg. Co. (1892) 131 N. Y. 603, tiff], stands excused for not discontin-30 N. E. 196. In Stiles v. Richie uing the use of the car on account of (1896) 8 Colo. App. 393, 46 Pac. 694, it. Whatever diligence he exercised in the owner of a mine was held not liaseeing to the apparent safety of the ve- ble for the death of an experienced minhicle goes to the credit of the company, er in its employ, caused by the caving as well as to his own credit." Central in of a shaft while sinking it, where R. & Bkg. Co. v. Kenney (1877) 58 Ga. such shaft was at the time only 12 feet 485. A master is not bound to antici- deep, and the former, on being informed pate the danger of bolts projecting from that the shaft needed timbering, immea fly wheel coming in contact with a diately began to place the timber, which pipe running near the wheel, which vi-pipe running near the wheel, which vi-brated when the machinery was in mo-tion, so as to break it and cause injury advance the defense of contributory to an employee, if the employee, an en-negligence, the following peculiar alle-gineer of experience, knowing the condi-gation was inserted in the complaint: tion of the machinery, has worked about "That at the time deceased was killed it for fourteen months without anticias as aforesaid, he thought, and any man pating such danger. Detroit Crude-Oil of ordinary prudence, with the knowl-Co. v. Grable (1899) 36 C. C. A. 94, edge which deceased had of the ground cases the point in view is perhaps essentially the same, but the precise effect of the judgments is not clearly defined for the reason that the

he was working in, would have thought, means of knowing this difference as or it would cave in." The court com- gence of the intestate and that of the mented upon the averment as follows: company in this respect are equally bal-"If such was the conclusion of an ex- anced, ought the plaintiff to recover?" perienced miner who had done the In Ray v. Jeffries (1887) 86 Ky. 367, work, and would have been the conclu- 5 S. W. 867, the court, after remarking sion of any man of 'ordinary prudence,' that there was no proof that the applihow could defendants be charged with ance which caused the injury (nitronegligence, and made liable for failing glycerin) was defective, said: "Conseyears, possessed of all knowledge that to avoid injury to his employee, whether could be obtained, voluntarily prosethe latter is, or professes and undercuted the work, and incurred the risk takes to be, skilled in that branch of incident to the employment." In Balthe business or not. To require of an low v. Chicago, M. & St. P. R. Co. employer such knowledge and skill, and (1882) 54 Wis. 257, 41 Am. Rep. 31, 11 impose upon him such obligation, would, N. W. 559, one of the grounds upon in many cases, put a stop to business." which the plaintiff's right to recover It was accordingly held error to inwas denied was that he had the same struct the jury that, if the plaintiff did whenever the brakeman ascended or descended the ladder in question. . . . requiring the defendant to know and His inspection and testing was the inform the plaintiff, not merely of the company's inspection and testing. His dangerous character of the appliance, failure to discover any visible indications of insufficiency, while so inspecting and testing, was no more culpable declared to be that, where an employee in the company than in himself." In represents and undertakes that he possesses the knowledge and skill requisite Am. Rep. 292, 23 N. W. 890, the court to operate or use machinery or impleargued as follows: "The difference in ments of a dangerous character, which, the elevation of the coupling irons of if not properly used, are liable to cause this foreign car and the caboose or other injury, he, and not the employer, is recars of the defendant's road would not have been very easily or readily observed when they were distant from each other, and yet the company is sought to be held liable for its want of ordinary care in not knowing this difference when consenting to take this foreign car relied upon in the master's favor were sponsible for consequences resulting to handling of it. In Walsh v. Whiteley (1888) L. R. 21 Q. B. Div. 371, 57 L. S. Q. B. N. S. 586, 36 Week. Rep. 876, and not the employer, is resulting to take this foreign car relied upon in the master's favor were nary care in not knowing this difference by J. P. 38, one of the circumstances when consenting to take this foreign car relied upon in the master's favor was into its train. When the car and the the admission of the plaintiff that he caboose were brought nearly together, had not complained of the machine durthis difference could have been at least much more readily seen and observed with it, because it had "never entered by comparison. . . Did not the his head that it was dangerous,"

that said shaft could be timbered before to that of the company? If the neglito exercise extraordinary and prophetic quently, the simple question is, whether prudence previous to the preceding Frithe employer is bound in every case to It is clear beyond controversy know, not merely the dangerous characthat deceased had greater knowledge of ter of implements or agencies used in the shaft and the character of the his business, but also the peculiar conground than Hook could have had, and struction and mode of handling each that deceased, a practical miner of part so as to make it most efficient, and years, possessed of all knowledge that to avoid injury to his employee, whether means of knowledge as the company. "It not know of the dangerous character of appears from the testimony," said the appliance, the defendant could not Judge Cassoday, "that the ladder in be excused for his failure to know and question was almost in constant use, inform plaintiff of the danger, unless not by the engineer, nor so much by the he used reasonable care in obtaining conductor, but by the brakeman. The and imparting such information. This constant was recoverily applied was recovered to the danger. straining test was necessarily applied was regarded as a misdirection because whenever the brakeman ascended or de- it might be understood by the jury as ignorance of coemployees of the plaintiff, or other persons concerned in the work, is adverted to as an evidential factor.<sup>2</sup>

There seems to be no little difficulty in finding a rational ground upon which these decisions can be reconciled with the well-recognized principle that, as a general rule, the master and servant are not on the same footing as regards the obligation of observing the quality of the instrumentalities of the business. See chapter xxi., post. The statements of the cases cited are at least compatible with the inference that, under the circumstances mentioned, the abnormal conditions would have been discovered if the master had properly discharged his duty of active inspection. See next chapter. Due weight has been given to this consideration by some courts.3 Another objection to treating the servant's ignorance of the risk as a sufficient basis for a conclusion of law respecting the master's nonpossession of knowledge

<sup>2</sup> A nonsuit was held to have been in which he was working, had been enfully examined by both the plaintiff and was not imputable to the city, though the overseer of the road, that there was sheathing might have prevented the acgood. Reid v. Central R. & Bkg. Co. dletown (1900) 56 App. Div. 525, 67 (1888) 81 Ga. 694, 8 S. E. 629. The N. Y. Supp. 483. fact that only one out of ten employees sin Eddy v. Aurora Iron Min. Co. engaged in handling a chain noticed any (1890) 81 Mich. 548, 46 N. W. 17, it defect in it was declared to be in itself was explicitly laid down that the mas-

properly granted, where, so far as the gaged in that work for three or four testimony showed, the rope furnished to years, and neither he nor his coemthe plaintiff for the purpose of clean-ployees, nor the engineer in charge, nor ing out a well was a good rope, and it his foreman, saw any apparent danger was also in evidence that it was care- until the accident occurred, negligence no defect in it which would be discov- cident, and though one of the aldermen, ered by the use of ordinary care, and a hatter by trade, told the foreman that that both parties pronounced the rope sheathing was needed. Farrell v. Mid-

evidence that the defect was not such an ter is not, as a matter of law, excused evidence that the defect was not such an ter is not, as a matter of law, excused apparent one as to put them or their for maintaining his instrumentalities employers on their guard. Kinney v. in an unsafe condition, merely for the Corbin (1890) 132 Pa. 341, 19 Atl. 141. reason that the servant himself thought The fact that miners had been riding they were in a safe condition. The servup and down on a car every day for sevant, it was said, might or might not eral years, exposed to any danger which have had the requisite knowledge or might arise from the failure of a cersistely to safe but whether they were really the safe but whether he had or not it was tain simple unhitching apparatus to safe; but whether he had or not, it was, perform its proper work, and never ordinarily, no part of his business to complained of it or protested against its look after their condition. This case use, has been considered to have a masseems inconsistent with the Michigan terial bearing upon the question whetherease cited in note 1, supra. In Alton er the mine owner was negligent in not Lime & Cement Co. v. Calvey (1892) adopting some other contrivance. Burke 47 Ill. App. 343, the defendant's forev. Witherbee (1885) 98 N. Y. 562. man testified that if the plaintiff had There can be no recovery for the death been careful he might have seen the of a miner, caused by a clod falling on dynamite before he struck the rock, him from the roof of a room in the mine which caused the explosion. The court's into which he went of his own accord to comment upon this evidence was that, work, when both he and others tested if it was true, the company, whose duty the roof and thought it safe. Consoliit was not to allow any dynamite to redated Coal Co. v. Young (1889) 31 Ill. main in the quarry which, by the exer-App. 417. Where an employee of a cise of proper diligence, could have been city, injured by the caving of a trench discovered, should have had it removed,

is, in most, if not all, the situations which can suggest an appeal to this test, that there must be some facts presented which will be reasonably susceptible of the construction that the system of work and the measures taken to safeguard the servant were not satisfactory. It is manifestly unjustifiable to take the case from the jury, or to override a verdict, under these circumstances.4 Upon the whole, therefore, the present writer ventures to express the opinion that the standard of comparison is wholly out of place in this class of cases, and that the preferable analysis is rather one which treats as two entirely separate subjects of investigation the question whether the master, and the question whether the servant, ought respectively to have known of the risk which caused the injury in suit. What a prudent man would have discovered in each instance must be determined with reference to obligations so distinct in their character and extent that any process of ratiocination which involves placing them side by side and arguing from one to the other is more apt to obscure the true issues than to lead to an equitable conclusion.

135. Manner in which instrumentalities discharged their functions prior to the accident; inferences from, generally.—The fact that the instrumentality in question had or had not operated in a satisfactory manner prior to the time when it caused the injury in suit has been admitted as competent evidence to establish either that it was or was not a suitable one to be used as a part of the master's plant, or that the master was or was not excusably ignorant of its abnormally dangerous condition, as disclosed by the accident. The cases which relate

'In O'Driscoll v. Faxon (1892) 156 might hold him bound to use reasonable Mass. 527, 31 N. E. 685, the defendant care to guard against accidents which, contended that, upon the whole evi- at the moment of their occurrence, a dence, no want of due care on his part workman might not anticipate, though was shown; and in support of this himself in the exercise of reasonable was shown; and in support of this view it is urged that no notice was given to him that the bank was dangerous; that the plaintiff and his witnesses did not regard it as dangerous; and that if plaintiff, with his exeprience, was not guilty of carelessness in failing to anticipate that earth from the bank and that the cutting of the bank was such as to cause against accidents, they might lawfully no reasonable apprehension of danger. or the bank was such as to cause against accidents, they might lawfully no reasonable apprehension of danger, hold him responsible to one who was then the falling of the earth was a mere himself in the exercise of due care at accident. The court said: "We think the time of the injury. Such seems to the jury might be allowed to take a have been the view taken by the jury, broader view of the defendant's responsand we cannot say, upon the evidence, sibility. The duty rested upon him of that it was the duty of the presiding using reasonable care in providing a justice to withdraw the case from their safe place for the masons to do their consideration." work in building the wall, and the jury

to the bearing of this fact from the former of these standpoints will be collected in a subsequent chapter (XLIII.). At present we have to deal with it merely under the second aspect.

136. Previous satisfactory operation of the instrumentality which caused the injury.— The courts have used language which, if taken literally, would commit them to the unqualified doctrine that the use of an instrumentality which has been in daily use for a long time, and has uniformly proved safe and efficient, may be continued without imputation of negligence. But such a doctrine can easily be shown to be altogether too favorable to the master. Manifestly, it is impossible, in view of that tendency to deterioration which is characteristic of all the inorganic agencies of business, to affirm as a universal principle that an employer is entitled to infer, from the previous efficient operation of his instrumentalities, that such operation will continue.2 Indeed, it is evident that all the decisions cited in the next chapter are based on the theory that he is bound to take notice that the chances of his instrumentalities remaining in a safe condition steadily diminish in proportion to the period during which they have been used. The true doctrine applicable in this connection seems to be rather this,—that the previous safe and successful operation of the instrumentality is conclusive in the master's favor, provided it appears that he has not been derelict in regard to his duty of active inspection at reasonably frequent intervals (see next chapter), and no circumstance which would have put a prudent man on inquiry has come to his knowledge. This proviso is recognized in the language used by the courts in several of the cases in which the satisfactory operation of the instrumentality before the accident in suit is men-

<sup>1</sup> Sappenfield v. Main Street & Agri. semaphore had been put up in a differhad operated satisfactorily till within fifteen minutes of the accident); Kaye work. Whalen v. Michigan C. R. Co. v. Rob Roy Hosiery Co. (1889) 51 Hun, (1897) 114 Mich. 512, 72 N. W. 323. 519, 4 N. Y. Supp. 571 (elevator had been in constant successful operation up to the time of the accident); Hoskins v. Stewart (1890) 57 Hun, 380, 10 N. tion to the effect that "as a general Y. Supp. 833 (trench caved in which had been safe till the time of the accident); Richardson v. Cooper (1878) seen in daily use for years and has uniformly been found adequate, safe, and raised stones of ten times the weight of that which caused it to give way). The the imputation of negligence?); Goodengineer would not have occurred if a L. R. A. 673, 42 N. W. 873.

Park. R. Co. (1891) 91 Cal. 48, 27 Pac. ent place does not render the railroad 590. Sweeping expressions are also company liable for the injury, where found in the following cases: Prybil-the semaphore had always before proved ski v. Northwestern Coal R. Co. (1898) sufficient, and would have done so at 98 Wis. 413, 74 N. W. 117 (coal bucket the time of the accident but for the unhad operated satisfactorily till within accountable failure of the air brakes to

tioned as an exculpatory element,3 and it is probably implied in all the other cases in which phraseology of an unqualified description is used.

137. Previous unsatisfactory operation of the instrumentality which caused the injury.— In some states of the evidence the employer's nonliability, when considered with relation to a previous accident not known to him, is deducible, as a matter of law, from the general principle enunciated in § 126, ante. But it is recognized in a large number of cases that the fact of such an accident's having occurred is itself competent evidence tending to show that the master should have been aware of the conditions to which it was due.<sup>2</sup> A jury, therefore,

\*Southwest Virginia Improv. Co. v. that previous accidents not known to de-Andrew (1889) 86 Va. 270, 9 S. E. 1015 fendant were immaterial as evidence, (roof of a tunnel in a coal mine fell, exemplifies a similar conception. without the warning signs that usually precede it, and the evidence showed that Wright (1888) 115 Ind. 378, 16 N. E. the usual tests had been made without 145 (trainmen had previously been interesting to the collision with the the usual tests had been made without disclosing any unsafe conditions); jured by coming into collision with the Bradbury v. Kingston Coal Co. (1893) same overhead bridge as that which in 157 Pa. 231, 27 Atl. 400 (pin controling throttle of hoisting engine had for seven years continuously and successfully served its use without any way as to be dangerous to employees, it change, repair, substitution, or visible is not error to admit evidence to the effect, and gave no external indication of defect up to the time of the accident. In Thiel v. Kennedy (1901) 82 and had been caught between the structure so close to a tramfully served its use without any way as to be dangerous to employees, it is not error to admit evidence to the effect that, prior to the occurrence of the accident). In Thiel v. Kennedy (1901) 82 and had been caught between the structure and the tram cars. Salem Stone slipped and started a machine, it was & Lime Co. v. Griffin (1894) 139 Ind. should be used.

cited cases seems to be ignored in a rul- from the same cause as that to which ing to the effect that a brewer, to whom the plaintiff's injury is traceable was no notice is shown to have been given admitted to show that the employer of the previous bursting or exploding of knew it might at any time fall again bottles, is not chargeable with knowl- This distinction, however, seems to be edge of the actual fact of such explod- of very dubious soundness, for if, in any ing, and of the latent danger thereof to particular case, such evidence is deemed his employees. Melchert v. Robert to warrant the conclusion that the mas-Smith India Pale Ale Brewing Co. ter should have known that there was (1891) 140 Pa. 448, 21 Atl. 755. Sullia probability of similar accidents, the van v. Poor (1900) 32 Misc. 575, 66 N. constructive knowledge thus imputed to Y. Supp. 409, where it was observed him becomes, according to the principles Vol. I. M. & S.—19.

slipped and started a machine, it was & Lime Co. v. Griffin (1894) 139 Ind. held that its successful operation up to 141, 38 N. E. 411 (servant previously that time did not conclusively prove caught between tram car and structure that the defect could not have been disclose to track). See also cases cited in covered by due care. In Watt v. Neil-the next note. It has been said that the son (1888) 15 Sc. Sess. Cas. 4th series, true ground on which such evidence is 772, it was held that a master is not admitted or rejected in actions for negresponsible for injuries caused by the ligence is that it is competent for the fall of a simple hoisting apparatus purpose of showing that the defendant which his workmen have been rigging had knowledge of the probability of the up for themselves during several years, recurrence of similar accidents, but whenever it happened to be needed, with not for the purpose of proving that a out any suspicion of danger, or any sug- specific danger existed at the time the gestion that some other appliance plaintiff was injured. Malone v. Hawould be used. ley (1873) 46 Cal. 409, where evidence <sup>1</sup>The principle applied in the above-that an elevator had previously fallen

is always warranted in inferring from evidence of the previous defective operation of an instrumentality that the master was negligent in not seeing that the instrumentality was properly constructed and adjusted, so as to be safe when it was originally put in use, or in not discovering its dangerous condition and making it safe before the accident.3

rived at.

effect see Donahue v. Drown (1891) 154 had frequently done so automatically out provocation, kicked in a very dangerous manner); Krogstad v. Northern P. R. Co. (1891) 46 Minn. 18, 48 N.W. 409 cident caused by their projecting in this whether the master's representative in

explained in § 125, ante, one of the cir-manner); St. Louis Bridge Co. v. Felcumstances which charge him with neg- lows (1893) 52 Ill. App. 504 (derailligence in allowing the abnormal con- ment on sharp curve where such acciditions to continue up to the time of the dents had frequently happened); Byrne accident. In the last analysis, therev. Brooklyn City R. Co. (1894) 6 Misc. fore, such evidence must be one of the 441, 26 N. Y. Supp. 760 (portions of a elements involved in the conclusion arbank in course of excavation had falllen from time to time); Harter v. Atchison, T. & S. F. R. Co. (1895) 55 Kan. 250, 38 Pac. 778 (question whether a \*Mooney v. Connecticut River Lum- ison, T. & S. F. R. Co. (1895) 55 Kan. bcr Co. (1891) 154 Mass. 407, 28 N. E. 250, 38 Pac. 778 (question whether a 352 (machine had "run away" several railroad company had notice of the dandays before the accident). To the same gerous condition of a switch is for the jury, where one of the switchmen has Mass. 21. 27 N. E. 675 (machine shown testified that it was out of repair, anto have had a tendency to start auto-other that an engine always made a matically); Atchison, T. & S. F. R. Co. quick turn when it passed the point bev. Holt (1883) 29 Kan. 149 (railroad tween the movable and the stationary other that an engine always made a company held liable for injury caused rails, and another, that the switch had by sudden starting of engine, where it worked hard on the morning of the day when the accident occurred); The Caroand without warning, the jury having lina (1886) 30 Fed. 199 (held by disspecially found want of care in not as- trict judge that, as a hoisting rope had certaining its condition); Knickerbocker broken the day before the accident, the Ice C. v. Finn (1897) 25 C. C. A. 579,51 officers of the ship were chargeable with U. S. App. 256, 80 Fed. 483 (on two sepa-knowledge of its unfitness); Burnside rate occasions shortly before the accive. Novelty Mfg. Co. (1899) 121 Mich. dent, a horse had, viciously and with-115, 79 N. W. 1108 (press had been continuously giving trouble in the same way as that which caused the injury); R. Co. (1891) 46 Minn. 18, 48 N.W. 409 Mulvey v. Rhode Island Locomotive (appliance had given way prior to the ac-Works (1885) 14 R. I. 204 (elevator cident, under the same circumstances as when the plaintiff was injured); Stoher fore, when, according to some of the v. St. Louis, I. M. & S. R. Co. (1887) evidence, the person immediately in 91 Mo. 511, 4 S. W. 389 (1891) 105 Mo. charge of the men using it notified the 192, 16 S. W. 591 (track had several times been overflowed owing to the inadequacy of the culverts); Ousley v. Central R. & Bkg. Co. (1890) 86 (failed in its proper functions twice worn); Mangum v. Bullion, B. & C. failed in its proper functions twice Min. Co. (1897) 15 Utah, 534, 50 Pac. out of three attempts at using it); 834 (elevator cage had been rattling Knickerbocker Ice Co. v. Bernhardt and shaking and was loose in the (1900) 95 Ill. App. 23 (cakes of ice occasionally fell off the runway at an ice Ill. App. 417 (frames of windows had house); Bartley v. Trorlicht (1892) 49 been loosened on other occasions by Mo. App. 214 (elevator did not work same kind of work). Where it was discident, under the same circumstances as chain had broken about six weeks be-Mo. App. 214 (elevator did not work same kind of work). Where it was diswell, and was shown to have various covered on the first day that a pile drivspecific defects); Illinois C. R. Co. v. er was put into operation, that the wire Reardon (1894) 56 Ill. App. 542 (tim-rope supporting the hammer was apt, bers on car had shifted so as to project when slack, to get out of its place under over the end several times before an ac- the drum, it is for the jury to say

The cases illustrating the proposition just enunciated should be carefully distinguished from those in which the knowledge, actual or constructive, of the previous unsatisfactory operation of the instrumentality is established by evidence apart from, and independent of, the unsatisfactory operation itself. Cases of the latter class virtually assert nothing but the doctrine that a master is liable for injuries caused by a defective instrumentality the condition of which was, or ought to have been, known to him (§ 125, ante), and do not involve an inquiry into the evidential significance of a previous accident, as an element which itself tends to establish constructive knowledge.4

charge of the work should not have as- in each instance may affect the weight had been frequently in and about the case. boiler room, the jury is justified in finding that the defendant knew of the extended that the following cases on the ground that that the seam had been calked on different occasions. Ballard v. Hitchcock Mfg. Co. (1893) 71 Hun, 582, 24 N. Y. Supp. 1101, Affirmed without opinion in (1895) 145 N. Y. 619, 40 N. E. 163. In Findlay Brewing Co. v. Bauer (1893) 50 Ohio St. 560, 35 N. E. 55, the court, in holding that evidence as to how an elevator by which an employee operating it, or had simply fallen back, the conditions remaining substantially the same,—tended to prove some vice in its construction that rendered its opsaid: "Inspection itself may indicate

certained that the rope had become rag-of the evidence, but not its admissibil-ged, and a dangerous object to touch ity, as such a limitation would exclude with a mittened hand when liable to be the result of every experiment offered in set in motion without warning. Steen evidence, which would amount to a rev. St. Paul & D. R. Co. (1887) 37 Minn. ductio ad absurdum." In Moffatt v. 310, 34 N. W. 113. Where several with Bateman (1869) L. R. 3 P. C. 115, 22 nesses have testified that they had L. T. N. S. 140, 6 Moore P. C. C. N. S. heard steam escaping from a boiler for 369, the doctrine in the text was asa considerable period before it exploded, sumed to be correct (buggy had been and there is evidence that an employee overturned by runaway horses which had been engaged several times in calk-had bolted on several previous occaing the seam from which the steam essions), but the evidence was held insufcaped, and that the defendant's officers ficient to sustain this theory of the

istence of the defect, and was aware the master was chargeable with notice of the previous accidents: v. Forbes Lithograph Mfg. Co. (1898) 171 Mass. 271, 50 N. E. 543 (seat had tipped up several times previously); Beardsley v. Minneapolis Street R. Co. (1893) 54 Minn. 504, 56 N. W. 176 (jury justified in finding that the defendant was guilty of negligence in causing a car to be used, where it had frequently "bucked" before); Faerber v. was injured behaved on former occa- frequently "bucked" before); Faerber v. sions,—that, at other times, when being T. B. Scott Lumber Co. (1893) 86 operated by other persons, barrels being lifted had fallen and injured those sulted from collapse of slab burner owing to the same cause as on a previous occasion some years before); Leland v. Hearn (1900) 49 App. Div. 111, 63 N. Y. Supp. 204 (error to direct a verdict eration dangerous, and that the employ- for defendant where the injury was er knew, or should have known, the fact, caused by the fall of an elevator which had fallen before, and was known by desome defect in a machine, affecting its fendant to be out of repair); Johnson safety or usefulness; but, as is most us- v. Bellingham Bay Improv. Co. (1896) ually the case, its defective character, 13 Wash. 455, 43 Pac. 370 (master is whatever it may be, is more clearly ob- liable for injuries caused by the giving served in its operation. Experiment is way of a decayed plank in a platform, the final and most conclusive test of its at the very place where it joined a new safety, as well as of its usefulness; and the fact that the carefulness of the party break); Chicago & A. R. Co. v. Shanoperated the machine may be involved non (1867) 43 Ill. 338 (defects pre-

The unsatisfactory operation of an instrumentality because of one specific kind of defect is not evidence that the master should have known of another and distinct defect, with which that unsatisfactory operation had no connection.5

It has been laid down that the general principle stated above is subject to the limitation that proof of a single defective or imperfect operation of machinery or instrumentalities, resulting in injury, will not of itself be sufficient evidence, nor any evidence, that the master had previous knowledge or notice of any defect, imperfection, or insufficiency in such machinery or instrumentalities. But this gen-

determine if it is defective, and of re- part of the cars." pairing it in case it is found to be defective. A mere casual examination by ner (1885) 33 Kan. 666, 7 Pac. 204, the foreman is not a fulfilment of the cited with approval in Missouri, K. & 1049.

a railroad company that cars on passing obvious, something more must be shown

viously reported); Ashley Wire Co. v. over a certain place in its track had a  $M\epsilon rcier$  (1895) 61 Ill. App. 485 (evijumping or jarring motion is not notice dence that an employee of defendant to it of a latent internal seam in a had told its superintendent on two oc-rail at that place, which subsequently casions, shortly before an accident to caused the rail to split and break); plaintiff from the breaking of a crane, Campbell v. Jughardt (1900) 50 App. that he was afraid to work under it, Div. 460, 64 N. Y. Supp. 198 (bearings) and that such employee was discharged of machine known to be worn so that it on the second occasion, held admissible did not work easily; accident caused by to show notice of its unsafe condition, a sudden and unexpected movement); although no particular defect was Bien v. Unger (1900) 64 N. J. L. 596, pointed out). In Gates v. Chicago, M. 46 Atl. 593 (defective action of machine M. W. 907, the court, in holding that the it was of a different kind from that knowledge of a railroad company that which caused the accident); Schulz v. a derrick constructed by it was some Rohe (1896) 149 N. Y. 132, 43 N. E. times left unfastened, so as to swing 420 (employer's knowledge that the opover the track in a manner dangerous eration of a machine is defective, owing to employees, makes it liable for injury to the fact that the piston bends and caused thereby to a trainman, although so sticks in the cylinder, does not it did not know that it was unfastened charge him with liability for another at the time of the accident, and it had defect of which he has no knowledge, at the time of the accident, and it had detect of which he has no knowledge, remained unfastened for a short time consisting of the tilting back of the cylorly, remarked that the negligence for inder of its own accord while the emwhich the defendant was held liable ployee was filling it, and the descent of consisted, not in the precise condition the piston into it). Compare also the of the derrick at the time of the accident, but in its failure to use care to R. Co. (1875) L. R. 10 C. P. 486, 33 keep it fastened after constructive notice of what usually occurred when it 1 C. P. Div. 342, 24 Week. Rep. 907. was not in use. An employer whose atthat a railway company is not under tention is called to a clicking noise the duty—here, as respects a passenger, that a railway company is not under made by a machine used by an em—of making a minute examination of ployee, which would not have been the whole car "because defects have been made if the machine had been in proper discovered in some part of the cars, condition, owes such employee the duty which have no connection with the probof carefully inspecting the machine to able existence of defects in any other

duty. Kaplan v. New York Biscuit Co. T. R. Co. v. Young (1896) 4 Kan. App. (1896) 5 App. Div. 60, 38 N. Y. Supp. 219, 45 Pac. 963. "In order to charge a master with negligence in permitting \*James v. Northern P. R. Co. (1891) the use by a minor servant of a ma-46 Minn. 168, 48 N. W. 783 (notice to chine, the ordinary danger of which is eralization is, plainly, altogether too sweeping. The circumstances of the single accident which is shown to have occurred may be such as to certainly indicate that the abnormal conditions would have been discovered if the master had discharged his duty of inspection with reasonable care. Compare § 198, post.

138. Previous unsatisfactory operation of other instrumentalities of the same kind .- One case seems to embody the conception that the fact that appliances of the same sort as the one in question had proved defective never tends to charge the master with constructive notice of its defective properties.1 But it seems impossible to argue with any show of reason that evidence of this sort is to be wholly rejected, and its competency has been more than once recognized. Manifestly, it is a reasonable inference that, where several out of a number of appliances modeled upon the same pattern or a closely similar pattern fail to perform their functions properly, the master is put upon inquiry as to the suitability of all the others.2

139. Province of court and jury, where the master's constructive knowledge is in question.—If the plaintiff introduces any evidence which fairly tends to show that the master had either actual or constructive knowledge of the abnormal conditions which caused the injury, the case must be submitted to the jury. In the absence of such

same work and at the same time does that this is not a defect of manufacnot show negligence in the selection of ture which would necessarily or prob-

not show negligence in the selection of the hammer which caused the injury).

2 Slattery v. Walker & P. Mfg. Co. (1901) 179 Mass. 307, 60 N. E. 782 assumed to be correct in all the cases (bursting of a check valve of certain dimensions under a certain pressure dimensions under a certain pressure Mellors v. Shaw (1861) 1 Best & S. charges master with notice that it is not safe to put in another valve of that N. S. 845; Cumberland & P. R. Co. v. size); Painton v. Northern C. R. Co. State use of Moran (1875) 44 Md. 283; (1880) 83 N. Y. 7 (chains like the one Ledwidge v. Hathaway (1898) 170 which gave way had frequently broken). It cannot be charged, as a matter of law, that the purchaser of a railroad, sten (1894) 57 N. J. L. 402, 31 Atl. which has notice that one abutment of a bridge is so poorly built as to require by (1897) 60 N. J. L. 306, 37 Atl. 619;

than the fact that the machine, by its it to be partially taken down to repair unusual and unaccountable behavior it, has the right to assume that the othupon a single occasion, injured the er abutment, constructed at the same plaintiff in a way that was not obvious. Something in the nature of scienter from defects. Bogart v. Delaware, L. must be proved, from which it may be inferred that the master, by the exercise of reasonable caution, could have apprehended such an occurrence." Carring-hended such an occurrence occurrence." Carring-hended such an occurrence occurrence. 47 Atl. 564. of the defective quality of the lot to 

Georgia R. & Bkg. Co. v. Nelms which it belongs. But the rationale of 
(1889) 83 Ga. 70, 9 S. E. 1049 (evithe ruling was that the weakness redence that other hammers broke at the sulted from an imperfect welding, and

evidence the proper course is for the trial judge to declare, as a matter of law, that the action cannot be maintained.2 Otherwise, a verdict for the plaintiff is subject to reversal by a court of review.3 Such

<sup>2</sup> Plaintiff nonsuited. Clough v. Hoffman (1890) 132 Pa. 626, 19 Atl. 299; Melchert v. Robert Smith India Pale Ale Brewing Co. (1891) 140 Pa. 448, 21 Atl. 755; Simpson v. Pittsburgh Locomotive Works (1890) 139 Pa. 245, 21 Atl. 386; Corcoran v. Wanamaker may imagine several causes,—(1) from (1898) 185 Pa. 496, 39 Atl. 1108; Fenderson v. Atlantic City R. Co. (1894) 56 N. J. L. 708, 31 Atl. 767; Hobbs v. Stauer (1885) 62 Wis. 108, 22 N. W. 153.

Complaint dismissed. Painton v. Northern C. R. Co. (1880) 83 N. Y. 7; Warner v. Erie R. Co. (1868) 39 N. Y. 468; Martin v. Cook (1891) 37 N. Y. S. R. 733, 14 N. Y. Supp. 329; Schorn-Sing v. Knickerbocker Ice Co. (1891) 38 N. Y. S. R. 27, 13 N. Y. Supp. 434; Nelson v. Dubois (1882) 11 Daly, 127.

Demurrer to evidence sustained. Carruthers v. Chicago, R. I. & P. R. Co. (1895) 55 Kan. 600, 40 Pac. 915; Burnes v. Kansas City, Ft. S. & M. R. Co. (1895) 129 Mo. 41, 31 S. W. 347; Humphreys v. Newport News & M. V. Co. (1889) 33 W. Va. 135, 10 S. E. 39.

Verdict directed for defendant. Mel-chert v. Robert Smith India Pale Ale 755; Murphy v. Great Northern R. Co. (1897) 68 Minn. 526, 71 N. W. 662.

<sup>8</sup> Feltham v. England (1866) L. R. 2 v. Eidlitz (1897) 19 App. Div. 256, 46 and other employees considered the N. Y. Supp. 184; Essex County Electric place safe. In Atchison, T. & S. F. R. Co. v. Kelly (1894) 57 N. J. L. 100, Co. v. Swarts (1897) 58 Kan. 235, 48

Harter v. Atchison, T. & S. F. R. Co. 29 Atl. 427; St. Louis, I. M. & S. R. (1895) 55 Kan. 250, 38 Pac. 778; Covey Co. v. Gaines (1885) 46 Ark. 555; De v. Hamibal & St. J. R. Co. (1885) 86 Graff v. New York C. & H. R. R. Co. Mo. 635; Coontz v. Missouri P. R. Co. (1879) 76 N. Y. 125. In the last case, (1894) 121 Mo. 652, 26 S. W. 661. A where a brake chain gave way, the finding that defendant knew of the prescourt said: "Upon the next proposience of a solution of potash in a waste tion, that the exercise of ordinary care pipe from which he directed plaintiff would have discovered the defect, and to remove an obstruction is sustained that the defendant neglected to evergise before and at the time of the accident failed to satisfy me that the evidence to plaintiff, caused by coming in contact was sufficient to warrant a verdict. In with such solution, and had been personally concerned in directing the reliable to satisfy me that the evidence to plaintiff, caused by coming in contact was sufficient to warrant a verdict. In with such solution, and had been personally concerned in directing the reliable to satisfy me that the evidence was sufficient to warrant a verdict. In the first place, assuming a defect, there is no evidence what it was, or the nature of the other warrant a verdict. moval of the obstruction, even though ture of it. The car was in a train go-he denies having had any knowledge of ing west, and it does not appear that its presence. Dunn v. Connell (1897) anyone ever saw the chain afterwards, 21 Misc. 295, 47 N. Y. Supp. 185, Afexcept the person who took the plainfirming 20 Misc. 727, 46 N. Y. Supp. tiff's place after the accident, and he only looked at it with a lantern at a station, and saw that it was broken. There is some evidence, although slight, that the car did not belong to the defendant. There was an entire absence of evidence as to the nature and character of the defect, or the cause of the breaking. an original defect in the iron, or (2) in its manufacture, or (3) by reason of weakness and ordinary decay by use, or (4) by getting misplaced on the trip on which the accident occurred. There is no evidence that ordinary care and observation would have discovered all of these defects if they had existed, and they must have so found, as they could not have singled out a defect which ordinary care would have discovered, be-cause the particular defect was entirely unknown." Evidence which merely shows that one of the defendants superintended the work of putting into place a steam pipe from which the plaintiff's injury resulted is insufficient to support a finding that he knew the condition in which the pipe was left. Hobbs v. Stauer (1885) 62 Wis. 108, 22 N. W. 153. In Cherokee & P. Coal & Min. Co. v. Britton (1896) 3 Kan. App. 292, 45 Brewing Co. (1891) 140 Pa. 448, 21 Atl. Pac. 100, a general verdict for plaintiff, injured by the fall of the roof of a tunnel, was held to be inconsistent with a special finding (1) that there was no evi-Q. B. 33, 36 L. J. Q. B. N. S. 14, 15 dence to show that the rock was known Week. Rep. 151, 7 Best & S. 676; White to be loose, and (2) that the miners

a verdict will also be reversed where the trial judge has given instructions which are inconsistent with the principle that proof of the master's knowledge, actual or constructive, is an essential prerequisite to recovery,4 or has refused instructions embodying that principle.5

## C. What degree of foresight is imputed to a master.

140. General principles.—The typical prudent man, whose conduct furnishes the standard to which a master is bound to conform, is supposed to exercise a proper degree of care, not merely in observing existing conditions, but also in forecasting future occurrences. Under one of its aspects, therefore, the question whether he has been guilty of a breach of duty in respect to the quality of the instrumentalities of his business may be appropriately discussed with reference to the fact that negligence is a wrong the substance of which is a failure to act with due foresight.1 A consideration of the subject from this

\*As, where they are not explicitly inhowever, the aspect of the evidence on formed that such knowledge must be eshwhich stress was laid was that the servtablished. Chicago & A. R. Co. v. Platt ant had assumed the risk, and could (1878) 89 Ill. 141; Lincoln Street R. not call upon the master to make alter-(1878) 89 111. 141; Lincoin street K. not call upon the master to make alter-Co. v. Cox (1896) 48 Neb. 807, 67 N. ations.

W. 740; East St. Louis Pkg. & Provision Co. v. Hightower (1879) 92 III. (1894) 11 C. C. A. 260, 24 U. S. App. 139; Tolcdo, P. & W. R. Co. v. Conroy 103, 63 Fed. 407; Warner v. Erie R. Co. (1871) 61 III. 162; Fordyce v. Yarborova (1868) 39 N. Y. 468.

rough (1892) 1 Tex. Civ. App. 260, 21 See Pollock on Torts, p. 36. That rough (1892) 1 Tex. Civ. App. 260, 21

See Pollock on Torts, p. 36. That
S. W. 421 (error to instruct a jury foresight is one of the elements of adethat, "if the defect in the car was latent quate care is also noticed in Gibson v.

Pac. 953, it was contended that the evi- and not known to plaintiff, and could dence failed to establish negligence upon not be known by the exercise of ordidence failed to establish negligence upon not be known by the exercise of ordithe part of the railroad company, and nary care, then the duty was on the masalso that, by two special findings of the ter to acquaint him with the defect, if jury, it was acquitted of negligence. any existed"). A fortioria verdict for These findings are as follows: Q. Did the servant cannot stand where an init not (referring to the hole), by its struction is given to the effect that a appearance, indicate that it had been master impliedly warrants the fitness in that condition for a considerable of his appliances. Columbus, C. & I. C. time? A. We cannot determine how determine how P. Co. v. Troesch (1873) 68 Ill. 545, 18 long. Q. Did defendant have any knowledge of defect in the track, or hole, if any Where the negligence alleged is that dethere was, at the time of the accident? Mendant company allowed a ditch under A. We do not know. The court, how-the track, 6 inches square, to remain un-A. We do not know. The court, how- the track, 6 inches square, to remain unever, declared that these answers, uncovered, and the testimony is conflicted former decisions construing others ing whether it was more dangerous than of a like kind, were to be taken as neg- a covered ditch would have been, it is ativing the existence of the facts neces-error to instruct the jury that if they sary to charge the company with liabil- found the ditch to be more dangerous ity, and were therefore equal in effect than if covered the defendant was guil-to an affirmative finding that the com- ty of negligence, even though he had pany had no knowledge of the hole in made due inquiry as to the safest kind its track, and also that such hole had of ditch, and adopted the uncovered one not been there for such length of time because he believed it to be safer. De as to charge the company with negligence in allowing the same to remain. Affirmed in (1892) 88 N. Y. 264. Here,

point of view leads us to two principles, each of which possesses a special applicability of its own in the solution of the problems suggested by certain phases of the evidence presented in cases of this class.

On the one hand, the master is charged with knowledge that, if he allows the instrumentalities of his business to fall below a certain standard of efficiency, the servants who use or are brought into proximity with them in the course of their employment will probably be injured. He does not conduct himself as a prudent man, therefore, if, in carrying on his business, he fails to take due notice of the fact that machinery and other inanimate appliances, after the lapse of a certain period of time, longer or shorter according to the nature of the material, will certainly deteriorate in quality, as the normal result of wear and tear incident to their use; and that animate appliances undergo a similar deterioration in a sufficient number of cases to render it his duty to conduct his business with a view to the probability that danger will occasionally arise from this cause. The obligations which his assumed possession of this information entails, as regards the maintenance and inspection of his instrumentalities, are dealt with in chapters IX., ante, and XI., post.

On the other hand, the conception may be entertained that the master's liability is dependent upon whether the event which caused the injury was or was not one which a prudent man would have anticipated when he furnished the instrumentality or made the arrangements which he is alleged to be negligent in furnishing or making. The question thus presented is, it should be observed, essentially different from another, in the decision of which the assumed capacity of the defendant to forecast the future is the criterion of his responsibility,-the question, namely, whether the necessary juridical connection can be established between the thing done and the hurt suffered. In the one case, the test of anticipation is applied for the preliminary purpose of ascertaining whether any negligence is imputable to the defendant.2

Pacific R. Co. (1870) 46 Mo. 163, 2 Am. rience." Hope v. Fall Brook Coal Co. Rep. 49. "An essential element of neg- (1896) 3 App. Div. 70, 38 N. Y. Supp. ligence is a knowledge of facts which 1040, citing McNish v. Peekskill (1895) render foresight possible, and the circumstances necessary to be known bethe point that "where there is no knowlfore the liability for the consequence of edge of facts which would lead to an apfore the liability for the consequence of edge of facts which would lead to an apan act or omission will be imposed must prehension of danger, there can be no be such as would lead a prudent man to imputation of foresight or blameworth-apprehend danger. All are bound to iness, and these two ingredients are necforesee what experience will teach them essary to constitute negligence." is likely to follow from the existence

<sup>2</sup> The logical connection is apparent
of a given state of facts. In a given from the language used in a ruling that,
case, action must be dictated by expewhere a servant is injured by such an

The unexpected character of an occurrence is a feature which serves to differentiate an accident from an event which implies a want of care.3

In the other case, the law makes use of this test as the appropriate means of determining whether, supposing the defendant to have been negligent, his negligence was the efficient cause of the injury. The latter predicament, so far as it is material in the present treatise, will be discussed in chapter XLII., post. The former now claims our attention.

The results of applying the test of imputed anticipation will be brought out most clearly by stating them both from a negative and a positive standpoint.

141. Liability imputed because accident should have been anticipated. Operation of natural laws.—It is the duty of the master having control of the times, places, and conditions under which the servant is required to labor, to guard against probable danger in all cases in which that may be done by the exercise of reasonable caution. 1 He is, therefore, negligent, if, in the ordering of his business and the selection of his plant, he fails to provide for contingencies which are likely, or not unlikely, to occur.2 He is bound to take into account the limits of the mental and physical capacity of his employees.3 This

occurrence as the caving in of a ditch, ployees and passengers are killed,—that the question for the jury is not whether is an unusual and unexpected event while the servant was in the ditch. such a cause. It is not accident, but it Leonard v. Collins (1877) 70 N. Y. 90. is negligence."

See also Kelley v. Forty-Second Street

M. Govern v. Central Vermont R.
M. & St. N. Ave. R. Co. (1890) 58 Hun, Co. (1890) 123 N. Y. 280, 25 N. E. 373. 93, 11 N. Y. Supp. 344, where it was remarked, in regard to the place of work, ground that the injury resulted from a cautions.

<sup>3</sup> See Crutchfield v. Richmona a D. R. Co. (1877) 76 N. C. 320, where the er care on the part of the master. 1 and court remarked: "An accident is 'an zar v. Tilly Foster Iron Min. Co. event from an unknown cause,' or 'an (1885) 99 N. Y. 368, 2 N. E. 24.

<sup>3</sup> The danger of having the cage of a constant of the cage of th known cause; 'chance; casualty.' As, freight elevator so hung that when it if a railroad bed be in good order, and has reached the level of the highest the engine and cars be in good order, floor of the building its top is within and the engineer and other attendants an inch of the beam from which the cabe skilful and careful, and yet a rail ble is suspended is obvious, and the em-

the employer omitted to do something from a known cause, an accident. But which would have prevented the acci- if the track be out of order, and the endent, but whether he exercised ordi- gine worn and unmanageable, and on nary care and prudence in conducting account thereof there be the like result the excavation, in view of the probable as above stated on the good road, that consequences which would result from is not an unusual and unexpected event, the falling of the overhanging earth but a usual and expected event from

<sup>2</sup> A motion for a nonsuit on the that under the circumstances there was risk assumed by the servant is properly no cause for apprehension, and theredenied when the evidence is conflict-fore no negligence in not taking preing as to whether the event which caused ing as to whether the event which caused the injury could have been foreseen and guarded against by the exercise of proper care on the part of the master. Pant-

breaks, the train is crushed, and the em- ployer is, under such circumstances,

obligation, in some instances, can only be discharged adequately by properly instructing the servant. See chapter xvi., post. He is also deemed to fall short of the required standard of care if he leaves fixed objects in such a position that, although not ordinarily dangerous, some particular class of employees would be injured if a certain conjunction of circumstances, reasonably to be anticipated in the course of their employment, should intervene. 4 So, also, he must take into account the properties of such substances as he employs for the purposes of his business, and the operation of familiar physical laws upon these substances.

Under this head he is chargeable with knowledge of the following facts: That all instrumentalities of the organic class deteriorate, more or less rapidly, while they are being used; 5 that certain materials will

accurately the height to which the cage reenced men to do it. In order to fix the has ascended will sooner or later make liability of the master, it is not necessa miscalculation and allow it to strike sary that he should know that injury the beam, and, as a probable consequence, break the cable. Stringham v. will inevitably follow, for that would exhibit express malice or intent to instruction. Stewart (1885) 100 N. Y. 516, 3 N. E. 575, Reversing (1882) 27 Hun, 562. It it would probably occur, for that would is a catastrophe to be expected, that brakemen, called, as they often are, to their brakes on the top of the train on dark and stormy nights, when they have no means of determining exactly the no means of determining exactly the ing repairs on the roof of a passenger portion of the road over which the train in a standing posture. Louisville, N. der the wire while such repairs are being made, even though the position of Ind. 378, 17 N. E. 584 (this reasonable the wire may not be negligence as reconsideration is, however, not treated by all courts as a controlling element in this class of cases. See § 71, ante). 377, 30 Atl. 980. A master is liable for In Ryan v. Los Angeles Ice & Cold Storage Co. (1896) 112 Cal. 244, 32 L. R. which he was not hired to perform, and be expected. Selleck v. Langdon in which he had had no experience. The (1889) 55 Hun, 19, 8 N. Y. Supp. 573. defendant contended that it was not lia
5 Negligence of the master is shown nuts while the pressure was on, though some of the links being worn a quarit may be conceded that the preponder-ter off; and that the master's superinance of the evidence was that it could tendent had been notified of its imperbe done by skilled men with reasonable fect and unsafe condition. Honifius v.

bound to foresee that an engineer oper- safety; but there was little conflict in ating the hoisting machinery from a po- the evidence tending to show that it sition in which he is unable to observe was dangerous for unskilled or inexpeaccurately the height to which the cage rienced men to do it. In order to fix the has ascended will sooner or later make liability of the master, it is not neces-

age Co. (1896) 112 Cal. 244, 32 L. R. an elevated footway which he used in A. 524, 44 Pac. 471, the plaintiff had his work, the support of which had been been injured by the explosion of a gas forced out of place by a passing wagon, generator while he was tightening the when it was so constructed that such nuts of the bolt in it, a kind of work accidents were reasonably and fairly to which he was not hired to perform, and be expected. Selleck v. Langdon

ble unless such result should reasonably in respect to the use of a chain, where have been foreseen, but the court said: the evidence is that the chain had been "There was evidence tending to show used for eight years; that the life of that it was unsafe for a skilled engisuch a chain was four or five years; that neer or machinist to tighten up these it had become weakened by long usage,

not support more than a certain weight; that ropes and cables will break if subjected to a certain tensional strain;7 that a certain kind of timber is not suitable for use in the manufacture of some particular tool; 8 that a certain kind of coal is unfit for use in a steam boiler; 9 that timber which is constantly kept in a damp condition will be apt to grow rotten; 10 that certain kinds of strains crystallize iron; 11 that structures will be endangered if subjected to vibratory movements by the operation of heavy machinery; 12 that banks of earth disinte-

Chambersburg Engineering Co. (1900) of shed gave way under an excessive 196 Pa. 47, 46 Atl. 259. The jerkings weight). of a bucket used for hoisting coal may ity or nonliability of the defendants de-cinnati, I. St. L. & C. R. Co. v. Roesch pended upon whether cables like the one (1891) 126 Ind. 445, 26 N. E. 171. in question would last for a limited or an unlimited time; that, if the former should be found true, and the defendants used them beyond the limit, they wood used for the head of a maul in were absolutely, and without more, liacombination with a hard wood handle). ble; and that, if the alternative proposition were correct, then they were not label. The court said that the jury 513 (condition of coal so inferior that should have been instructed that, if they it causes flames to burst through the found that this life was limited, and furnace door is not a latent defect that ercise of reasonable care could have gence). known, this fact, and continued to use \_\_\_\_\_ 10 See known, this fact, and continued to use them for a greater length of time than Thomp. & C. 1, 3 Hun, 553, where the was safe, then they should find for supports of a wash tub gave way (judgplaintiff, if they, at the same time, ment Reversed in [1876] 64 N. Y. 5, to inspect the various parts of his plant servant of the plaintiff). from time to time will be discussed in the next chapter.

"Moynihan v. Hills Co. (1888) 146 Mass. 586, 16 N. E. 574.

v. Harlow (1892) 46 N. Y. S. R. 872, 19 a pile driver upon it); Ryan v. Fow-N. Y. Supp. 705 (floor gave way when ler (1862) 24 N. Y. 410, 82 Am. Dec. piled with materials of more than twice 315 (factory owner required to take nothe weight necessary to bring the tice of the effect which the vibrations strain up to a breaking point); Flynn communicated by a water wheel to a v. Union Bridge Co. (1890) 42 Mo. App. wall near which it is running may have strain); Johnson v. First Nat. Bank privy built out from the wall). (1891) 79 Wis. 414, 48 N. W. 712 (roof

<sup>7</sup>A railroad company is liable for inbe so frequent as to charge the master juries sustained by an employee caused with knowledge that, after a given period, the chain which supports it has beplow was drawn over cars to unload come materially weakened. McClain v. gravel therefrom while the train was Henderson (1898) 187 Pa. 283, 40 Atl. standing on a curve, where additional 985. In Bruce v. Beall (1897) 99 Tenn. appliances should have been employed 303, 41 S. W. 445, it was held to be erron account of the unusual strain on the roncous to tell the jury that the liabil-cable when used in that position. Cin-

that the defendants knew, or by the ex- cannot be discovered by ordinary dili-

found that the plaintiff was in the ex- 21 Am. Rep. 573, but only on the ground ercise of ordinary care. The bearing of that the man charged with the duty of this doctrine on the master's obligation looking after the supports was a fellow

<sup>6</sup> Twomey v. Swift (1895) 163 Mass.

<sup>12</sup> Bowen v. Chicago, B. & K. C. R. Co. 273, 39 N. E. 1018 (hemlock boards which readily become brittle in cold way company chargeable with knowlweather used for scaffold in winter; edge of the danger to a bridge caused verdict for plaintiff sustained); Flynn by the vibrations incident to operating

grate if exposed alternately to a freezing and a thawing temperature;13 that structures must be so planned as to be capable of withstanding the pressure of high winds;14 and also such shocks as they may be exposed to from the ordinary operations of the business;15 that conditions which produce a jolting or other unexpected movement of a vehicle are apt to be dangerous in various ways to persons on or near it;16 that climatic influences will occasionally produce certain conditions which are apt to endanger the safety of instrumentalities which are reasonably secure in normal weather; 17 that the putrefaction of blood and flesh generate bacteria which are dangerous when brought into contact with the eye; 18 that the fumes given off by various substances used in industrial processes are poisonous to persons

<sup>13</sup> Holden v. Fitchburg R. Co. (1880) life. Beardsley v. Minneapolis Street 129 Mass. 268, 37 Am. Rep. 343; De- R. Co. (1893) 54 Minn. 504, 56 N. W.

Whether it so failed was a question for the jury."

<sup>15</sup> Smizel v. Odanah Iron Co. (1898)
116 Mich. 149, 74 N. W. 488 (plank of platform in mine so loosely fastened that it was moved by a blast).

<sup>10</sup> A street railway company is bound to know that, with a low dasher in front, the almost inevitable result of bucking would be to suddenly hurl the motoneer upon the ground in front of the car, and thus to greatly imperil his 39.

129 Mass. 268, 37 Am. Rep. 343; Deucesee v. Meramee Iron Min. Co. (1893)
54 Min. 504, 56 N. W.
176. A jury may properly find an em54 Mo. App. 476, Affirmed (1895)
128
Mo. 423, 31 S. W. 110.

14 If a master erects a novel kind of
structure, which will be peculiarly exposed to wind pressure, it is his duty
to supplement the theoretical needs of
safety by a liberal margin of safeguards against mistakes or underestimates. Hesketh v. New York C. & H.
R. R. Co. (1899)
37 App. Div. 78, 55
N. Y. Supp. 898 (where a signal house
to exist on its road, in which water acspanning a railway was blown down). cumulated which flooded the track and

N. Y. Supp. 898 (where a signal house to exist on its road, in which water acspanning a railway was blown down). cumulated which flooded the track and The contention that, when the requisite froze. Balhoff v. Michigan C. R. Co. amount of care was known by the com- (1895) 106 Mich. 606, 65 N. W. 592. pany to be unknown, the company A railway company which constructs a used all that was requisite, was rejectline skirting a mountain range and ed. "It may be," said the court, "that crossing numerous gulches and ravines the company used all that it knew to is bound to know that sand, gravel, and be requisite. But the company knew other materials will be washed down that it did not know what was actually these channels during the rainy season that it did not know what was actually these channels during the rainy season, requisite, and hence it knew that, if it and will probably accumulate on the only used all that it knew to be requi- upper side of the track to such an exsite, it was liable to fall short in respect to the unknown quantity. Hence, provided for the purpose of allowing the spect to the unknown quantity. Hence, it was its duty to do more than its actual knowledge of what was requisite Union P. R. Co. v. O'Brien (1892) 1 C. suggested, and to make reasonable provision against the unknown. If it did not do this, it failed in reasonable care. L. ed. 766, 16 Sup. Ct. Rep. 618. A Whether it so failed was a question for the jury."

Smizel v. Odanah Iron Co. (1898)

16 Mich. 149, 74 N. W. 488 (plank of the control of the control of the control of the control of the purpose of allowing the purpose of allowi against them by a storm greater than usual, but no greater than a person acquainted with the climatic conditions of the country might have expected. Carney v. Caraquet R. Co. (1890) 29 N. B. 425.

18 Hysell v. Swift (1899) 78 Mo. App.

who inhale them; 19 that fire is a casualty peculiarly incident to, and reasonably to be anticipated in the prosecution of, some particular kinds of business; 20 that the contact of water with molten metal, or other substance which is heated to a sufficiently high temperature, will generate steam suddenly, and so cause an explosion;21 that certain inflammable substances will ignite under certain circumstances;22 that special precautions must be taken where the business involves the

Co. (1892) 147 Pa. 475, 23 Atl. 772 bious point, if the doctrine stated at the (plaintiff here was a common laborer beginning of this section is to be adoptwho was temporarily taken from out- ed,—it was surely a question for the side work and assured by the superin-jury, whether a person of the plaintiff's tendent that the fumes would not hurt age and presumable education had the him). Whether a malting company was same means of ascertaining the danger negligent in permitting the fumes of as the master. The knowledge here assulphur and salt to escape from the cribed to him is, we suspect, not poskiln room in its malting house to ansessed by a large number of persons other floor, where they overcame an employee working there, so that he fell cated than a workman in a factory usuated into a machine and was injured, is a question for the jury. Deisenrieter v. Kraus-Merkel Malting Co. (1896) 92
Wis. 164, 66 N. W. 112. In O'Keefe v. National Folding Box & Paper Co. (1886) 60 Mich. 501, 27 N. W. 662; (1895) 66 Conn. 38, 33 Atl. 587, the court, while conceding that the defendant was chargeable with knowledge and was chargeable with knowledge 294; McGowan v. La Plata Min. & Smelting Co. (1882) 9 Fed. 861; Westtion of steam, held, on demurrer, that poisons are volatilized by the action of steam, held, on demurrer, that poisons are volatilized by the action of steam, held, on demurrer, that poisons are volatilized by the action of steam, held, on demurrer, that plaintiff could not recover for injuries received in steaming the colored paper in guestion, the reasons assigned being which the servant of a manufacturer of other floor, where they overcame an em- much older than he was, and better edureceived in steaming the colored paper 2. The fact that turpentine, into in question, the reasons assigned being which the servant of a manufacturer of that there was an averment that it household utensils is required to plunge wore the appearance of being poisoned, or was of a kind in the manufacture of has never caught fire will not relieve which poison was commonly used; that, the master from liability, as the danger of imition is one which should have so far as the complaint showed, the ger of ignition is one which should have servant's means of determining whether been anticipated by a person having the the paper was poisoned was as good as technical knowledge which the manufacthe defendant's; and that, if this were turer must have possessed. Latorra v. the defendant's; and that, if this were turer must have possessed. Latorra v. not so, the complaint should have stated the difference between the positions of the parties in this regard. Considering that the plaintiff here was a youth of only nineteen years of age, this decision seems to be an unwarrantably strict application of the rules of technical pleading. Even assuming that it was excussible for the master to be ignorant of turns the master to be ignorant of turns turns thave possessed. Latorra v. Central Stamping Co. (1896) 9 App. Div. 145, 41 N. Y. Supp. 99. A master is liable for the death of a servant, caused by an explosion of escaping gas, where the place is unsafe and the event absolutely certain on account of the absolutely cer able for the master to be ignorant of

19 Wagner v. H. W. Jayne Chemical the properties of the paper,—a very du-

production or use of things of the imminently dangerous class, such as an explosive;23 or a current of electricity.24

For injuries caused by his failure to foresee the results of the operation of the natural laws which he is presumed to comprehend the master is liable, even though such results may be of an unusual character.<sup>25</sup> Compare case cited in notes 17 and 22, supra, and § 146, post.

dynamite magazine, the court said: to have known that in placing the magazine where it was placed he was exposthe common idea that dynamite could not be exploded but by the ordinary said, this ignorance, if ignorance it was, will not excuse the company, for there was a duty resting upon it to know, as far as it was possible to know, the character of the material which it placed in the hands of its agents."

<sup>24</sup> Myhan v. Louisiana Electric Light liss Steam Engine Co. (1899) 21 R. I. track).

<sup>28</sup> Bertha Zinc Co. v. Martin (1895) 386, 45 L. R. A. 267, 43 Atl. 874, the 93 Va. 791, 22 S. E. 869; Smith v. Oxcourt stated the question to be anford Iron (o. (1880) 42 N. J. L. 467, swered, as follows: "Was the defendance of dynamite, and the constant daned the influx to its premises of a curve ger of its explosion, either through heat rent of electricity sufficiently powerful or collision, is a continuing admonition to dangerously charge the metallic porto an employer who uses it to take tions of its crane, and did it take reaevery precaution to guard against ex-sonable precautions for the protection plosions. Mather v. Rillston (1895) of its servants employed in the hand-156 U. S. 391, 39 L. ed. 464, 15 Sup. ling of the crane?" and proceeded thus: Ct. Rep. 464. In Tissue v. Baltimore "The accidental crossing or contact of & O. R. Co. (1886) 112 Pa. 91, 56 Am. wires, caused by their sagging or break-Rep. 310, 3 Atl. 667, where the plaining, or by high winds and other causes, tiff was injured by the explosion of a and the consequent charging of a wire carrying a light current with a danger-"Ought the company's superintendent ous current from a more heavily charged wire is, in our opinion, a sufficiently frequent occurrence to have suging the men engaged in operating the gested to the defendant the liability to road, as well as others, to a danger to accident from that cause, and to have which they ought not to have been ex-required it to take precautions against posed? The question is not whether he injury to its employees thereby. The did have knowledge of the peculiar testimony shows that light shocks had properties of the material which he was been received from time to time by the intrusted to handle, for his ignorance men from the lifting-chain, and the dein this particular would be no excuse fendant had supplied rubber gloves to for the company, but whether the agent be used by the pourers on that account. thus intrusted ought to have been one These shocks were notice to the defendwho knew that dynamite was, from its ant of the leakage of electricity from nature, liable to accidental explosions the motor to the chain, and were also such as could not be ordinarily foreseen notice that, if, from any cause, a suffior provided against. We would, in- cient current of electricity was brought deed, be unwilling to assume that either to the motor, the leakage might be suf-Yardley or Armstrong knew that he ficient, not only to charge the lifting was subjecting these laboring men to a chain, but also the hauling chain or danger so frightful. They may, like other metallic portions of the crane, unthe men themselves, have entertained less properly insulated, with a dangerous current."

<sup>25</sup> Scagel v. Chicago, M. & St. P. R. method of percussion. But, as we have Co. (1891) 83 Iowa, 380, 49 N. W. 990 (railroad company liable to an employee killed through its negligence in failing to guard against the danger of ice being forced upon its track at a point where the stream has several times risen to the top of the tracks in floods, and where the track has once & P. Co. (1889) 41 La. Ann. 964, 7 L. been washed away, although no ice has R. A. 172, 6 So. 799. In Moran v. Corpreviously been washed upon the

142. Liability denied because accident could not have been anticipated.— The negative form of the doctrine under discussion may be stated in its most general form as follows: "A person is not . . . answerable at law for a failure to avert or avoid peril that could not have been foreseen by one in like circumstances, and in the exercise of such care as would be characteristic of a prudent person so situated." In other words, it is not negligence to fail to provide against an accident of such a nature that nobody could have foreseen it, and that no prudence could have anticipated the need of guarding against it.2 After an accident has occurred it may be easy to see what would have prevented it; but that, of itself, does not prove nor tend to prove that reasonable or ordinary care would have anticipated and provided against it.3 This rule, like the one stated in § 126, ante, is sometimes rather illogically associated with another which is of much wider scope, viz., that a master does not insure his servant's safety.4

<sup>1</sup> Turner v. Goldsboro Lumber Co. care and caution on the part of the em-(1896) 119 N. C. 387, 26 S. E. 23. ployer would have disclosed to be dan-<sup>2</sup> Kern v. De Castro & D. Sugar Ref. gerous, and that should have been Co. (1890) 125 N. Y. 50, 25 N. E. 1071. guarded against as dangerous. Morris Employers are not "liable for accidents v. Gleason (1877) 1 III. App. 510. occurring by which injury ensues, when skill and experience are not able to foresee and avoid them." Toledo, P. & W. R. Co. v. Conroy (1873) 68 Ill. 560. A railroad company "is not required to provide against all such unforeseen accidents or misfortunes as could not be caused; and it was reasoned that if the averted by the utmost diligence in the plank had been nailed to the scantlings, management of the road." Louisville it would not have worked off. The & N. R. Co. v. Filbern (1869) 6 Bush, court, however, said: "There is a plain 574, 99 Am. Dec. 690; to the same effect distinction between the suggestion of a see Sjogren v. Hall (1884) 53 Mich. possible precaution by which an injury 274, 18 N. W. 812; Richards v. Rough might probably have been avoided, and (1884) 53 Mich. 212, 18 N. W. 785; the adducing of evidence which shows that for v. Herman (1896) 66 Ill. App. 481; mishap occurs where the wisdom which Del Sejnore v. Hallinan (1897) 153 N. comes after the event cannot suggest Y. 274, 47 N. E. 308; Hoskins v. Stewsome expedient by which, through the art (1890) 57 Hun, 380, 10 N. Y. Supp. exercise of a more abundant caution, the 833; Easton v. Houston & T. C. R. Co. accident might have been prevented." (1889) 39 Fed. 65. It is error to charge a jury that a master who might ber (1856) 5 Ohio St. 541, 67 Am. Dechave known, by the use of ordinary 312, it was said of a hazardous employ-care and diligence, that a tool furnished ment that the employer does not insure care and diligence, that a tool furnished his servant for use was defective is liable for the injury resulting from its use, "irrespective of any probability of harm or danger in using it." Little Rock & Ft. S. R. Co. v. Duffey (1880) at there may be defects, and these may have been known, and yet they may have been such as no amount of the that the employer does not insure against accident, or those unforeseen perils which due and proper care and diligence cannot provide against. Injuries from accidents which the utmost stretch of human skill and foresight cannot provide against are incident to all situations and conditions in life. So, in Cherokee & P. Coal & Min. Co. may have been such as no amount of v. Britton (1896) 3 Kan. App. 292, 45

proyer would have disclosed to be dangerous, and that should have been guarded against as dangerous. Morris v. Gleason (1877) 1 Ill. App. 510.

<sup>3</sup> Consolidated Coal Co. v. Scheller (1892) 42 Ill. App. 619. In Nolan v. Shickle (1877) 3 Mo. App. 300, the theory of plaintiff was that a plank in a carffold slid or worked off from its supposed of the s scaffold slid or worked off from its supports, and that the injury was thus Trinity County Lumber Co. v. Denham the injury was caused by negligence of (1892) 85 Tex. 56, 19 S. W. 1012; Huf- the defendants. Probably, scarcely a mishap occurs where the wisdom which

<sup>4</sup> In Mad River & L. E. R. Co. v. Bar-

The cases in which excusable nonanticipation of the event which caused the accident has been inferred, as a matter of law, may be classified under several different heads, indicative of the special element of improbability suggested by the facts in evidence.

The conception of an excusable nonanticipation of the event which ultimately caused the injury has been relied on, as a ground for denying the master's liability, in several cases where he had no knowledge. actual or constructive, of the conditions which created the abnormal perils.<sup>5</sup> In a logical point of view, this mode of dealing with such

accidents."

alyson v. Utica Min. & Mill Co. (1895) 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. 507 (mine owner is not guilty of negligence toward an employee engaged in timbering an entry, in respect to a mass of gouge which its foreman and another employee have, but an hour before its fall, vigorously endeavored to bring down. The dissent of Caldwell, J., was merely on the ground that the foreman was bound to use something more than a pick to test the condition of the roof); Cherokee & P. Coal & Min. Co. v. Britton (1896) 3 Kan. App. 292, 45 Pac. 100 (no liability for "unforeseen accidents" from the action of the weather, or the unanticipated slipping of earth, etc., from the walls or roof of a mine); Daly v. Alexander Smith & Sons Carpet Co. (1893) 69 Hun, 77, 23 N. Y. Supp. 269 (weaver injured by a wire flying out of a carpet loom cannot recover of her employer, where it appears that there was no lack of inspection and no defects in the wire, and that, in spite of the greatest care, wires would fly out, to the knowledge of such weaver, whose duty it was to watch and replace them). Independent Tug Line v. Jacobson (1898) 84 Ill. App. 684 (fireman on a tug, injured by a line which, after being pulled tight, slipped loose and struck him, was held unable to recover, in the absence of evidence that when he was directed to

Pac. 100, it was said that the master N. W. 323 (engineer held to have asis not an insurer against "unforeseen sumed the risk of an unexpected, unusual, and unexplained failure of the <sup>5</sup> Elgin, J. & E. R. Co. v. Malaney air brakes to work); Mancuso v. Cat-(1894) 59 Ill. App. 114 (unexpected aract Constr. Co. (1895) 87 Hun, 519, failure of appliance, apparently in good 34 N. Y. Supp. 273 (unexploded charge order); Nelson v. Allen Paper Car- in a rock in which plaintiff was ordered Wheel Co. (1886) 29 Fed. 840 (defect to drill holes, the fact that the charge not apparent till after accident); Fin- is there not being due to any negligence on the employer's part); In Del Sejnore v. Hallinan (1897) 153 N. Y. 274, 47 N. E. 308, Reversing (1895) 36 N. Y. Supp. 1124, the plaintiff was killed by the fall of a mass of earth which slipped into a trench he was engaged in digging for a contractor. The mass was part of a strip of material a few feet in width between the trench where he was working and one which had been excavated for the construction of a sewer some years before, but the existence of which was not known to the defendant, except in so far as he might be deemed to have had constructive notice from the fact that there were several catch basins next the curb from which pipes led into the sewer. Defendant had provided appliances for shoring up the trench, and had instructed his employees to use them at once upon their discovering any crack in the sides of the trench showing a tendency to collapse. A careful watch had also been kept, and nothing had been observed which indicated the approaching catastrophe. Nor had the civil engineer appointed to superintend the contractor's work seen anything which indicated that the banks were liable to cave in. It was held that the defendant was not liable, as, under the evidence, the accident was of such a character that prudent men, proceeding with reasonable caution, would not ordinarily take up the position where he was at have foreseen or anticipated it. For a the time of the accident, the captain similar ruling, in a case where the facts had any reason to suppose he would be were almost identical, see *Burns* v. exposed to danger); Whalen v. Michi-Pethcal (1894) 75 Hun, 437, 27 N. Y. gan C. R. Co. (1897) 114 Mich. 512, 72 Supp. 499. In an action against a city

cases as those cited in the note is doubtless permissible. But it seems simpler to refer the master's liability directly to the fundamental principle explained in § 126, ante.

- 143. Master not bound to anticipate infliction of injuries by simple instrumentalities.— In one case the position taken was that a master has no reason to anticipate injury as the result of the use of a simple appliance by an experienced workman. Under such circumstances, however, the preferable conception seems rather to be that the master's freedom from liability should be referred to the obvious character of the danger, and the servant's presumed acceptance of the risk, or capacity for protecting himself. See chapters IV. and VII., ante.
- 144. Master not bound to anticipate accidents resulting from the unusual mental or physical defects of employees.-In the absence of something to put him on his guard, an employer is entitled to conduct his business on the assumption that the mental, nervous, and other physical characteristics of his employees are not materially different from those of ordinary persons of their age and sex.1
  - 145. Exceptional character of accident, how far an element negativ-

for injuries caused to an employee en- old water pipe, 5 feet away from the gaged in digging a trench, the fact that trench. an alderman, who was chairman of the sewer committee, and by trade a hatter, of a machine used for cutting iron, was told the foreman before the accident standing at the machine pulling scrap that the trench needed sheathing, did iron out of a heap, and placing it so not show that the trench did need as to be conveniently reached by the sheathing, or that there was any appar-operator. While doing this the opersheathing, or that there was any apparent danger; the engineer and foreman having charge of the work being competent and experienced in the construction of such trenches. Farrell v. Mid-time the shears of the machine, within two seconds after the operator passed behind him, plainting of such trenches. Farrell v. Mid-time tiff stumbled and placed his hands between the shears of the machine, therehaving charge of the work being competent and experienced in the construction of such trenches. Farrell v. Middletown (1900) 56 App. Div. 525, 67 tween the shears of the machine, therefore, Y. Supp. 483. In Quinn v. Baird by losing his fingers. Held, that it was (1900) 49 App. Div. 270, 63 N. Y. Supp. 235, it was held (three judges dissenting) that the defendant was, as a matter of law, not negligent in omitting to shore a trench, where the evidence was that his superintendent and the engineer of the city for which he had contracted to dig the trench had both examined it and pronounced shoring to be unnecessary; that, in the opinion of all the witnesses who had any experience in such work, no shoring was perience in such work, no shoring was necessary; and that there was nothing in the nature of the soil which suggested the danger of a collapse of the sides in quantity to affect an ordinary man, of the trench; and that, up to the time because the lungs of such employee were the aggident there were no indicate the constant of the properties. of the accident, there were no indications of the existence of the conditions of the existence of the conditions  $Burke\ v.\ Syracuse,\ B.\ \&\ N.\ Y.\ R.\ Co.$  which really caused it, viz., the disintegration of the soil, produced by the moisture which had sweated from an youth seventeen years of age, who

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Plaintiff, an assistant to the operator

ing a duty to anticipate it.—(See also conclusion of § 141, ante.)— A principle frequently applied is that, in certain states of the evidence, a court is entitled to declare, as a matter of law, that the catastrophè in question, though a natural and possible result of the conditions which existed, was so "rare and peculiar," or so far "outside the range of ordinary experience," or "out of the common course," that the master could not reasonably be expected to conduct his business in such a manner as to eliminate the risk of its occurrence. His nonliability is assumed to be a conclusive inference from the principle that "ordinary care does not require that every possible contingency must be anticipated and guarded against, but only such as are likely to occur." It seems fairly open to question, whether at least some of the particular applications of this principle do not overstep the proper limits of the power of a court to draw inferences of fact.<sup>5</sup> It is, of

<sup>3</sup> Phrase used in Schultz v. Chicago & N. W. R. Co. (1887) 67 Wis. 616, 58 Am. Rep. 881, 31 N. W. 321.

McKee v. Chicago, R. I. & P. R. Co. (1891) 83 Iowa, 616, 13 L. R. A. 817, 50 N. W. 209. "It is a master's duty to guard a servant against probable, but not against all possible, dangers." Lawless v. Laclede Gaslight Co. (1898)

had managed a switch for two and a (servant of a railway company struck half months, was suddenly seized, on an in the eye by a flake of iron knocked occasion when a train was approaching from a swage worked on by other serv-which should have been kept on the ants and shown to have been in average main track, with the mistaken idea that condition); Garnett v. Phænix Bridge the switch was set wrong, and, on the Co. (1899) 98 Fed. 192 (servant inimpulse of the moment, turned the lever jured by a fall received in consequence Market the hollents, threat the teval fated by a lan received in reconsequence so as to send the train onto a siding); of the breaking of a wrench with which Montreal Steam Laundry Co. v. Demers he was screwing on nuts); Moore v. (1896) Rap. Jud. Quebec, 5 B. R. 191 Great Northern R. Co. (1897) 67 Minn. (employer who surrounds his servants 394, 69 N. W. 1103 (brakeman was in-(employer who surrounds his servants 394, 69 N. W. 1103 (brakeman was inwith all the precautions which human jured while coupling cars, owing to the foresight can naturally suggest is not liable for an injury resulting from density had settled on the track after physical weakness,—as, where the hand of a girl drops into an opening and comes in contact with a heated roller, the passage of a train); Wabash, St. L. of a girl drops into an opening and density had settled on the track after the passage of a train); Wabash, St. L. of a girl drops into an opening and density had settled on the track after the passage of a train); Wabash, St. L. of a girl drops into an opening and struck the head of an unusually tall her hand was resting over such opening, through having gone to work without food).

Therefore while coupling cars, owing to the condition of the track after the passage of a train); Wabash, St. L. of a girl drops into an opening and the passage of a train); Wabash, St. L. of a girl drops into an opening and the passage of a train); Wabash, St. L. of a girl drops into an opening and the passage of a train); Wabash, St. L. of a girl drops into an opening and the passage of a train); Wabash, St. L. of a girl drops into an opening and the passage of a train); Wabash, St. L. of a girl drops into an opening and the passage of a train); Wabash, St. L. of a girl drops into an opening and the passage of a train); Wabash, St. L. of a girl drops into an opening and the passage of a train); Wabash, St. L. of a girl drops into an opening and the passage of a train); Wabash, St. L. of a girl drops into an opening and the passage of a train); Wabash, St. L. of a girl drops into an opening and the passage of a train); Wabash, St. L. of a girl drops into an opening and the passage of a train); Wabash, St. L. of a girl drops into an opening and the passage of a train); Wabash, St. L. of a girl drops into an opening and the passage of a train); Wabash, St. L. of a girl drops into an opening and the passage of a train); Wabas 1 region food).

1 Phrase used in McNally v. Savanthe insulator of the telegraph pole, nah, F. & W. R. Co. (1890) 86 Ga. 262, causing the wire to fall and coil about the body of the decedent, who stood, in <sup>2</sup> Phrase used in Allison Mfg. Co. v. the line of duty, on a flat car on a side McCormick (1888) 118 Pa. 519, 12 Atl. track, dragging him from the car, and causing instant death); Schultz v. Chicago & N. W. R. Co. (1887) 67 Wis. 616, 58 Am. Rep. 881, 31 N. W. 321 (injury received by a track walker, who, while standing beside the track to allow a train to pass, was struck by a piece of coal which fell from the tender); Lawless v. Laclede Gaslight Co. (1898) 72 Mo. App. 679 (master not bound to anticipate that a brick recep-72 Mo. App. 679; Drew v. Gaylord Coal tacle, which he directs his servant to Co. (1886; Pa.) 3 Cent. Rep. 389.

\*In the following cases recovery was contains water, and that the water is denied: McNally v. Savannah, F. & W. poisonous and likely to find its way into R, Co. (1890) 86 Ga. 262, 12 S. E. 351 the servant's shoes and injure him); course, not open to dispute that the unlikelihood that may be predicated of a catastrophe which results from an "act of God" is sufficiently pronounced to warrant a peremptory conclusion that a servant who has been injured by it cannot be permitted to claim any indemnity. And it is also settled by the authorities that there are other events, the result of the operation of physical laws, which, though they may not be acts of God in the technical sense, happen so infrequently that it is proper to hold, as a matter of law, that a person may, without incurring the imputation of negligence, conduct his affairs on the assumption that they will not happen at all.7

matic lubricator will occur at a time treme improbability. when the combined heat of the day and Gonlon v. Oregon Short Line & U. of the boiler will render oiling by hand N. R. Co. (1893) 23 Or. 499, 32 Pac. W. 665. A laborer who, while moving of a bridge, owing to an unusual freshet along beside a construction car on a produced by an unprecedented storm); track, trying to stop it with a crowbar, Galveston, H. & S. A. R. Co. v. Danis injured by the bar striking a post 4 iels (1892) 1 Tex. Civ. App. 695, 20 S. feet high and 2 feet from the rail, cannot hold the employer liable for damages, on the theory that the erection of the post on the preceding day for the J. Exch. N. S. 212, 2 Jur. N. S. 333 purpose of a temporary cattle gap, (unusually severe frost burst water without notifying him thereof, was negligence. Robinson Land & Lumber Co. Smith v. London & S. W. R. Co. (1870) v. Gage (1900; Miss.) 27 So. 998. A L. R. 6 C. P. 14, 23 L. T. N. S. 678, 19 packing company is not liable to its empacking company is not liable to its em- Week. Rep. 230, 40 L. J. C. P. N. S. 21.

Know v. New York, L. E. & W. R. Co. ployee for injury to his eye, caused by (1893) 69 Hun, 93, 23 N. Y. Supp. 198 bacteria in dust from an iron railing (brakeman struck by a bolster on a from which, in ignorance of the danger, passing car, which was designed to allow timbers longer than the cars room dried blood, where the dust from the for play while rounding curves, and railing settled over the clothing, faces, which was properly devised and inspected, but suddenly worked out and struck the calcoose where the brakeman is not shown that it was ever before struck the caboose where the brakeman is not shown that it was ever before was). In a case where a brakeman fell known to produce injury. Hysell v. into a cattle guard while coupling cars Swift (1899) 78 Mo. App. 39. The court at a place where it was not usual for here cited the following statement of rains to stop, the court said: "That a the general principle applicable to such railroad company should anticipate cases: "That which never happened bethat a train may, for some necessary fore, and which, in its character, is purpose, be stopped at a place other such as not to naturally occur to pruthan the usual stopping places, is pos-dent men to guard against its happensibly true; but at what place cannot be ing at all, cannot, when in the course anticipated, and therefore they, in the of years it does happen, furnish good exercise of ordinary diligence, are not ground for a charge of negligence in not required, as we have said, to plank foreseeing its possible happening, and every bridge or cattle guard and have guarding against that remote continthe whole track so guarded as to pregency." Hubbell v. Yonkers (1887) vent accidents to employees." Koontz 104 N. Y. 434, 58 Am. Rep. 522, 10 N. v. Chicago, R. I. & P. R. Co. (1884) 65 E. 858. See also note 6, infra. Some Iowa, 224, 226, 54 Am. Rep. 5, 21 N. W. of the cases illustrating this point of 577. A railway company is not bound view ought, apparently, to be referred, to anticipate that the breaking of a rather to the conception discussed in glass tube and valve stem of an auto- subtitle A, supra, than to that of ex-

dangerous. Stockwell v. Chicago & N. 397 (railroad company not liable for W. R. Co. (1898) 106 Iowa, 63, 75 N. personal injuries caused by the falling W. 665. A laborer who, while moving of a bridge, owing to an unusual freshet

But there is considerable difficulty in admitting that the occurrences in the cases cited in note 5, supra, fall under this category, or that the unusual nature of the accident or the attendant circumstances was anything more than a factor to be considered by the jury in relation to the master's exercise of due care.8

146. No similar accident previously produced by same conditions.— In one group of cases the master's nonliability is referred to the consideration that no similar accident had ever before resulted from conditions resembling those complained of. Compare § 136, ante.

<sup>8</sup> In McKee v. Chicago, R. I. & P. R. performing his duty in promptly ascer-Co. (1891) 83 Iowa, 616, 13 L. R. A. taining what had happened. 817, 50 N. W. 209, where a brakeman <sup>1</sup> Wood v. Heiges (1896) 83 Md. 257, Co. (1891) 83 Iowa, 616, 13 L. R. A. taining what had happened.

817, 50 N. W. 209, where a brakeman 'Wood v. Heiges (1896) 83 Md. 257, who, while hanging down from a ladder of a car to examine a brake, struck to place a guard around the place where against a cattle-guard fence was held castings were broken by the dropping to have no cause of action, Beck, J., of a heavy weight upon them, to arrest dissented in a well-reasoned opinion things out so clearly the impropriety of treating the decision of such dering him liable for injuries to a serveases as being within the province of a court that it is worth while to summarize it briefly. He argued that it marily, the pieces of iron did not fly was an unjust discrimination to excuse the defendant because the accident was known to fly so far before): Muster v. cause of the flying of the stones, was convex dies were used,

the defendant because the accident was known to fly so far before); Muster v. so improbable that the company could *Chicago*, *M. & St. P. R. Co.* (1884) 61 not be regarded as negligent in main- Wis. 325, 50 Am. Rep. 141, 21 N. W. taining the fence so near the track, and 223 (railroad company not liable to an to hold the plaintiff negligent because employee for an injury sustained by the he did not know the danger. He also throwing of a mail bag from a train by thought that it could not be said, as a postal agent at a place where it had matter of law, that such an occurrence never been thrown off before, the train as a brake beam getting out of order not being propelled, at the time, at an and trailing along the track was such unusual rate of speed). The question an unusual occurrence that it could not being whether the plaintiff's foot was have been anticipated, and if such oc- caught by a splinter on the inside of a currence was one incident to the operation of the road, the company was er the defendant is chargeable with negbound so to construct its track, cars, ligence therefor, danger from such and cattle guards, that trainmen might, cause not being self-evident, it is comwith safety, make investigations in the position which that could be done, perienced witnesses that such accidents viz., by looking underneath the car have heretofore been unknown. Doyle from the position which would naturally be taken for that purpose. The Minn. 79, 43 N. W. 787 (syllabus by view of the majority, that the flying of stones from under a car did not indicate any unusual danger, and that, as it was the duty of the brakeman to reto the convexity of a metal die, so slight port to the conductor if he noticed that currence was one incident to the opera- railroad track or rail, and as to whethport to the conductor if he noticed that as to be discoverable only by the applianything was amiss with the train, his cation of a straight edge, and the mas-conduct showed that he did not anticiter was held not to be liable, on the pate any danger, was also combated. ground that there was no previous in-The trailing of timbers under the car stance of an explosion being produced was thought to be a highly dangerous by that degree of convexity, although it occurrence, and the brakeman, if he was known to him that explosions were had reason to suspect that this was the likely to occur in such machines when

146a. Unexpectedly severe strain put upon appliances.— In another group recovery has been denied on the ground that the unusual event which caused the injury put a severer strain upon the instrumentality in question than that which was fairly within the contemplation of the master when he put it into use.1 These cases really amount to the assertion, in a different form, of the doctrine that the master's duty is fulfilled if his instrumentalities are reasonably safe for the specific purposes which they were designed to subserve. See § 26, ante.

147. Unexpected position of the servant at the time of the accident.— In a third group the rationale of the inability to maintain the action was that the local relations of the injured person with respect to the appliance in question at the time of the accident were such as for some reason the master was not bound to anticipate. These cases, it will

chain was held erroneous for the reason such a position that it could safely rethat there was no evidence that an engine and tender had ever separated for In Preston v. Chicago & W. M. R. Co. the lack of safety chains, and that the (1893) 98 Mich. 128, 57 N. W. 31, it evidence did not show that this was so was held that no negligence could be inlikely to occur as to authorize the jury ferred from the fact that an engine to find that their omission was actionable negligence. Morse v. New York C. remain in its place when a collision occurred.

1 In constructing a seaffold a master.

atter hegigence. New York C. 1886) 39 Hun, 414.

¹In constructing a scaffold a master is not bound to anticipate the unusual when a gutter which an employee is wrenching off comes away with unexpected ease. McLean v. Cole (1899) 175 Mass. 5, 55 N. E. 458. In Kern v. shaft); Eckles v. Chicago Ship Build-De Castro & D. Sugar Ref. Co. (1890) 125 N. Y. 50, 25 N. E. 1071, a freight elevator became tightly wedged in the shaft, and the engineer, in trying to move it, put such a strain on the cables that one of them, and also the wheel or which it worked, was broken. A fragment of the wheel, in falling, rebounded from the side of the well and struck fective will not render him liable for plaintiff. Held, that no action lay. In Beasley v. Linehan Transfer Co. (1890) 148 Mo. 413, 50 S. W. 87, a went upon the boiler to ascertain where heavily loaded car broke loose from a strain or which the course. train, and, running down an incline, at such gauge to indicate the steam presthe foot of which was moored a trans- sure, where he could not have anticifer boat, rushed against her boilers and puted that employees would go upon the caused them to explode. The jury was boiler when it was under steam. Mcheld to have been erroneously charged Callum v. McCallum (1894) 58 Minn. that if the proper position of the track 288, 59 N. W. 1019.

In a case where a brakeman was on the boat was in a straight line with killed by a pusher engine parting from that on the incline, and it was not in its tender by running into another enthat position, and that was the cause of gine, an instruction that the company the accident, the defendant was liable. The extent of the defendant's duty, it engine and tender attached by a safety was laid down, was to have the boat in chain was held erroneous for the reason such a position that it could safely rether there were gridene that are only a contraction of the reason such a position that it could safely re-

be observed, merge into those in which contributory negligence is ascribed to a servant who puts himself unnecessarily in a dangerous position. See chapter xix., post.

147a. Servant's attention diverted by fellow servant.—In one case the servant failed to recover for the reason that the particular movement to which the accident was due was caused by the fact that a sudden shout, proceeding from another employee, diverted his attentionat a critical moment from the special dangers of the position in which he happened to be. Such a case, it may be remarked, may also be regarded as an application of a comprehensive principle of which the defense of common employment is one particular exemplification, viz., that a master is not liable for an injury which proximately results from the act of a coservant of the injured person, whether that act was or was not negligent or otherwise tortious. In fact, the court relied, both on the theory of the master's excusable nonanticipation of the event which led to the catastrophe, and on the theory that that event broke the chain of causation.

# D. Whose knowledge of abnormal conditions is imputed to the master.

148. Introductory.—All the courts proceed upon the theory that the master is chargeable or is not chargeable with the knowledge of an employee that the instrumentality in question was unsuitable for use, according as that employee was or was not one who fell within the category designated by the term "vice principal," or "alter ego." It is apparent, therefore, that the factors which, in any given case, determine whether the knowledge, actual or constructive, of a delinquent employee shall or shall not be imputed to the master are, for practical purposes, the same as those which determine whether the employee was or was not a representative of the master in the sense explained in the subsequent chapters which deal with the exceptions to the doctrine of common employment (xxviii. to xxxi.). The extended discussion of the latter question in those chapters may, however, be appropriately anticipated at this point to an extent sufficient to elucidate the subject with which we are now more immediately concerned.

Where the servant with whose knowledge it is sought to charge the master is not one of those whose knowledge is, as a matter of law, im-

<sup>&</sup>lt;sup>1</sup> Cheney v. Middlesex Co. (1894) 161 and his hand was caught by the uncov-Mass. 296, 37 N. E. 175 (servant turned ered gearing of one of two spinning maquickly around on hearing the outcry, chines between which he was passing).

puted to the master, liability can be brought home to the master only by showing that the danger was actually reported. A fortiori, where no relation whatever exists between the person notified and the injured person's employer, there is no principle upon which the latter can be charged with notice.2

It is, of course, immaterial that the individual servant who acquired the knowledge was no longer in the master's employment when the injury in suit occurred. The master's liability, so far as it depends upon his imputed knowledge, is complete, in law, as soon as the actual knowledge of the servant would have reached him if such servant had used due diligence in transmitting the information which he had obtained.<sup>3</sup> Still less should a verdict for the defendant be directed where there is evidence which goes to show that the dangerous condition from which plaintiff's injuries resulted had been discovered by a former foreman of the defendant corporation, and actually communicated by him to its officers.4

As to the effect of the doctrine of imputed knowledge upon the question of the admissibility of declarations of agents as evidence, see chapter xl.111., post.

149. Knowledge of a mere coservant not imputed to the master.— The knowledge of an employee who was a mere coservant of the injured person is not chargeable to the master.1 In other words, the

<sup>1</sup> Kidwell v. Houston & G. N. R. Co. 114, 20 So. 284 (employee had left the (1877) 3 Woods, 313, Fed. Cas. No. service); Baird v. New York C. & H. R. 7,757. There the principle was applied, R. Co. (1901) 64 App. Div. 14, 71 N. Y. with somewhat doubtful propriety, in a case where a defect in a car had been reported by the plaintiff to the car inspector, and by the car inspector to the master mechanic. A demurrer to the master mechanic. A demurrer to the patition was sustained on the scaffold was the foreman supervising

which he had no other notice than that (Indiana, I. & I. R. Co. v. Snyder the architect, who was not his agent, [1893; Ind.] 32 N. E. 1129); where a discovered its dangerous condition ten section foreman knew of the defective minutes before. Quinn v. Fish (1893) condition of appliances under his con-

the master mechanic. A demurrer to employee who knew of a defect in a the petition was sustained on the scaffold was the foreman supervising ground that it did not appear that the the work (Gallagher v. Piper [1864] master mechanic had the power of appointment and removal. The standard 329, 10 Jur. N. S. 879, 10 L. T. N. S. of pleading thus applied is extremely 718, 12 Week. Rep. 988); where the chiet strict, and at the present day most courts would probably hold that the precise capacity and powers of the master in the machinery (Searle v. Lindsay cise capacity and powers of the master mechanic were matters to be disclosed by the evidence.

2 Thus, an employer is not liable for carpenter in a railway shop knew that <sup>2</sup> Thus, an employer is not liable for carpenter in a railway shop knew that an accident to a servant, caused by an the timber used in the manufacture of insufficient fastening of a ladder, of the handle of a hand car was defective 6 Misc. 106, 26 N. Y. Supp. 10. trol (Barringer v. Delaucare & H. Canal 

\*Bland v. Shreveport Belt R. Co. Co. [1879] 19 Hun, 216; Kinney v. 

(1896) 48 La. Ann. 1057, 36 L. R. A. Corbin [1890] 132 Pa. 341, 19 Atl.

master will not be regarded as negligent in not knowing of a defect which is not known to any officer or agent for whose negligence the master would be responsible.2 There is, accordingly, a misdirection wherever the jury is given to understand that notice received by any of the servants was sufficient to affect the master with liability,3 or where a right to recover is predicated upon the knowledge of a servant who was not chargeable with the performance of the duties which supervened as a result of the acquisition of that knowledge.4

150. Knowledge of vice principal imputed to master.— The which charges a master with the knowledge of any servant who is a vice principal is merely a special application of the general doctrine that notice to an agent of a corporation or individual, relating to a matter of which he has the management and control, is notice to his employer.1 The practical consideration upon which the rule is based

141); where the only person who was Mo. 528 (railway company held not to trains were ready, and, if one could not his duty to see that it was safe). go, to call the next (Michigan C. R. Co. v. Dolan [1875] 32 Mich. 510). Where 67 Ala. 13. there is no evidence that a brake was out of order when at the last car-in
Co. (1895) 65 Mo. App. 162; St. Louis principal, unless such person really be agent of the one sought to be bound; and the agency of such person must be proved by evidence directed to that point, and cannot be proved by the mere fact of giving the notice." McGowan v. St. Louis & I. M. R. Co. (1876) 61

aware of the temporary physical unfit- be chargeable with knowledge of conness of a conductor was a subordinate ductor that a rope used in connection employee, whose duty it was to call the with a work train was defective, there conductors in a certain order, when being no evidence to show that it was

<sup>2</sup> Smoot v. Mobile & M. R. Co. (1880)

specting station, or at any previous S. W. R. Co. v. Threat (1896) 12 Tex. time, and the testimony merely goes to Civ. App. 375, 34 S. W. 152. In Sioux preve that another employee not an inSignature of the station of the state of the sta the condition of the car, testified that 860, the following instruction was sushe had noticed the defect three or four tained: "Even if the agents of the dehours before the accident, no negligence fendant who had charge of the engines on the part of the company is shown. on defendant's road, and the duty of Chicago & E. I. R. Co. v. Hagar (1882) their repair, did not positively know 11 Ill. App. 498. Notice of a defect in that the engine was unsafe, yet, if it a railway track, given to an official of was in fact unsafe, and they had rethe company who is not in charge of ceived such reports in regard to it as on the pair.

Chicago & E. I. R. Co. v. naya.

11 Ill. App. 498. Notice of a defect in a railway track, given to an official of the company who is not in charge of that part of the track, is not notice to the company. Union P. R. Co. v. and to have led, by the use of proper Springsteen (1889) 41 Kan. 724, 21 diligence, to knowledge of the facts, Pac. 802. A master builder is not chargeable with knowledge which was imparted only to a foreman superintendiable with knowledge which was imparted only to a foreman superintendiable. The objection made to the fendant liable, regardless of who of its against the defendant liable, regardless of the defects of the defe was engaged. Richardson v. Cooper agents had knowledge of the defects of (1878) 88 Ill. 270. "Notice to a per-the engine, or to whom reports of such son as agent will not bind anyone as defects were made." But the court said that the proposition could not be maintained, as the instructions as a whole, and the entire case, made it perfectly plain what agents were referred to.

\* Covey v. Hannibal & St. J. R. Co.

(1885) 86 Mo. 635.

1 Pittsburgh, Ft. W. & C. R. Co. v.

has been thus tersely stated in a leading English case: "If a master's personal knowledge of defects in his machinery be necessary to his liability, the more a master neglects his business and abandons it to others the less will he be liable."2

By referring to chapters xxvIII. - xxxI., post, it will be seen that the cases involving the question whether an employee was a vice principal are divisible, broadly speaking, into two main classes. In one of these the representative character of the employee is regarded as being determinable by the rank which he holds in his master's service. In the other, his rank is treated as immaterial, and the master is held liable er not, according as he was or was not deputed to perform one of those strictly personal duties of the master which are variously denominated absolute, non-delegable, nonassignable, or nontransferable.

with reason nor sound policy, and the evil consequences of which it is easy to imagine. But, if this be not the correct view, and if, in the present case, the company is not affected by notice to Flynn and Foster, how, it may be asked, could notice affect it? Would notice to an executive officer suffice? Jection urged. It is, we think, sufficient to say that, when a duty is imposed upon and intrusted to an agent by once be settled that the humblest watchman who walks the track is, within the scope of his employment, the representative of the company, that he has eyes to see, ears to hear, and lips to communicate to his superiors the knowledge municate to his superiors the knowledge

Ruby (1871) 38 Ind. 294, 10 Am. Rep. he acquires as to the condition of the 111; Ohio & M. R. Co. v. Collarn track, or of impending danger, and the (1881) 73 Ind. 261, 38 Am. Rep. 134; law upon this important subject will be Crown Coal Co. v. Hiles (1892) 43 Ill. placed upon such a footing as that none Crown Coal Co. v. Hiles (1892) 43 Ill. placed upon such a footing as that none App. 310.

2 Clarke v. Holmes (1862) 7 Hurlst. men must approve it. That such is the & N. 937, 31 L. J. Exch. N. S. 356, 8 law is clear, we think, not only upon Jur. N. S. 992, 10 Week. Rep. 405, per reason, but from the authorities already Byles, J. In Baltimore & O. R. Co. v. McKenzie (1885) 81 Va. 71, the court that, in cases like the present, the proprefused to adopt the theory contended for by the railroad company, that it was not bound by the knowledge which was not bound by the knowledge which employees charged with the duty of keeping its tracks in good order possessed as to its defective condition, saying: "To hold otherwise would be to hold that a corporation, whose lines— a common watchman." In Sangamon hold that a corporation, whose lines— a common watchman." In Sangamon as we know from the record in the pres-coal Min. Co. v. Wiggerhaus (1887) ent case—extend into several states of 122 III. 279, 13 N. E. 648, one of the Union, and over which numerous instructions informed the jury that if employees are daily carried, is, so far they believed from the evidence that an as the guarding of its track is conagent of the defendant whose duty it cerned, virtually without a representative at all. It would be to declare that same to be adjusted was notified that to be law which is consistent neither the door across the gangway was diffiwith reason nor sound policy, and the cult and hard to open, then such notice

a. Superintendents and managers.—Adverting, in the first place, to the former of the categories of vice principals just mentioned, it will be sufficient for present purposes to state that, so far as the American courts are concerned, there is complete unanimity upon the point that the master is chargeable with any knowledge possessed by a general or departmental manager or superintendent with respect to the abnormal condition of any part of the plant.3

How far the same doctrine can be said to prevail in England since the decision in Wilson v. Merry, 4 is open to some doubt. See chapter XXIX., post.

b. Superior servants of lower grade than superintendents.—There are also decisions in which the knowledge of employees of a lower grade than superintendents has been held imputable to the master. These embody the so-called "superior servant doctrine" (explained in chapter xxviii., post), and, so far as they rest upon that doctrine, would not be regarded as good law except in the comparatively small

<sup>8</sup> Corcoran v. Holbrook (1815) 59 N. Wayne v. Unristie (1905) 160 1101. 112, Y. 517, 17 Am. Rep. 369; Cone v. Del- 59 N. E. 385; Campbell & Z. Co. v. aware, L. & W. R. Co. (1880) 81 N. Y. Roediger (1894) 78 Md. 601, 28 Atl. 206, 37 Am. Rep. 491 (1878) Affirming 901; Nash v. Nashua Iron & Steel Co. 15 Hun, 172; Schulz v. Rohe (1893) 53 (1882) 62 N. H. 406; Missouri P. R. N. Y. S. R. 576, 24 N. Y. Supp. 118; Co. v. Peregoy (1887) 36 Kan. 424, 14 aware, L. & W. R. Co. (1880) 81 N. Y. Roediger (1894) 78 Md. 601, 28 Atl. 206, 37 Am. Rep. 491 (1878) Affirming 901; Nash v. Nashua Iron & Steel Co. 15 Hun, 172; Schulz v. Rohe (1893) 53 (1882) 62 N. H. 406; Missouri P. R. N. Y. S. R. 576, 24 N. Y. Supp. 118; Co. v. Peregoy (1887) 36 Kan. 424, 14 Upton v. Bartlett (1891) 37 N. Y. S. Pac. 7; Missouri P. R. Co. v. Patton R. 193, 13 N. Y. Supp. 451; Patterson (1894; Tex. Civ. App.) 25 S. W. 339 v. Pittsburg & C. R. Co. (1875) 76 Pa. (1894; Tex.) 26 S. W. 978; Hanley v. 389, 18 Am. Rep. 412; Huntingdon & B. California Bridge & Constr. Co. (1899) T. Mountain R. & Coal Co. v. Decker (1876) 82 Pa. 119 (1877) 84 Pa. 419; 577; Connor v. Saunders (1894) 9 Tex. Pantzar v. Tilly Foster Iron Min. Co. (1v. App. 56, 29 S. W. 1140. The (1885) 99 N. Y. 368, 2 N. E. 24; Fra-knowledge of one who customarily suzier v. Pennsylvania R. Co. (1860) 38 perintends a mill in the absence of a Pa. 104, 80 Am. Dec. 467; Caldwell v. superior officer is assimilated to that of Brown (1866) 53 Pa. 453; Quincy a regular superintendent. Chapman v. Coal Co. v. Hood (1875) 77 Il. 68; Southern P. Co. (1895) 12 Utah, 30, 41 Texas Mexican R. Co. v. Whitmore (1883) 58 Tex. 276; Deweese v. Mera-knew Grann Rep. 152, 8 So. 216; Here under discussion, a captain of a mec Iron Min. Co. (1895) 128 Mo. 423, 31 S. W. 110, Affirming (1893) 54 Mo. 423, 31 S. W. 110, Affirming (1893) 54 Mo. 423, 410. 46; Eureka Co. v. Bass (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216; (1890) 43 Fed. 592; The Norway v. Bowers v. Union P. R. Co. (1885) 4 Jensen (1869) 52 Ill. 375 (defective Utah, 215, 7 Pac. 251; Wilson v. Willimantic Linen Co. (1883) 50 Conn. 433, that a plaintiff was injured by the negmantic Linen Co. (1883) 50 Conn. 433, that a plaintiff was injured by the negmantic Linen Co. (1887) 50 Conn. 433, that a plaintiff was injured by the negmantic Linen Co. (1886) 4 Linen & Linen of the Markey and the Linen of the Alenta & Linen o mantic Linen Co. (1883) 50 Conn. 433, mantic Linen Co. (1883) 50 Conn. 433, that a plaintiff was injured by the neg47 Am. Rep. 653; Krogg v. Atlanta &
1 ligence of the defendant's superintendW. P. R. Co. (1886) 77 Ga. 202; Goggin
v. D. M. Osborne & Co. (1896) 115 Cal.
a newly invented blasting powder,
437, 47 Pac. 248; Delaney v. Hilton
(1883) 18 Jones & S. 341; Higgins v.
without first informing himself wheth(1883) 18 Jones & S. 341; Higgins v.
without first informing himself wheth(1883) 18 Jones & S. 341; Higgins v.
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without first informing himself wheth(1886) 18 Jones & S. 341; Higgins v.
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without first informing himself wheth(1886) 18 Jones & S. 341; Higgins v.
without first informing himself wheth(1886) 18 Jones & S. 341; Higgins v.
without first informing himself

<sup>8</sup> Corcoran v. Holbrook (1875) 59 N. Wayne v. Christie (1900) 156 Ind. 172, that a plaintiff was injured by the negnumber of jurisdictions which have adopted it. But, as will be seen from the memoranda indicating the character of the conditions of which the servants in question had knowledge, it is clear that, upon the facts, all these cases might be sustained as applications of the second of the two tests of vice principalship above noted.<sup>5</sup>

and a division engineer. Illinois C. R. 661, it was held that, as employees haveour co. v. Welch (1869) 52 Ill. 183, 4 Am. ing charge of the inspection and repair man who is in charge of the works, and who hires the employees; precise function and rank not stated. Atchison, T. ceiving notice of the incompetency of & S. F. R. Co. v. Midgett (1895) 1 Kan. App. 138, 40 Pac. 995 (defective machinery). A roadmaster. McDermott v. Hannibal & St. J. R. Co. (1881) 73 Mo. 516, 39 Am. Rep. 526 (1885) 87 of the appliances with which they are Mo. 285 (incompetent servant). A required to work, and guarding those foreman of a gang of laborers. Sullisubordinates themselves against injury van v. Hannibal & St. J. R. Co. (1891) therefrom. Texas Mexican R. Co. v. 187 Mo. 66, 17 S. W. 748 (defective scaffold). A section foreman. Clov-v. Saunders (1894) 9 Tex. Civ. App. 56, ers v. Wabash, St. L. & P. R. Co. 29 S. W. 1140; International & G. N. R. (1886) 21 Mo. App. 213 (defective Co. v. Smith (1895; Tex. Civ. App.) 30 lever of hand car). An overseer of the yards of a stock company. Union Stock yards of a stock company. Union Stock

A railroad company is chargeable

Yards Co. v. Larson (1893) 38 Neb. with knowledge that its employees ha492. 56 N. W. 1079 (defective drawhead). A conductor. Mad River & L. when such fact is known to the division

E. R. Co. v. Barber (1856) 5 Ohio St. superintendent. Galveston, H. & S. A.
541, 67 Am. Dec. 312 (train not suffi
R. Co. v. Slinkard (1897) 17 Tex. Civ.

<sup>6</sup> A roadmaster. Thompson v. Chiciently manned). A railway engineer; cago, M. & St. P. R. Co. (1883) 5 Mc-precise functions not stated. Nashville Crary, 542, 18 Fed. 239 (dangerous & C. R. Co. v. Elliott (1860) 1 Coldw. bank). A mate of a ship. The Caro-611, 78 Am. Dec. 506 (defective lina (1886) 30 Fed. 199 (defective bridge). A conductor. Louisville & rope); The Ethelred (1899) 96 Fed. N. R. Co. v. Kenley (1893) 92 Tenn. 446 (defective rope); The Phæniæ 207, 21 S. W. 326 (defective foot-rest (1888) 34 Fed. 760 (defective hoisting on car). In Chicago & N. W. R. Co. v. apparatus). A division superintendent Jackson (1870) 55 Ill. 492, 8 Am. Rep. and a division engineer. Illinois C. R. 661 it was held that as employees have and a division engineer. Illinois C. R. boll, it was held that, as employees have to v. Welch (1869) 52 Ill. 183, 4 Am. ing charge of the inspection and repair Rep. 593 (awning dangerously near of railway cars are superior in author-track). A foreman in charge of the underd coal Co. v. Wombacher (1890) diced by their negligence, and notice to duted Coal Co. v. Wombacher (1890) list of a defect is notice to the company of roof). A foreman in charge of workmen. Union Bridge Co. v. Teerond company liable for an injury han (1900) 92 Ill. App. 259 (defective caused by a defect in an engine which machinery). Foreman of switch crews, and been frequently reported by the enunder whose supervision trains are gineer to his immediate superior, the court taking the ground that, upon the N. R. Co. (1887) 72 Iowa, 166, 33 N. principle that everyone is presumed to W. 451 (defective cars). An assistant roadmaster and assistant foreman in control of a trackman. Atchison, T. & control of the work of building a culvert. Kansas P. R. Co. them by which that power is customaman who is in charge of the works, and who hires the employees; precise function of the work of reference the employees; precise function of the work of red road reals not company obtained, is deemed a vice principal not merely for the purpose of reference of the interpretation of the work of red road reals not company obtained, is deemed a vice principal not merely for the purpose of reference of the interpretation of the work of the interpretation of the purpose of the court road reals not company obtained, is deemed a vice principal not merely for the purpose of reference of the interpretation of the pur

c. Servants furnishing or maintaining inorganic instrumentalities.—The cases cited in the subjoined note proceed upon the doctrine that the master is affected with the knowledge of any employee who is intrusted with the discharge of any duty incident to the furnishing or maintenance of suitable instrumentalities of the inorganic class.<sup>6</sup> The facts involved will be more fully stated in chapter xxxi., post.

App. 585, 44 S. W. 35. A complaint Atl. 340; Anderson v. Michigan C. R. as to the incompetency and inexperience Co. (1895) 107 Mich. 591, 65 N. W. of a coservant, made to an employee 585; Ashman v. Flint & P. M. R. Co. or a coservant, made to an employee 385; Ashman v. Funt & P. M. R. Co. having direction of the work of the complex of the company with notice, so as to 121 Mich. 115, 79 N. W. 1108; Dutzi v. render it liable for personal injuries Geisel (1886) 23 Mo. App. 676; Broth-sustained by the complexional because are v. Carter (1873) 52 Mc. 372 14 Am. sustained by the complainant because ers v. Cartter (1873) 52 Mo. 372, 14 Am.

Chicago & A. R. Co. v. Scanlan (1897)

sustained by the complainant because ers v. Cartter (1873) 52 Mo. 372, 14 Am. of such inexperience and incompetency. Rep. 424; Lewis v. St. Louis & I. M. R. Galveston, H. & S. A. R. Co. v. Eckols Co. (1875) 59 Mo. 495, 21 Am. Rep. (1894) 7 Tex. Civ. App. 429, 26 S. W. 385; Hollenbeck v. Missouri P. R. Co. (1877) 141 Mo. 97, 38 S. W. 723, 41 Northern P. R. Co. v. Herbert S. W. 887; Porter v. Hannibal & St. J. (1885) 116 U. S. 642, 29 L. ed. 755, 6 R. Co. (1879) 71 Mo. 66, 36 Am. Rep. Sup. Ct. Rep. 590; Texas & P. R. Co. v. 454; Wellman v. Oregon Short Line & Thompson (1895) 17 C. C. A. 524, 30 U. N. R. Co. (1892) 21 Or. 530, 28 Pac. U. S. App. 549, 70 Fed. 944; Eureka 625; Covey v. Hannibal & St. J. R. Co. Co. v. Bass (1886) 81 Ala. 200, 60 Am. (1885) 86 Mo. 635; Van Steenburgh v. Rep. 152, 8 So. 216; Elledge v. National Thornton (1895) 58 N. J. L. 160, 33 City & O. R. Co. (1893) 100 Cal. 282, Atl. 380; Cerrillos Coal R. Co. v. Des. 34 Pac. 720, Rehearing denied in 34 erant (1897) 9 N. M. 49, 49 Pac. 807; Pac. 852; Wilson v. Willimantic Linen Kain v. Smith (1882) 89 N. Y. 375; Co. (1883) 50 Conn. 433, 47 Am. Rep. Rima v. Rossie Iron Works (1890) 120 rac. 592; wilson v. Willimaniic Linen Rain v. Smith (1882) 89 N. Y. 375; Co. (1883) 50 Conn. 433, 47 Am. Rep. Rima v. Rossie Iron Works (1890) 120 653; Toledo, W. & W. R. Co. v. Fred-N. Y. 433, 24 N. E. 940; Gage v. Delericks (1874) 71 III. 294; Hess v. Rossaurer, L. & W. R. Co. (1878) 14 Hun, enthal (1896) 160 III. 621, 43 N. E. 446; Larkin v. Washington Mills Co. 743; Chicago & N. W. R. Co. v. Jack- (1899) 45 App. Div. 6, 61 N. Y. Supp. son (1870) 55 III. 492, 8 Am. Rep. 661; 93; Missouri P. R. Co. v. Sasse (1893; Chicago & R. Go. v. Scarler (1897) 777; Chicago & R. Co. v. Sasse (1893; R. 93; Missouri P. R. Co. v. Sasse (1893; Tex. Civ. App.) 22 S. W. 187; Cunning-170 III. 106, 48 N. E. 826; Goldie v. ham v. Union P. R. Co. (1885) 4 Utah, Werner (1894) 151 III. 551, 38 N. E. 206, 7 Pac. 795; Davis v. Central Ver-95; Falkenau v. Abrahamson (1896) 66 mont R. Co. (1882) 55 Vt. 84, 45 Am. Ill. App. 352; Consolidated Coal Co. v. Rep. 590; Baltimore & O. R. Co. v. Mc-Scheiber (1896) 65 Ill. App. 304; Indi-Kenzie (1885) 81 Va. 71; Skidmore v. ana, I. & I. R. Co. v. Snyder (1895) 140

Ind. 647, 39 N. E. 912; Ohio & M. R. W. Va. 293, 23 S. E. 713; Riley v. Co. v. Stein (1894) 140 Ind. 61, 39 N. West Virginia & P. R. Co. (1885) 27

E. 246; Terre Haute & I. R. Co. v. W. Va. 145; Schultz v. Chicago, M. & Fowler (1900) 154 Ind. 682, 48 L. R. A. St. P. R. Co. (1879) 48 Wis. 375, 4 N. 531, 56 N. E. 228; Locke v. Sioux City W. 399; Bessex v. Chicago & N. W. R. & P. R. Co. (1877) 46 Iowa, 109; Mc-Co. (1878) 45 Wis. 477. In Brabbits Ghee v. Bell (1897; Ky.) 38 S. W. 702 v. Chicago & N. W. R. Co. (1875) 38 (reversed on rehearing in 19 Ky. L. Rep. 267, 39 S. W. 823, but merely on road company for injuries sustained the ground that the evidence showed that the servant was fully aware of the danger, and voluntarily used the appliance of the danger, and voluntarily used the appliance of the danger of the repairs of engines, to Ill. App. 352; Consolidated Coal Co. v. Rep. 590; Baltimore & O. R. Co. v. Mc-

d. Servants having power to hire and discharge other servants.—It is agreed by all the American courts that, where an employee is invested with the power to appoint and remove, promote and degrade, other servants, any knowledge, actual or constructive, which he may possess as to their incompetency is imputed to the master.<sup>7</sup> This principle has lately been declared to be applicable also to the case of an officer entitled to suspend a servant of the company temporarily.8 On

whom engineers were to report when engines became out of repair, and whose bard v. Harrison (1871) 38 Ind. 323; duty it was made by the company to act on such reports,—to see that the engines were put in repair,—I must instruct you that, if such notice was given to any person thus acting in behalf of the defendant in this case, such notice is good notice to the company."

Am. Rep. 417; Baulec v. New York & In Johnson v. Missouri P. R. Co. H. R. Co. (1871) 49 N. Y. 521, 10 notice is good notice to the company."

Am. Rep. 417; Baulec v. New York & In Johnson v. Missouri P. R. Co. H. R. Co. (1874) 59 N. Y. 356, 17 Am. (1888) 96 Mo. 340, 9 S. W. 790, it was insisted that the trial judge erred in (1874) 55 N. Y. 579; Gilman v. Eastoverruling defendant's objection to the reception of the evidence of two blacksmiths, Smith and Hardy, which tended R. Co. (1884) 85 Mo. 95; McDermott reception of the evidence of two blacksmiths, Smith and Hardy, which tended R. Co. (1884) 85 Mo. 95; McDermott to show that the hammer which caused to show that the hammer which caused the injury had not been repaired with reasonable skill. But the court said:

"The petition alleges that the hammer R. Co. v. Whitrefendant's own shops, and it was owing to the imperfect and brittle condition and flaws in the hammer negligently furnished him that plaintiff was injured. Under these averments the evidence was admissible, and also as bear (1896) 19 C. C. A. 623, 43 U. S. App. furnished him that plaintiff was injured. Under these averments the evidence was admissible, and also as bearing upon the question of defendant's light formulation of the hammer, the repair of it having been made or done by defendant's agent in its repair shops, thus making the knowledge of the agent the knowledge see is distinguished from the case of home in any way the knowledge of an Gutridge v. Missouri P. R. Co. (1887) 94 Mo. 468, 7 S. W. 476." It has been held that an injured servant cannot retained. held that an injured servant cannot re- the safety of the road, the company was cover, where, so far as the evidence obliged to intrust to many other agents goes, the employee through whom it is than those mentioned the power to sussought to impute notice to the master pend incompetent servants, in order might have been merely a workman sent that the company's property, and the to repair one particular defect. Illipersons whose lives were in its custody, nois C. R. Co. v. Barslow (1901) 94 Ill. should not be exposed to extraordinary App. 206. But there does not seem to dangers. Clearly, the men whose duty be any reason why the absolute quality to the company it was to exercise this of the master's obligations should not power were those through whom the be conceived to attach to such a piece company sought its knowledge of the

New York C. & H. R. R. Co. (1901) 64 ing habitual negligence, and of prevent-

whom engineers were to report when App. Div. 14, 71 N. Y. Supp. 734; Hub-

manner in which its servants were dis-'Illinois C. R. Co. v. Jewell (1867) charging their duties. They were 46 Ill. 99, 92 Am. Dec. 240; Baird v. agents for the very purpose of discoverthe other hand, a master is, in most states, not chargeable with the knowledge of an employee who has no power to dismiss the incompetent employee.9 But the rule is otherwise in at least one of the states in which the "superior servant doctrine" is applied. 10

e. Servants whose duty is restricted to reporting defects.—The fact that the employee with whose knowledge it is attempted to charge the master was not under any duty to report the delinquencies of an incompetent employee was adverted to as one of the elements which tended to show, in a case already cited, that he was not a vice principal.<sup>11</sup> But whether the mere possession of that power will constitute him an agent of the master, so far as to render the latter chargeable with his knowledge, seems to have never been directly determined. In view of the functions of such an employee, it seems difficult to contend that he is not a vice principal.12

ing danger from its presence, when discovered, by immediate suspension. We entirely concur with the court below in holding that an officer entitled to suspend a servant of the company temporarily is an officer who has authority to receive notice for the company of the incompetency of the person to be suspended. If, as was testified to, Fitzgerald, the yard master, had power to suspend the engineer from a further discharge of his duties when he found that he was intoxicated, if the master mechanic had the power to suspend an engineer pending inquiry for any derelic-tion of duty, if the train master had the same power,—then all these officers were persons whose knowledge of the incompetency of employees under their supervision was the knowledge of the company, and the failure on their part to use due diligence in observing the competency and sobriety of those whom it was their duty to suspend for incompetency or inebriety was the negligence of the company. This obligation of a railway company to use due diligence in the selection and retention of its employees is one which, in view of the assumption of risk by the employees of any casual negligence of their fellow servants, it is most important to maintheir notice."

Smith v. St. Louis & S. F. R. Co. (1899) 151 Mo. 391, 48 L. R. A. 368, 52 S. W. 378 (head hostler of railway) roundhouse); Baltimore Elevator Co. v. Neal (1886) 65 Md. 438, 5 Atl. 338 (captain of tugboat belonging to an elevator company); Reiser v. Pennsylvania Co. (1892) 152 Pa. 39, 25 Atl. 175 (train despatcher).

10 In Tennessee it has been held that, as a conductor is the immediate superior of the engineer, his knowledge of such engineer's incapacity is imputed to the company, although he has no authority to discharge him. East Tennessee, V. & G. R. Co. v. Wright (1897) 100 Tenn. 56, 42 S. W. 1065.

"Smith v. St. Louis & S. F. R. Co. (1899) 151 Mo. 391, 48 L. R. A. 368, 52 S. W. 378.

12 Under the "consociation" theory (see chapter xxvII., post), a night watcher employed by a railroad company to note and report upon the conduct of the foreman of a night crew whose duty it is to make up trains is a fellow servant with the foreman. Chicago & E. I. R. Co. v. Geary (1884) 110 Ill. 383. But the doctrine of non-delegable duties was not referred to. The decision, in Houd v. Mississippi C. R. Co. (1874) 50 Miss. 178, that a contain, and it should not be frittered ductor is a fellow servant of a section away by limiting those whose knowl-foreman, whose duty it was to report edge shall be the knowledge of the com-defects in the track, necessarily implies pany to one or two officers so far rethat the court considered that notice to moved from possible knowledge as to the latter was not notice to the commake it a hopeless task to bring the inpany. But here again the theory of competency of subordinate servants to non-delegable duties was not considered by the court.

As to the circumstances under which the knowledge of certain employees that a rule is habitually violated will be held to justify the inference that the rule is virtually abrogated, see chapter xv., post.

### CHAPTER XI.

#### DUTY OF INSPECTION.

- 151. Introductory.
- A. DUTY AT THE TIME WHEN THE INSTRUMENTALITIES ARE FIRST BROUGHT INTO USE.
  - 152. Rule where the employer is himself the manufacturer of the instrumentality.
  - 153. Rule where the employer is a purchaser of the instrumentality.
- B. DUTY OF INSPECTION WHILE THE INSTRUMENTALITIES ARE IN USE.
  - 154. Generally.
  - 155. Evidential prerequisites to the maintenance of an action based on the failure to inspect.
  - 156. No negligence imputable where a defect is not discoverable by a reasonably careful inspection.
  - 157. Culpability usually inferable where the master has made no inspection of an instrumentality.
  - 158. With what frequency inspections should be made.
  - 159. Specific circumstances putting an employer upon inquiry as to the condition of instrumentalities.
    - a. External appearance of instrumentality.
    - Unsatisfactory operation of instrumentalities prior to the accident.
    - c. Length of time an instrumentality has been in use.
    - d. Operation of physical laws.
    - e. Accidents subjecting instrumentalities to extraordinary strains.
    - f. Inexperience of employees who erected an appliance.
  - 160. Sufficiency of the inspection; generally.
  - 161. Nature of the inspection required.
  - 162. Limits of the master's duty in regard to inspection.
  - 163. Common usage as a test of the adequacy of an inspection.
  - 164. Duty of inspection with regard to conditions arising from the progress of the work.
  - 165. Inspection by parties other than the proprietor himself, effect of.
    - a. Public officials.
    - b. Manufacturer.

As to the liability for negligent inspection, so far as it depends upon the quality of the duty, as being delegable or non-delegable, see chapters xxxI. C, xxXII. D, post.

As to the duty of inspection under statutes, see chapter xxxvII., post.

151. Introductory.— The rule stated under its positive and negative

forms in §§ 125, 126, ante,—viz., that a master is or is not chargeable with the consequences of knowledge, according as he or his agents could or could not have obtained it by the exercise of ordinary care,casts upon him, in some instances, a duty of a much more stringent and onerous character than that of taking notice of those abnormally dangerous conditions which, in this branch of the law of negligence, are designated by some such term as obvious, palpable, apparent, and the like. The standard of ordinary care is frequently not deemed to be satisfied unless he also obtains knowledge of any abnormal conditions which are discoverable by a formal inspection, made for the express purpose of ascertaining whether they exist, and as minute and searching as a reasonably cautious man, mindful of the safety of his servants, may be supposed to deem proper under the circumstances.

The extent and character of the master's duty to inspect his plant depend upon somewhat different considerations, according as it is predicated of the time when that plant is first brought into use, or of some subsequent time. It will, therefore, be necessary to segregate the two classes of cases thus indicated.

## A. Duty at the time when the instrumentalities are first BROUGHT INTO USE.

152. Rule where the employer is himself the manufacturer of the instrumentality.—It is well settled that a master who, himself, manufactures and supplies an instrumentality is chargeable with such knowledge of its defects as ordinary care during such manufacture would have disclosed.1 Manifestly, the responsibility which is thus

\*\*Standard Oil Co. v. Bowker (1895) fracture of a brake rod, in which the 141 Ind. 12, 40 N. E. 128 (ladder); fracture of a brake rod, in which the evidence shows there was a crack or Tennessee Coal, I. & R. Co. v. Currier, (1901) 47 C. C. A. 161, 108 Fed. 19 through the clasp which is attached to (car in a mine); Atchison, T. & S. F. R. Co. v. Carey (1897) 58 Kan. 815, 49 the top of the car, and that the defect Co. v. Carey (1897) 58 Kan. 815, 49 placed in the car. Hickman v. Missouri land (1865) 4 Fost. & F. 460, per Cockburn, Ch. J. (structure); Foley v. Webster (1892) 2 B. C. 138, Affirmed in 21 Can. S. C. 580 (defective rollway and chock blocks in a sawmill. The case is for the jury where a mine owner, in constructing a gangway into his mine, did not examine the roof for loose and fractured pieces of coal, so that they might be removed. Vanesse v. Catsburg Coal Co. (1893) 159 Pa. 403, 28 Atl. 200. A railroad company, it has been said, is properly held liable where a brakeman was killed owing to the Vol. I. M. & S.—21.

assumed to come into existence continues as long as the defects remain unremedied, irrespective of whether the instrumentality was or was not properly inspected after being put into use.2 This is apparently all that is meant by the language used in several Illinois cases to the effect that, where negligence in the original construction of an instrumentality is established, it is not necessary to show that the master had notice of its dangerous condition.3 That there was negligence in the construction implies, ex hypothesi, that there were abnormally dangerous conditions which were or ought to have been discovered. But, if this be the actual position of the court, the phraseology used

used upon the road, it would not be necessary to show further notice or knowledge thereof on defendant's part, or that of its agents, in order, thus far, to ing section.

<sup>2</sup>McGar v. National & P. Worsted properly constructed, and had become Mills (1901) 22 R. I. 347, 47 Atl. 1092; unsafe by reason of a defect subsequent-Stock v. Le Boutillier (1897) 19 Misc. ly arising, the doctrine that the liabil-Stock v. Le Boutillier (1897) 19 Misc. ly arising, the doctrine that the liabil112, 43 N. Y. Supp. 248, Affirming ity of the appellant company depended
(1896) 18 Misc. 349, 41 N. Y. Supp. upon notice of such subsequent defect
649. This distinction is also referred might have had application; but not so
to in Greenleuf v. Illinois C. R. Co. when the defect occurs by reason of the
(1870) 29 Iowa, 14, 4 Am. Rep. 181, failure of the appellant company to diswhere the court said: "If this car was charge the duty cast upon it by law, of
wanting in the appliances referred to providing a safe place for the appelle
by plaintiff, at the time of its constructo work. If it omitted its duty in this wanting in the appliances referred to providing a safe place for the appellee by plaintiff, at the time of its construction, work. If it omitted its duty in this tion, and so continued when put and regard, no rule of law required it should be notified of its own failure before it should be deemed answerable for inedge thereof on defendant's part, or juries resulting from such failure." that of its agents, in order, thus far, to in McBeath v. Rawle (1900) 93 Ill. fix liability." See also the extract from App. 212, an instruction to the effect the opinion in Vosburgh v. Lake Shore that, where a scaffold, properly con-& M. S. R. Co. (1884) 94 N. Y. 374, 46 structed, has become unsafe by reason Am. Rep. 148, in note 9 of the follow- of defects subsequently arising, the liability of the master depends on notice <sup>3</sup> Crown Coal Co. v. Hiles (1892) 43 of such subsequent defect, was held to Ill. App. 310, citing Alexander v. Mt. be rightly refused as misleading, where Sterling (1874) 71 Ill. 369, where the the defect existed at the time when the court said: "For the proper construction of this sidewalk, it is not denied C. R. Co. v. Harris (1894) 53 Ill. App. the town authorities were responsible. 592, held that the rule that, if a car They should see to it that such structures are properly made, and reasonably safe; and they must be kept so. They, being the projectors of them and the builders of them, are, in law, held structed car is used, notice is not necto a knowledge of their original condition. It would be absurd to say they must have notice of the original defect, when they themselves are the authors ant's liability, depend on his knowledge, of the defect. Why notice to a party of actual or imputed, of the fact that two original defects in a work he is bound to make safe and reasonably free from defects? The town being in fault at bars from coming together. But this the outset, no notice was necessary." decision can scarcely be correct, as it In Chicago & 1. R. Co. v. Maroney (1897) 170 Ill. 520, 48 N. E. 953, Affirming (1896) 67 Ill. App. 618. the court said; "If the scaffold had been ligence. See preceding chapter. They should see to it that such struc- has become defective by use in the servis not very apt for the purpose of conveying the real conception on which the decisions are based.

In cases where the evidence tends to show that the dangerous conditions supervened subsequently to the time when the instrumentality was put into use, it is error to give an instruction which fails to make it clear to the jury that notice of those conditions cannot arise out of anything connected with the original construction. In this state of the evidence, such an instruction, as the court pointed out in the case cited, runs counter to the general principle that a master is only liable where actual or constructive notice of the defect is brought home to him4.

153. Rule where the employer is a purchaser of the instrumentality.— (See also § 163, post.)—Negligence is sometimes inferable from the fact that the purchase of the instrumentality was carried out in a careless manner. But, in the absence of some special feature of this sort, the extent of the master's responsibility in cases of this type is necessarily determined with reference to the principle that he may rely in some degree upon the assumption that the parties who supplied an instrumentality exercised ordinary diligence in seeing that it was fit for use. All the authorities are agreed that the fact of the appliance being of an approved pattern (see chapter vi., ante), and having been bought from a reputable maker, is at least prima facie evidence that the defendant was not negligent in requiring his servant to use it.2 But most of the cases go much further than this, holding that such facts are conclusive in the master's favor in the absence of some circumstance which would put a prudent man upon inquiry at the time of the purchase or afterwards.<sup>3</sup> A fortiori is the defendant re-

<sup>4</sup> Baldwin v. St. Louis, K. & N. R. Co. 51 Hun, 519, 4 N. Y. Supp. 571. This (1885) 68 Iowa, 37, 25 N. W. 918, hold-aspect of an employer's liability was bind the defendant for negligence.

ing the defendant liable where it appears the process of construction, the explodthat his representative, in ordering an ers are as good as any made, no one but appliance, omitted to inform the manu- an expert could make a competent infacturers for what use it was intended, spection, and no defect in any has been so that care in making it and testing its discovered after use for several years. strength might be insured, and defects Plaintiff put reliance on the fact that in it, if any, might be thus detected on the day of the accident he saw one Consolidated Ice Mach. Co. v. Kiefer with a seam in it, or one which exposed (1888) 26 Ill. App. 466. the mercury: but there was no evidence

ing that there was a misdirection where carefully considered in Shea v. Wellingthe jury were told that if certain tim- ton (1895) 163 Mass. 364, 40 N. E. 173, bers were piled by the employees of the where it was held that the owner of a defendant, under its direction, that quarry owes no duty to its employees would be notice, of itself sufficient to to inspect exploders given to the quarrymen for use, where the manufacturers A jury is therefore justified in find- of them make repeated inspections in <sup>2</sup> Schroeder v. Michigan Car Co. that an exploder of this kind with a (1885) 56 Mich. 132, 22 N. W. 220. seam in it, or with any other defect of \*Kaye v. Rob Roy Hosiery Co. (1889) construction. had ever before been disgarded as free from culpability where there is specific testimony going to show that the appliance had been thoroughly tested by the maker before he sold it.4

If, in a case where the master is entitled to put an article into use without inspecting it, his managing agent undertakes to make an inspection, that inspection will not affect the master's liability for an injury to an employee, caused by a defect not discovered, unless he knows and consents to the agent's performing the work as a part of that which he is employed to do. In the absence of such consent, the inspection is regarded as supercrogatory and outside of the scope of his employment.5

This right of the employer to rely upon the quality of articles so purchased involves the corollary that he is not under any obligation to subject the articles to tests as minute as can and ought to be applied by a manufacturer.6

covered by anybody. The principle of Grand Rapids & I. R. Co. v. Huntley Moynihan v. Hills Co. (1888) 146 Mass. (1878) 38 Mich. 537, 31 Am. Rep. 321. \*As in Fuller v. New York, N. H. & which dealt with the master's duty to H. R. Co. (1900) 175 Mass. 424, 56 N. supervise the instrumentalities of his E. 574; Shea v. Wellington (1895) 163 business, with a view to discovering Mass. 364, 40 N. E. 173. business, with a view to discovering whether it was necessary to replace or repair them, were held inapplicable. The court said these exploders "were not railway company for damages, see use the same, and there were no circum-

<sup>5</sup> Shea v. Wellington (1895) 163 Mass. 364, 40 N. E. 173.

<sup>6</sup> In a leading New York case it was a part of the machinery or tools of the held that an employer is not liable for defendant. They were articles to be injuries caused by a latent defect in a used in his business, which were in- bar of iron purchased from a reputable stantly consumed in use. It was his house, and used in making a hook, when duty, so far as he could do it by rea- he orders the best quality, and the desonable effort, to see that none but safe fect could not have been discovered and proper articles were furnished to his servants for such a use, but he was only called upon to do what was reasonable under the circumstances." In Reynolds v. Merchants' Woolen Co. (1897) 55 Hun, 485, 8 N. Y. Supp. 634. The court said: "The case shows that such iron is tested in its manufacture to 168 Mass. 501, 47 N. E. 406, the bursting of the cylinder of a dusting machine, a few weeks after its purchase from a reputable maker, was in question. It was held that if "a machine is bought of a reputable maker,—in other case, yet the institution of such an exwords, if reasonable care is used in selecting the maker, and then reasonable care is used, upon the delivery of a machine, in inspecting it, in setting it up, to the provision of implements for his in putting it in operation,—it cannot be servant. There is no conceivable desaid that the defendant, or an employer, feet which may not be discovered and proper articles were furnished to without resorting to extraordinary tests. said that the defendant, or an employer, feet which may not be discovered would be liable in such a case, although by some possible test. The law is deit might clearly appear, later on, that signed for application to the ordinary the maker of that machine was care-affairs of business and everyday life. less, and put in improper materials, or All men are not scientists, and all are did imperfect and improper work." See justified in acting upon certain assumpalso the cases cited in the following tions and appearances. We do not notes. That similar principles are contest a harness or a wagon which we trolling where a passenger is suing a order from a reputable dealer before we

Nor do the courts, in determining whether an employer should have ascertained the existence of a defect, hold him responsible for the lack of technical knowledge which is ordinarily possessed only by per-

stances surrounding the manufacture of Hitchcock Mfg. Co. (1889) 51 Hun, 188, the hook in question which would induce 4 N. Y. Supp. 940. Ordinary care does a prudent man to depart from the usual not require a railroad company to take course of procedure, and adopt special out the dome cap and throttle valve of and extraordinary precautions." This a locomotive purchased from reputable judgment was affirmed by the court of manufacturers. It would be an unrea-appeals (1892; 132 N. Y. 273, 30 N. E. sonable rule to require such a company 750), which said: "When articles are to keep on hand mechanical contrivances manufactured by a process approved by and employ experts capable of making use and experience, and apparently the highest tests, like those which the properly finished and stamped, it is not manufacturers are in a position to usual for them to be tested again in make. Clyde v. Richmond & D. R. Co. quality, and such examinations are not (1894) 65 Fed. 482. There the special generally required by law. All the master, whose report was approved in best iron and steel is made in a few toto by Newman, D. J., considered that large establishments. The evidence shows the rule laid down by the Supreme that all practicable tests are used Court of the United States in Richmond during the process of manufacture, and & D. R. Co. v. Elliott (1893) 149 U. S. the completed product represents the 266, 37 L. ed. 728, 13 Sup. Ct. Rep. best articles that can be produced. It 837, meant that the employer was not passes into the hands of dealers, and so bound to do more than test an engine reaches the consumer. If the best reto see that it was in good running or-fined iron is required, the purchaser der, where it had been purchased from may assume that the tests necessary to a manufacturer of good standing. Commay assume that the tests necessary to produce that article have been properly a manufacturer of good standing. Comproduce that article have been properly and a manufacturer of good standing. Compare Indianapolis, B. & W. R. Co. v. made and the work properly done. He must see that the work that he undertakes to do is properly performed, but if the tool breaks from an internal defect in the material, not apparent from C. R. Co. v. Elliott (1860) 1 Coldw. 611, an external examination of the iron, or in the process of making the tool, the master is no more responsible than he would be if he had purchased it ready height for an external, apparent defect produced by use, of which he was not chargeable with knowledge." To the same effect, see Powers v. New York C. was designed, thereby injuring an emfeth. R. R. Co. (1891) 60 Hun, 19, 14 N. Supp. 408, Affirmed in 128 N. Y.659, Div. 521, 41 N. Y. Supp. 628; An employer who procures a steam boiler from a reputable manufactory to use in providing it is in making the care he is bound tweer sounce he held light for an external was purtous in process of making the tool, the posite effect, has been overruled in Nashmater is no more responsible than he wille & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jones (1871) 9 willed & D. R. Co. v. Jone steam boiler from a reputable manufactory peted to buy; and the care he is bound turer cannot be held liable for an exto use in providing it is in making the plosion on the ground that the iron of selection, and includes such inspection which it was constructed was of inferior as will detect defects which can be quality, where that fact could have been found by a careful inspection. But discovered only by breaking or cutting this does not require him to find a posthe plates. Nor is he liable if the ex- sible hidden flaw the presence of which plosion was caused by defects in the riv- there is no reason to apprehend, and eting, which could not have been dis- which is so concealed in the construccovered without taking the boiler apart tion of the machine that it cannot be and removing the rivets. Ballard v. discovered by inspection; nor does it

sons in certain lines of business, and which it would therefore be unjust to expect other persons to possess.7

Similar principles are applied in favor of a person who engages the services of an independent contractor to erect a structure, the rule being that one who, having no knowledge of scaffold building, employs a builder whom he knows to be skilful and experienced to erect a scaffold for the use of his employees, does not owe them a duty of inspection, the proper performance of which would have disclosed the defect.8 But a case in which a structure is purchased from another person, who has been using it in the business in which the defendant succeeded him, stands upon a somewhat different footing, as will be seen from the ruling cited in the subjoined note.9

tests" to determine the safety of a boiler is erroneous where there is no evier is erroneous where there is no evidence introduced to indicate what known tests might have been applied by him, and which were omitted, the jury being thus left to determine of their own volition what tests ought, in their judgment, to have been applied. Ballard v. Hitchcock Mfg. Co. (1889) 51 Hun, 188, 4 N. Y. Supp. 940. On the second appeal of this case (1893; 71 Hun, 582, 24 N. Y. Supp. 1101, Affirmed (1895) 145 N. Y. 619, 40 N. E. 163) this point was not discussed.

\*Deane v. Roaring Fork Electric

39 Pac. 346 (machinery); Prentice v. Wellsville (1893) 50 N. Y. S. R. 557, 21 N. Y. Supp. 820 (blasting compound). may provide materials such as are ortheir use.

N. E. 1017, and the effect of the two the part of the defendant to continue

make him responsible for such a flaw in cases has quite recently been stated to the block which he has purchased with be that, where an appliance (as a float) due care."

has been constructed by a skilful and
An instruction requiring an employer
to show that he had applied "all known liable to his servant for injury resulting in its construction, and is at liberty to accept the same without inspection. Wittenberg v. Friederich (1896) 8 App. Div. 433, 40 N. Y. Supp. 895.

§ In Vosburgh v. Lake Shore & M. S. R. Co. (1884) 94 N. Y. 374, 46 Am. Rep.

148, the court rejected the contention that a railroad company acquiring by purchase an additional line already built and in operation, of which an existing bridge forms a part, owes no obligation to its employees running trains over such bridge, except to keep it in as good condition as when it was bought, <sup>7</sup>Deane v. Roaring Fork Electric and has a right, without negligence, to Light & P. Co. (1895) 5 Colo. App. 521, assume the sufficiency of its original plan and construction; and denied the application of the doctrine of Devlin v. Smith (1882) 89 N. Y. 470, 42 Am. In Allison Mfg. Co. v. McCormick Rep. 311, for two reasons: (1) Because (1888) 118 Pa. 519, 12 Atl. 273, where the defendant here bought the bridge of an explosion of paint used in painting another railroad company, and without the interior of a water tank was inany selection or choice of the builder, volved, the court held that the master such as was made in the scaffold case; and (2) because the bridge, unlike the dinarily used in the same business, but scaffold, was not a temporary but a peris not required to secure the best known manent structure, intended for contin-materials, or to subject such as he does uous use through the years. The court provide to a chemical analysis in order said: "Assuming, as we must, what to settle by experiment what remote and the jury could have found from the evi-possible hazard may be incurred by dence,—that the bridge when purchased was unsafe and dangerous by rea-<sup>8</sup> Devlin v. Smith (1882) 89 N. Y. son of defects in its original plan and 470, 42 Am. Rep. 311, as explained in construction, and which defects were Vosburgh v. Lake Shore & M. S. R. Co. obvious to the eye of a skilled inspector, (1884) 94 N. Y. 374, 46 Am. Rep. 148. and easily and surely ascertainable by Devlin v. Smith was followed in Butler a structural analysis determining its v. Townsend (1891) 126 N. Y. 105, 26 factor of safety,—it was negligence on

A doctrine less favorable to the master than that applied in the cases thus far cited has been applied in some jurisdictions.<sup>10</sup>

There are at least two very weighty reasons why the theory that a

competent persons to inspect the bridge, of strength."

Co. (1890) 81 Mich. 423, 46 N. W. 111, it fully to all the ordinary tests which the extent of the defendant's duty to are applied for determining the effitest the strength of a chain was dis- ciency and strength of completed encussed. The court first laid down the gines, and such examination and tests general rule that railroad companies disclosed no defect, it could not, in an "cannot be held responsible for hidden action by an employee of another comdefects in tools or appliances, if they pany, be adjudged guilty of negligence have used reasonable care in procuring because there was a latent defect which them; but they are not absolved from subsequently caused the destruction of the duty of testing or inspection because the engine, and injury to him. Richthey have bought in the open market mond & D. R. Co. v. Elliott (1893) 149 of reputable dealers, or employed com- U. S. 266, 37 L. ed. 728, 13 Sup. Ct. Rep. petent workmen to construct them. If 837.

its use in the face of such obvious de- any defect exists which a careful test or fects without ascertaining their effect inspection would have discovered, the upon its strength and capacity. The master must be held to have knowledge defects pointed out by the evidence of such defect, and to be responsible for were almost all obvious to the eye of it." The court then proceeded thus: competent examiner. The learned "It is urged that the railroad company counsel for the appellant insists that has done all it can do when it buys of the defendant did employ suitable and reputable dealers material and machinery for use by its employees; that it who did make the usual and customary cannot, when buying, inspect personally examinations, and that there is no dis- every link of a chain to see whether it pute about that in the evidence. But is properly welded. But it can do this it is plain that the inspection described personally, as well as it can personally in the proofs as customary is that made do any act involved in the operation of by a company which has built its own its road. It not only can, but its duty bridges. In such case it already knows requires that it shall, before it is placed the plan and mode of construction, and on a car, cause every link of every chain is already responsible for the lack of used by its employees in places or under reasonable care in either the design or circumstances involving danger in case its execution. The subsequent inspect he chain should break, to be carefully tion is directed only to its perfect retested and inspected by someone compe-pair, and to indications of weakness. tent to judge of its fitness for the ut-But, where the company does not know most strain that is likely to come upon either the safety of the plan or the pru- it. If this duty had been performed in dence of the construction, because it has this case, the cold weld in the chain purchased it completed, and in use, and would very likely have been discovered, knows nothing of the skill or want of and the chain condemned as unfit for its skill of the builder, an inspection which intended use." See also Sim v. Domintakes no heed of that inquiry when de- ion Fish Co. (1901) 2 Ont. L. Rep. 69, fects are obvious, and lack of safety is where the court discussed the defendindicated and may be easily ascertained, ant's liability, on the assumption that is not sufficient. Of course, the test it was for the jury to say whether the of actual, previous use goes for some-handles of a box designed to sustain a thing. It might justify a continuance heavy weight should have been inspected of that use until a competent inspec- by a competent person before it was put tion could reasonably be made, but into use. In the following passage the would not justify a neglect when it was Supreme Court of the United States made to observe and remedy obvious also recognizes the obligation of making defects and elements of danger, because at least some kind of examination, existing in the original plan, and an where it was laid down that, if a railomission to learn, by a well-understood road company, after purchasing an enprocess, whether, in view of its appar- gine from a manufacturer of recognized ent defects, it had the ordinary surplus standing, made such reasonable examstrength." ination as was possible without tearing to pieces, and subjected master is entitled, as a matter of law, to rely on the quality of appliances obtained from a reputable manufacturer should be rejected. One of these is that such a theory is essentially inconsistent with the doctrine of non-delegable duties. See chapter xxxi., post. As between master and servant, this doctrine should, it is submitted, always be regarded as controlling whenever it comes into conflict with that which declares that the employer of an independent contractor is not liable for his negligence. See chapter xxxi. A, post. The situation is materially different from that presented where a stranger is the injured person, inasmuch as the former of those doctrines has no application to such cases, except where statutory duties are violated. The other reason is that, according to the rule adopted by most of the authorities, the servant has ordinarily no right of action against the manufacturer, and, if he cannot recover from his master, he cannot recover at all. 11 Assuming the defect which caused the injury to have been discoverable by the exercise of proper care, someone ought, in fairness, to be held responsible for its existence, and it is a mere mockery of justice to absolve the master simply on the ground that he was justified in trusting to the skill and diligence of a person who, if that skill and diligence were, as a matter of fact, not exercised, is not liable to the servant because there is no privity of contract between them.

The question as to what extent the employer had a right to rely upon the skill of a manufacturer is, of course, immaterial, where he was put upon inquiry as to the condition of the appliance which caused the injury.12

## B. Duty of inspection while the instrumentalities are in use.

154. Generally.—After an instrumentality has been put into use, the presumption that proper skill and care were exercised in its manufacture begins to lose its evidential importance with greater or less rapidity, according to circumstances (see § 158, post), and, as a matter of fact, that presumption is usually a negligible quantity.

in See a note contributed by the author to Cleveland, C. C. & St. L. R. Co. of an elevator bought from first-class v. Berry (Ind.) 46 L. R. A. 38, et seq., machinists, where the engineer had preand an article published by him in the Law Quarterly Review of April, 1900, ager that the chain was not strong and in the Canada Law Journal for the same month.

12 As, by the report of an employee.

13 As, by the report of an employee.

14 As, by the report of an employee.

15 As, by the report of an employee.

16 As, by the report of an employee.

17 As, by the report of an employee.

18 As, by the report of an employee.

19 As, by the report of an employee.

20 As an elevator bought from first-class of an elevator bou

follows, therefore, that, whether the instrumentality in question was obtained from another party, or was manufactured or constructed by the master himself, the servant's right of action will almost always be determined simply and solely by the principle that he was bound to subject that instrumentality to a systematic examination at such regular intervals as its nature and quality indicated to be proper, and at such other times as were suggested by specific circumstances calculated to put a prudent man on inquiry as to its condition.

This duty is sometimes spoken of as if it were one peculiarly and specially incident to the duty of keeping the instrumentalities in good condition. See chapter ix., ante. But this phraseology, wherever it occurs, is doubtless suggested by the evidence which happened to be under review. The cases cited in subtitle A show that the duty of inspection may, under some circumstances, be predicated with reference also to the time when the instrumentalities are first put into use, and, in some of the general statements relative to the existence of the duty, this logical connection is more or less distinctly recognized.2 Any other theory, it is manifest, would be inconsistent with the fundamental principle which underlies all the cases, viz., that, except in so far as his obligations may be modified by the doctrine of common employment, the master's responsibility for the safe condition of his instrumentalities attaches at the first moment when they are put into use, and continues as long as they remain in use. Such being the character of the master's responsibility, the existence of the duty of in-

the part of the corporation [employer]

may consist of acts of omission or commission, and it necessarily follows that

"See Tierney v. Minneapolis & St. L.

R. Co. (1885) 33 Minn. 311, 53 Am.

Rep. 35, 23 N. W. 229; Nord Deutscher mission, and it necessarily ionows that kep. 35, 23 N. W. 229; Nora Deutscher the continuing duty of supervision and inspection rests on the corporation. For 57 N. J. L. 400, 31 Atl. 619; Chicago & it will not do to say that, having fure E. I. R. Co. v. Kneirim (1894) 152 Ill. nished suitable and proper machinery and appliances, the corporation can

<sup>1</sup> The master's duty to the servant re- thereafter remain passive. The duty of The master's duty to the servant requires of the former reasonable care inspection is affirmative, and must be and skill in furnishing safe machinery and appliances, and in keeping such machinery and appliances in safe condition, including the duty of making inspection and tests at proper intervals. Rep. 243, 6 N. W. 5. For other expection and tests at proper intervals. Rep. 243, 6 N. W. 5. For other expection and tests at proper intervals. Rep. 243, 6 N. W. 5. For other expection and tests at proper intervals. Rep. 243, 6 N. W. 5. For other expection and tests at proper intervals. Rep. 243, 6 N. W. 5. For other expection and tests at proper intervals. Rep. 243, 6 N. W. 5. For other expection and tests at proper intervals. Rep. 243, 6 N. W. 5. For other expection is affirmative, and must be inspection is affirmative, and must be inspection is affirmative, and must be continuously fulfilled, and positively performed." Brann v. Chicago, R. I. & C a duty of the employer arising out of Northern R. Co. (1898) 75 Minn. 61, the liability of machinery or appliances 77 N. W. 541; Cameron v. Great Northto get out of order from time to time, ern R. Co. (1898) 8 N. D. 124, 77 N. W. or to become unfit for use from wear 1016; Chesson v. John L. Roper Lumber or from age and decay, and this is the Co. (1896) 118 N. C. 59, 23 S. E. 925; Oberfelder v. Doran (1889) 26 Neb. 118, 41 N. W. 1094; Ocean S. S. Co. v. Matduty of inspection, as meant by the Oberfelder v. Doran (1889) 26 Neb. 118, law." Armour v. Brazeau (1901) 191 41 N. W. 1094; Ocean S. S. Co. v. Mat-Ill. 117, 60 N. E. 904. "Negligence on thews (1890) 86 Ga. 418, 12 S. E. 632.

spection is a necessary consequence of the fact that the master's obligations cannot be adequately discharged unless, during the entire period of which that responsibility is predicated, he takes notice of whatever a reasonably prudent person would have ascertained under the particular circumstances which happen to be involved.

It has been held that an omission to inspect cannot be the foundation of a charge of negligence where the abnormally dangerous conditions resulted from the tortious and unauthorized acts of servants who were not vice principals.3 But this rule is to be taken subject to the limitations indicated in § 129, ante. The principles laid down in that section also involve the corollary, recognized in one case, that a master is not invariably entitled to conduct his business on the assumption that there will be no unlawful interference by trespassers with his plant.4

The duty of inspection is imposed merely as a means towards an end. Hence, if knowledge of a defect, such as the inspection was designed to reveal, has reached the master or his representative through some other channel, the mere fact that inspection has been duly provided for will not absolve the master.<sup>5</sup> So, also, if the agent employed to inspect and repair an instrumentality fails to perform the work properly, and defects still remain which would have been discovered by a proper inspection, the employer is liable for any injury which may afterwards be caused by those defects.<sup>6</sup> And it would also seem that there are good grounds for saying that the satisfactory character of the test applied for the purpose of determining whether an appliance was in good condition must be an inadequate reason for inferring the nonliability of the master in any case where the appliance was of a kind not suitable to be used at all.7 On the other hand, evidence that a sufficient force of inspectors was not employed, and that

S. W. 772.

\*Indiana, I. & I. R. Co. v. Snyder

(1892) 156 Mass. 163, 30 N. E. 559.

(1894) 140 Ind. 647, 29 N. E. 912;

\*This principle was relied on in Judge

\*Hart v. Naumburg (1888) 50 Hun, 392,

3 N. Y. Supp. 227, Reversed (1890) 123

N. Y. 641, 25 N. E. 385, but merely on
the ground that the master was ignorthe ground that the master was ignorthe defects.

\*This principle was relied on in Judge

\*This principle was relied on in Judg

<sup>6</sup> Hoes v. Ocean S. S. Co. (1900) 56 opinion there is nothing inconsistent App. Div. 259, 67 N. Y. Supp. 782 (verwith it, considered as an abstract propdict sustained, which was based on eviousition.

\*Schwandt v. William Wright Co. dence showing that certain machinery (1901) 126 Mich. 609, 85 N. W. 1107 had not been tested after it was re(plank laid on roof to stop pulley paired). The duty of inspection being weights, if they should fall, was non-delegable, the employer cannot escape liability merely on the ground that he had good reason to suppose that son (1900) 23 Tex. Civ. App. 160, 55
S. W. 772.

\*Indiana, I. & I. R. Co. v. Snyder (1892) 156 Mass. 163, 30 N. E. 559.

one of the inspectors sometimes got drunk when on duty, is not sufficient to authorize a recovery, where it is shown that the defective instrumentality was, as a matter of fact, properly inspected.8

The duty of inspection is not predicable of circumstances in which the essential situation presented is that the servant is engaged in completing or repairing some instrumentality,9 or in restoring the place of work to its normal condition. 10 The duty of inspection does not extend to the small and common tools in everyday use, of the fitness for use of which the employees using them may reasonably be supposed to be competent judges. 11 In such cases the employer may

121. There are others which, even if give way." permanent conditions of the business, which the workman must take the risk plained in § 29, ante, or, as indicated by if he accepts employment there. Leary the reasoning in the Massachusetts case O'Maley v. South Boston Caslight Co. thing in its defective condition is as-32 N. E. 1119. There are others which least equally easy to be discovered by chapter XVII., post. employer and employed. When a room "Wachsmuth v." has been shattered by an explosion, it is Co. (1898) 118 Mich. 275, 76 N. W. 497 plain to everybody that things are not (sliver flew off from a snap hammer in their normal condition, that the used for driving rivets). usual support of part by part has been

<sup>8</sup> St. Louis, I. M. & S. R. Co. v. Gaines shaken or interfered with, and that (1890; Ark.) 13 S. W. 740. some portion may have been weakened some portion may have been weakened <sup>o</sup> Allen v. Galveston, H. & S. A. R. Co. to the point of being ready to fall. If (1896) 14 Tex. Civ. App. 344, 37 S. W. the explosion was of an iron wheel, it is 171. In Stourbridge v. Brooklyn City plain that the fragments probably have R. Co. (1896) 9 App. Div. 129, 41 N. flown in different directions, and that Y. Supp. 128, the court took the ground they may have lodged above or below. that the only duty of an employer, in When a workman is sent into such a legard to a cross-beam furnished merely room on the day of the explosion to as a part of the structure which the clear away the ruins, it is manifest that as a part of the structure which the clear away the ruins, it is manifest that servant is engaged in erecting, and not he is taking one of the steps which are for the purpose of providing him with a place of work, is to apprise him of the pened. It is not a natural inference on existence of any latent defects of which the part of one so sent that the place has it has knowledge. See, further, as to been inspected, and it is not a natural this class of cases, chapter XXXII., post. interpretation of the offer to take it as <sup>10</sup> A servant is not entitled to rely on implying that the superior knows that his employer's having examined the it is safe. Such an inference and interplace where he is put to work where he pretation are not based on the experiplace where he is put to work, where he pretation are not based on the experi-is sent into a room, on the day of the ence of life; they are mere deductions explosion of a fly wheel, to clear away from the letter of an inaccurately stated the ruins. Kanz v. Page (1897) 168 rule of duty assumed beforehand to Mass. 217, 46 N. E. 620. The court cover the case. Someone must be first said: "There are many momentary in the place of possible danger. The dangers which, though hidden, it is im-workman sent in to clean it up has no practicable to guard against by inspec- right to assume that he is not the first, tion, and for which, on this ground, the nor is the employer bound in formal employer is held not liable. Whittaker language to notify him that no one, as v. Bent (1897) 167 Mass. 588, 46 N. E. yet, has made certain that nothing will

This rule may be regarded as a necesare obvious without warning, and of sary inference from the principle exv. Boston & A. R. Co. (1885) 139 Mass. cited, it may be deduced from the con-580, 587, 52 Am. Rep. 733, 2 N. E. 115; ception that the risk of handling the (1893) 158 Mass. 135, 47 L. R. A. 161, sumed by the servant as an inseparable and manifest incident of the very work are both transitory and obvious, or at which he undertakes to perform. See

11 Wachsmuth v. Shaw Electric Crane

ordinarily rely on the presumption that those using the article will first discover the defect. 12 See chapter IV., ante.

One case seems to proceed upon the theory that a master is not bound to examine into the condition of articles which form part of his stock of merchandise, and which are merely handled for the purposes of transportation. 13 As there is nothing in the facts of that case to indicate that the master knew who was the maker of the injurious agency, or whether he was or was not a reputable manufacturer, this decision goes beyond even those cited in § 153, and the conclusion is apparently independent of the principle there relied upon. It is difficult to see any satisfactory reason why the responsibility for accidents of this type should be thrown upon the servant. The essential import of such evidence is simply that certain conditions existed by which the place of work was rendered unsafe, and it is submitted that a distinction which segregates from the rest one particular class of the material substances which may produce this result is purely arbitrary.

The merc fact that the conditions which caused the injury were due to an act of God will not excuse the master if it appears that no harm would have resulted if a reasonably careful inspection would have disclosed the danger in time to have prevented the catastrophe.14 Compare § 129, ante.

155. Evidential prerequisites to the maintenance of an action based on the failure to inspect.— The first step in the establishment of the plaintiff's case is to show that the master was subject to the duty of inspecting the instrumentality in question. If it was a part of his plant, as is the situation in all the cases considered in this chapter, the only circumstances under which this point can be of any importance are those in which it is open to controversy whether the duty lay upon him or upon the servants who prepared or adjusted the instrumentality. See chapter xxxII., post.2 If this point is determined in the

Co. (1893) 158 Mass. 596, 33 N. E. 652

2 In Lafayette Bridge Co. v. Olsen (purchaser of cotton is not liable for an (1901) 54 L. R. A. 33, 47 C. C. A. 367, injury to his servant from the giving 108 Fed. 335, the defendant company way of the bagging upon a bale while was held liable for the reason that it he was moving it with a hook, in the had made no arrangements for inspect-absence of evidence of a custom or ing the timber from which the workmen agreement on the master's part to in- in a bridge gang were to select the nec-

<sup>&</sup>lt;sup>12</sup> Miller v. Erie R. Co. (1897) 21 App. bankment weakened by extraordinary Div. 45, 47 N. Y. Supp. 285 (poles for rain).

pushing cars along an adjoining track).

<sup>16</sup> Garragan v. Fall River Iron Works
Co. (1893) 158 Mass. 596, 33 N. E. 652

<sup>17</sup> Cases not answering this description are considered in the following chapter.

Co. (1893) 158 Mass. 596, 33 N. E. 652

<sup>18</sup> In Lafayette Bridge Co. v. Olsen

spect it and ascertain its strength).

14 Central R. Co. v. Grady (1901) 113 work. Compare § 164, post.

Ga. 1045, 39 S. E. 441 (railway em-

servant's favor, the master's liability depends upon the answer to the following questions:

- (1) Whether the conditions which caused the injury were discoverable by an examination of a reasonably careful character.
- (2) Whether any examination of the instrumentality had ever been made.
- (3) Whether the examinations which were actually made were made as frequently as was proper.
- (4) Whether there were any circumstances which would have suggested to a prudent man the advisability of making a special examination during the interval between two of the regular examinations.
- (5) Whether the regular or special examinations which were actually made were as thorough as the circumstances demanded.

These questions will be considered in the following sections.

156. No negligence imputable where a defect is not discoverable by a reasonably careful inspection.— (See also § 163, post.)—The general principle explained in § 126, ante, involves the corollary that an employer cannot be held negligent for failing to discover a defect which an examination, made with that degree of care which is obligatory under the circumstances, would not disclose. The phraseology used in stating this principle is often of a sufficiently general character to indicate that its applicability is independent of the question whether, as a matter of fact, such an examination had or had not been made. Indeed, it is clear that the failure to examine an instrumentality cannot be regarded as an efficient cause of an accident, where ex hypothesi, the conditions which rendered it possible would not have come to the master's knowledge even if the examination had been made.2

<sup>1</sup> A master is declared not to be liable v. Clausen & P. Brewing Co. (1896) 12 1 A master is declared not to be liable v. Clausen & P. Brewing Co. (1896) 12 for "hidden defects, which could not App. Div. 366, 42 N. Y. Supp. 848; have been discovered by the most careful inspection" (Ladd v. New Bedford (1885) 87 Mo. 545 (rail without any R. Co. [1876] 119 Mass. 412, 20 Ann. visible defect broke by reason of cold Rep. 331); or which "the usual and weather); Racine v. New York C. & H. well-recognized tests of science and art R. R. Co. (1893) 70 Hun, 453, 24 N. Y. fail to detect" (Toledo, P. & W. R. Co. Supp. 388 (nonsuit proper, where the v. Conroy [1873] 68 Ill. 561); or "for evidence was that, after a supposed latent defects which could not have been burning of the crown plate of a boiler, discovered by the use of ordinary diligit was subjected to the test of 145 latent defects which could not have been burning of the crown plate of a boiler, discovered by the use of ordinary dilities as the constant of the crown plate of a boiler, discovered by the use of ordinary dilities as under the crown plate of a boiler, discovered by the use of 145 gence" (Quintana v. Consolidated Kanpounds pressure, its maximum capacity, sas City Smelting & Ref. Co. [1896] 14 and resisted that pressure; that it was Tex. Civ. App. 347, 37 S. W. 369); or then put in service by the defendant, in for "latent defects" simply (Missouri hauling freight and passenger trains, P. R. Co. v. Crenshaw [1888] 71 Tex. under a pressure of from 140 to 145 gounds of steam, and continued in such a service for each of the crown plate of a boiler, discovered by the use of subjected to the test of 145 gence" (Quintana v. Consolidated Kanpounds pressure, its maximum capacity, and resisted that pressure; that it was subjected to the test of 145 gence" (Quintana v. Consolidated Kanpounds pressure, its maximum capacity, and resisted that pressure; that it was Text. Civ. App. 347, 37 S. W. 369); or then put in service by the defendant, in hauling freight and passenger trains, pounds of steam, and continued in such a service for each of the test of 145 gence" (Quintana v. Consolidated Kanpounds pressure, its maximum capacity, as a subjected to the test of 145 gence" (Quintana v. Consolidated Kanpounds pressure, its maximum capacity, as a consolidated Kanpounds pressure, its maximum capacity, and resisted that pressure; that it was subjected to the test of 145 gence" (Quintana v. Consolidated Kanpounds pressure, its maximum capacity, and resisted that pressure; that it was subjected to the test of 145 gence" (Quintana v. Consolidated Kanpounds pressure, its maximum capacity, and resisted that pressure; that it was subjected to the test of 145 gence" (Quintana v. Consolidated Kanpounds pressure, its maximum capacity, and resisted that pressure; that it was subjected to the test of 145 gence" (Quintana v. Consolidated Kanpou 341, 9 S. W. 262).

2 See Louisrille & N. R. Co. v. Campbell (1893) 97 Ala. 147, 12 So. 574; supposed burning of the plate and up to
Atchison, T. & S. F. R. Co. v. Ledbetter the time of the accident without any
(1885) 34 Kan. 326, 8 Pac. 411; Boess evidence of weakness, and that it finally

But in the great majority of the cases in which this principle appears as a controlling factor the actual situation presented by the evidence is that an inspection, upon the sufficiency of which the master was entitled to rely, had been duly made before the accident, and that the

out a train); Atz v. Newark Lime & eyebolt connecting the chain with the Cement Mfg. Co. (1896) 59 N. J. L. 41, rod of a brake, as there was no evidence 34 Atl. 980 (bolt broke from internal that defendant or any of its agents had is, perhaps, the actual ground on which, have been discovered by inspection, exin Watts v. Hart (1893) 7 Wash. 178, cept that the maker could have discov-34 Pac. 423, 771, the defendant was ab- ered it by bending the bolt while hot, solved from liability, where the only and in other ways; but it did not apvisible defect in a piece of timber used pear whether the eyebolt was made by for "staking" cars was a small knot. the company or purchased; and no But the precise position of the court on want of care, the exercise of which this aspect of the case is not very clear. would have discovered the defect, In Warner v. Erie R. Co. (1868) 39 N. was shown. In Carlson v. Phæniw Y. 468, a bridge fell after about nine Bridge Co. (1892) 132 N. Y. and a half years' use. The evidence 273, 30 N. E. 750, several hooks were Y. 468, a bridge fell after about nine Bridge Co. (1892) 132 N. Y. and a half years' use. The evidence 273, 30 N. E. 750, several hooks were showed that bridges of similar construction and materials upon the defending ant's road had stood over ten years, and bar purchased by the defendant's superwere considered, and to all appearances intendent. They were used in lifting were, sound and safe; some had stood the heavy girders which formed a part that the support of the heavy girders which formed a part of the heavy girders which formed a part of the heavy girders which prilates and the prilates are the prilates are the prilates and the prilates are the prilates and the prilates are the prilates and the prilates are the prilates are the prilates and the prilates are the prilates are the prilates are the prilates and the prilates are the prilates over fourteen years, and one over seventeen years, in the same condition. Alexpected to stand would have no appreciable weight in the scale of evithe construction and maintenance, of this bridge, and that there was an abthis bridge, and that there was an absolute want of any actual notice of any conclusion that the defect would have defect, real or suspected, therein, and that it was the duty of the court to take been discovered would have had no other that it was the duty of the court to take and evidence of that character would be on the established facts, the plaintiff could not recover, but that, at all events, the defendant was entitled to the insufficient to sustain a judgment." In Bannon v. Sanden (1896) 68 III. App. events, the defendant was entitled to the 164, it was contended that a proper exinstruction the counsel asked, to wit, amination was not made of the timber that, in order to charge the defendant, that broke in a scaffold, but the court it was necessary for the plaintiff to show that the decay in the bridge, if that it had been used four or five times it fell from decay, was known, by some without breaking, and that an examina-

exploded while carrying only 110 it was held that an action could not be pounds of steam, and while running at maintained by a brakeman injured by only a moderate rate of speed and with- the breaking of a defectively welded flaw not visible on the surface). This notice of the defect, or that it could of the structure for the railway, and only one was shown to have broken, or though some of the witnesses for the to have been weak or defective. The plaintiff testified that they would not piece of the bar not used was shown to consider such a bridge as safe beyond have been of the best quality, and to the period of seven or eight years, yet possess an elasticity and strength far the court said that if, upon adequate beyond that required in lifting the girdand repeated inspection, and the applier in question. The hook that broke cation of appropriate tests, no defect did so from a weakness in the iron at was exhibited, a mere opinion as to the the particular point of fracture. The length of time such a bridge might be court said: "The evidence does not show from what part of the bar the piece of iron from which the hook was dence. It was held that there was no manufactured was taken, and, if the conflict of evidence as to the care and cutting test had been applied to either skill used in the inspection, as well as end or the middle of the bar, the jury could not have found that it would have disclosed the defect complained of. A it fell from decay, was known, by some without breaking, and that an examina-notice or otherwise, to the president and tion would not have disclosed any knot directors of the road. In Painton v. in the timber, an examination would Northern C. R. Co. (1880) 83 N. Y. 7, have been useless. In Kranz v. White

period which had elapsed between the inspection and the accident was so short that he might reasonably act upon the presumption that the condition of the instrumentality had undergone no change for the worse.3

The practical effect of this principle is considerably limited by the operation of another, equally well settled, viz., that the master's nonliability cannot be affirmed, as a matter of law, merely because the abnormal conditions which created the risk from which the servant suffered injury were not apparent to a person making a superficial examination of the instrumentality in question. In other words, it is laid down that no defect can be considered latent which is discoverable by the exercise of due care. 4 The predication of a specific duty of active

a nature as to elude the most careful a coupling pin broke owing to a hidden examination of the most skilful experts, flaw which could not have been discovan instruction was held erroneous which ered before the break, except by an ex-

sections, and also the following cases in which the fact of the previous inspection was adverted to: Louisville, N. A. tion was adverted to: Louisville, N. A.
& C. R. Co. v. Bates (1896) 146 Ind.
564, 45 N. E. 108 (defective car);
O'Connor v. Illinois C. R. Co. (1891)
83 Iowa, 105, 48 N. W. 1002 (defective car); Powers v. New York C. & H. R.
R. Co. (1891) 60 Hun, 19, 14 N. Y.
Supp. 408 (king bolt had a defect underpeath the surface): Indiana I. & I. derneath the surface); Indiana, I. & I. R. Co. v. Snyder (1893; Ind.) 32 N. E. 1129 (defective hand car); Sullivan v. the occurrence were as follows: "As to Poor (1900) 32 Misc. 575, 66 N. Y. the character of the danger which the Supp. 409 (clevator pronounced safe by plaintiff encountered in performing this competent experts at the time it came carefully from time to time); Smith v. New York C. & H. R. R. Co. (1900) 164 tiff, or to the humblest and most unin-N. Y. 491, 58 N. E. 655 (ring in chain formed section hand engaged about the broke owing to concealed defect, due to work. If the bolts that held the bottom the presence of dirt or sulphur; no external indications of flaw). Evidence between the tap and the nut, no eyes that there was, in a platform over could penetrate the iron and the wood which workmen were wheeling barrows, that surrounded the bolt, and it could a depression, "so small that it escaped not be expected or required that the secthe attention of the numerous other tion boss should chip into the bolt or persons who used the platform, some of cut through the iron and destroy the whom specially examined it," is insuftender to ascertain whether the bolts gence against the employer,—especially work to remove the tender from its where it is improbable that the imperproximity to the main track." fection played any part in the accident

(1881) 8 III. App. 583, where, for any-occasioning the injury complained of thing that appeared to the contrary, the Kaare v. Troy Steel & I. Co. (1893) 139 defect which caused the explosion of a N. Y. 369, 34 N. E. 901. A verdict for gas generator might have been of such the plaintiff cannot be sustained where told the jury that the mere absence of ceedingly critical examination. West-examination by prudent men was conclusive of the defendant's liability.

3 See the cases cited in the following pany is not liable for an injury to an employee caused by the breaking of a brake rod, due to an imperfect welding, where the flaw was not discoverable by the usual methods of inspection, owing to the accumulation of rust over the welding. Read v. New York, N. H. & H. R. Co. (1897) 20 R. I. 209, 37 Atl. 947. In Skidmore v. West Virginia & P. R. Co. (1895) 41 W. Va. 293, 23 S. E. 713, the bottom of a wrecked tender fell out and injured one of the wrecking. fell out and injured one of the wrecking crew. The comments of the court upon work, it was no more apparent to the under defendant's control, and inspected skilled and experienced supervisor and section boss than it was to the plainon were severed, as they must have been,

\* Sack v, Dolese (1890) 35 III. App.

inspection obviously entails the adoption of the latter of these principles. But it will be seen, by comparing the cases cited in the subjoined note with those cited in notes 2 and 3, supra, that there is considerable difficulty in reconciling, with reference to the actual facts involved, some of the decisions in the two groups.<sup>5</sup>

place." Burnes v. Kansas City, Ft. S. & M. R. Co. (1895) 129 Mo. 41, 31 S. W. 347. It has been held that proof that the appliance which caused the plaintiff's injury was defective will justified the implication that the defendant in which there was no discoloration, nor it was made in view of the conceded fact that the rope had been carefully inspected at reasonable intervals. The ances furnished to his servants, if they were apparently reasonably safe and adequate. Watts v. Hart (1893) 7 Wash. 178, 34 Pac. 423, 771. See, however, as to this case, note 2, supra.

<sup>5</sup> The servant was allowed to recover in the following cases: Northern P. R. Co. v. Teeter (1894) 11 C. C. A. 332, 27 U. S. App. 316, 63 Fed. 527 (hole in track concealed by slush); True v. Lehigh Valley R. Co. (1897) 22 App. Div. 588, 48 N. Y. Supp. 86 (inspection of bank from which slides may be expected not sufficient, where it has been only such as could be made by observation in passing along the track); Union P. R. Co. v. Daniels (1894) 152 U. S. 684, sub nom. Union P. R. Co. v. Snyder, 38 L. ed. 597, 14 Sup. Ct. Rep. 756, Affirming (1890) 6 Utah, 357, 23 Pac. 762 (evidence tended to show that a car had and rust, could have been detected withing station); Munch v. Great Northern after it gave way, looked as if there had

636, Affirmed (1891) 137 Ill. 129, 27 N. R. Co. (1898) 75 Minn. 61, 77 N. W. E. 62. "A defendant cannot avoid its 541 (old break in wheel of railway liability by shutting its eyes to its obcar); Myers v. Erie R. Co. (1899) 44 ligation to maintain a reasonably safe App. Div. 11, 60 N. Y. Supp. 422 (crack on brake staff concealed by rust); Lafayette Bridge Co. v. Olsen (1901) 54 L. R. A. 33, 47 C. C. A. 367, 108 Fed. 335 (curl in the grain of the timber praintill's injury was defective will justify the implication that the defendant R. Co. v. Conroy (1873) 68 Ill. 561 was negligent only when the defect was patent and obvious ("open to visual observation"), and the failure to discover Sons (1886) 101 N. Y. 547, 5 N. E. 449 it was the result of carelessness. Ers (evidence was that a casual inspection kine v. Chino Valley Beet-Sugar Co. of the lower side of a plank in a scaffing with the control of the lower side of a plank in a scaffing with the control of the lower side of a plank in a scaffing with the control of the lower side of a plank in a scaffing with the control of the lower side of a plank in a scaffing with the control of the lower side of a plank in a scaffing with the control of the lower side of a plank in a scaffing with the control of the lower side of a plank in a scaffing with the control of the lower side of a plank in a scaffing with the control of the lower side of a plank in a scaffing with the control of the lower side of a plank in a scaffing with the control of the lower side of a plank in a scaffing with the control of the lower side of a plank in a scaffing with the control of the lower side of a plank in a scaffing with the control of the lower side of a plank in a scaffing with the control of the lower side of a plank in a scaffing with the control of the lower side of a plank in a scaffing with the control of the c Donald v. Postal Teleg. Co. (1900) 22 anything whatever in its appearance to R. I. 131, 46 Atl. 407 (knot in cross-suggest a suspicion of its unsoundness. arm of telegraph pole); Kearney Elec-This decision, however, seems to be too tric Co. v. Laughlin (1895) 45 Neb. strongly in the master's favor, unless 390, 63 N. W. 941 (laborer injured by the caving of an imperfectly propped tunnel, the supports of which the superintendent had examined a short time same may be said of the ruling that an previous); Clune v. Ristine (1899) 36 employer is not liable for an accident C. C. A. 450, 94 Fed. 745 (large rock imoccurring because of a defect in appli- bedded in the slope of a railway cutting was loosened by the action of frost and water, and fell); Mayer v. Liebmann (1897) 16 App. Div. 54, 44 N. Y. Supp. 1067 (rivet holes in the rods and brackets of the run used for lowering barrels into a cellar had become enlarged by use and rust); Davis v. Nuttallsburg Coal & Coke Co. (1890) 34 W. Va. 500. 12 S. E. 539 (rock fell from roof of mine) McMillan Marble Co. v. Black (1890) 89 Tenn. 118, 14 S. W. 479 (prorecting rock in a quarry fell); Flanigan v. Guggenheim Smelting Co. (1899) 63 N. J. L. 647, 44 Atl. 762 (knot in side piece of ladder in close proximity to nail driven into cross piece); Whitney & S. Co. v. O'Rourke (1898) 172 Ill. 177, 50 N. E. 242 (boards covering terra cotta coping on a building under cree cotta coping on a building under erection were left loose, and one of them fell). See also, to same effect, Bushby a crack about 12 inches long in one of v. New York, L. E. & W. R. Co. (1887) its wheels, and that the crack, although 107 N. Y. 374, 14 N. E. 407; Missouri it was old and filled with greasy dirt P. R. Co. v. Dwyer (1886) 36 Kan. 58, 12 Pac. 352: Kaplan v. New York Bisout difficulty if the wheel had been cuit Co. (1896) 5 App. Div. 60, 38 N. properly examined at the last inspect- Y. Supp. 1049. Testimony that a hook,

157. Culpability usually inferable where the master has made no inspection of an instrumentality.— That a master cannot, in the majority of instances, be pronounced free from negligence, as a matter of law, where the instrumentality which caused the injury had never been inspected at all before the accident, or not at the time when it should have been (see next section), is obviously a necessary consequence of assuming that inspection is one of the duties which he owes to his servants. Usually, therefore, the case is for the jury wherever the evidence tends to show such omission to inspect.1 Setting aside the

been a break previous to the main worn, and many of the wires were break; that "if a man made a careful broken; that the cables appeared rusty, examination of the hook, after making as though they had been used, and were it he might possibly, or if a man famil- flattened in places, and, on account of iar with hooks examined it he might the wires being broken, could not be perhaps, have discovered the flaw which handled with bare hands; that after the caused the accident; but these flaws break the broken ends were rusty and would not be visible on an ordinary in- worn, with little strands sticking out, spection;" that there was actually a and some wires were longer than others, visible crack or flaw in the hook above and the break looked as though the the flaw at the place of rupture; and cable had pulled apart; and that when that, as testified to, iron will usually one of the wires breaks and moisture break in the weakest spot,—tends to gets in, the rust eats into the wire, and show that a careful inspection would weakens it. Yaw v. Whitmore (1899) have revealed the weakness of the hook. 46 App. Div. 422, 61 N. Y. Supp. 731. Spicer v. South Boston Iron Co. (1885) It was error to charge the jury to find nesses have testified that the materials on the testimony of a conductor that he furnished for a scaffold were rotten, it went along the side of the train, and is error to take from the jury the question whether the condition of those materials ought to have been known to the master. Roberts v. Smith (1857) 2 Hurlst. & N. 213, 26 L. J. Exch. N. S. 319, 3 Jur. N. S. 469. A finding that an employer was negligent in furnishing an improper or defective jackscrew, by the breaking of which his employee 52 N. Y. Supp. 1139 (no uniform in-was injured, is justified by proof that spection of an iron wheel supporting a the break had begun before the jack-screw was given, that an inspection showed that it was liable to be broken would have disclosed it, and that the inspection was not made. Kennedy v. oiled when work was slack); which chicago, M. & St. P. R. Co. (1894) 57 v. Moffat (1849) 12 Sc. Sess. Cas. 2d Minn. 227, 58 N. W. 878. A railway series, 434; International & G. N. R. company which, after using a lifting Co. v. Elkins (1899; Tex. Civ. App.) 54 S. W. 931. An employee of a railwould have disclosed it, and that the intent defect in the weld of the foot at-road company may recover for injuries tached to the jack, sends it to its shops resulting from an accident occasioned for other repairs, is liable to a servant by a defect in a brake rod, which an ininjured because of such defective weld, vestigation, pursuant to a rule of the if it could have been discovered by a company, would have revealed in time reasonable examination at the time such to prevent the accident. Bailey v. repairs were made. Kansas City & P. Rome, W. & O. R. Co. (1893) 139 N. Y. R. Co. v. Ryan (1894) 52 Kan. 637, 35 302, 34 N. E. 918. All the cases cited to prevent the accident. Bailey v. repairs were made. Kansas City & P. Rome, W. & O. R. Co. (1893) 139 N. Y. R. Co. v. Ryan (1894) 52 Kan. 637, 35 in the following sections were also be accepted. Pac. 292. The master's negligence is in the following sections may also be refor the jury, where the evidence is that garded as virtual recognitions of the steel cables supporting a derrick were doctrine in the text, old, and the outer surface had become

Mass. 426. Where several wit- that there was no defective machinery, looked under the cars, and saw no defects. Wright v. Southern R. Co. (1900) 127 N. C. 225, 37 S. E. 221.

<sup>1</sup> Weiden v. Brush Electric Light Co. (1889) 73 Mich. 268, 41 N. W. 269; Byrne v. Eastmans Co. (1900) 163 N. Y. 461, 57 N. E. 738, Reversing (1898) 27 App. Div. 270, 50 N. Y. Supp. 457, 52 N. Y. Supp. 1139 (no uniform inby hard usage at any moment; merely

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cases commented upon in § 164, post, which are not relevant in the present connection, the single exception to this rule would seem to be the case of an instrumentality which had been purchased under circumstances which absolved the employer from the duty of examining it when it passed into his possession (see § 153, ante), and the injury was received so soon afterwards that it would be unreasonable to hold that a new obligation to examine it came into existence while it was in use. But this particular situation does not seem to have been the subject of any express decision.

It has been held that the rule that the performance of a duty may sometimes be presumed is not available in the master's favor, where the question is whether an instrumentality has been duly inspected.<sup>2</sup>

158. With what frequency inspections should be made. How often an inspection should be made depends entirely upon the character of the instrumentality and the length of time during which it may reasonably be presumed that it will remain in that normal condition in which it must, for the purposes of the inquiry, be supposed to have been found at the time when it was put into use, or at the last preceding examination. It is therefore inevitable that the general expressions used to describe the extent of the master's obligations from this point of view should be somewhat vague. In view of the numer-

City & P. R. Co. v. Finlayson [1884] 16 Neb. 578, 49 Am. Rep. 724, 20 N. W. 860); or from time to time from time to time, as occasion may require (Murphy v. Phillips [1876] 24 Week. Rep. 647. 35 L. T. N. S. 477); or from time to time as may be neces-

\*\*McCauley v. Southern R. Co. (1897) as frequently as is reasonable under all 10 App. D. C. 560, where the contention of the defendant was that the due inspection of an engine might be presumed from the fact that it had been in the roundhouse, and might have been in the roundhouse, and might have been in the roundhouse, and might have been cocurred.

\*\*It has been said that the master must examine his instrumentalities after they have been in service as long C. C. A. 11, 57 U. S. App. 513, 86 Fed. as they can, with safety, be used withas they can, with safety, be used without examination and overhauling (Sioux Deutscher Lloyd S. S. Co. v. Ingebreg-City & P. R. Co. v. Finlayson sten [1894] 57 N. J. L. J. 400, 31 Atl. City & P. K. Uo. v. Funtayson sten [1894] 51 N. J. L. J. 400, 51 Rd. [1884] 16 Neb. 578, 49 Am. Rep. 724, 20 619; Comben v. Belleville Stone Co. N. W. 860); or from time to time [1896] 59 N. J. L. 226, 36 Atl. 473; (Chesson v. John L. Roper Lumber Co. Daniels v. Union P. R. Co. [1890] 6 [1896] 118 N. C. 59, 23 S. E. 925); or Utah, 357, 23 Pac. 762; Erskine v. from time to time, as occasion may re-Chino Valley Beet-Sugar Co. [1895] 71 Fed. 270); or at reasonable intervals (Williams v. St. Louis & S. F. R. Co. [1893] 119 Mo. 316, 24 S. W. 782 [railor from time to time as may be neces- [1893] 119 Mo. 316, 24 S. W. 782 [rail-sary to enable him to see that they are in a reasonably safe condition (Egan v. an injury to a brakeman who is tripped Dry Dock, E. B. & B. R. Co. [1896] 12 up by a small coil-spring, left on a side App. Div. 556, 42 N. Y. Supp. 188); or track by a car repairer and almost frequently (Richmond & D. R. Co. v. covered by grass, where the employees Burnett [1892] 88 Va. 538. 14 S. E. working on the track had never seen it, 372; Knapp v. Sioux City & P. R. Co. and there is no evidence to show how [1887] 71 Iowa, 41, 32 N. W. 18); or long it had been lying between the

ous and diversified elements involved in the consideration of the sufficient performance of the master's duty, it is evident that, in the great majority of instances, his liability must be treated as a question of fact for the jury. The subjoined note, in which the decisions are classified under headings which indicate the subject-matter, shows under what circumstances the courts have deemed it justifiable to exercise their power of controlling or setting aside verdicts.<sup>2</sup>

a defect which suddenly appears in a tool or instrumentality furnished an employee, unless he has been remiss in testing the same. Atchison, T. & S. F. R. Co. v. Napole (1895) 55 Kan. 401, 40 Pac. 669. The degree of vigilance which a railway company is required to exercise to guard against injuries to employees, resulting from the interfer-ence of trespassers with the track and switches, is determined by the possibility or probability of such interference, and the harm likely to result therefrom. International & G. N. R. Co. v. Johnson (1900) 23 Tex. Civ. App. 160, 55 S. W.

<sup>2</sup> 1. Railway tracks.— Where loose rocks are left in such a position above railway tracks that they may be displaced by the action of the elements and precipitated upon the tracks, the failure to patrol the track at night is culpable negligence. Clune v. Ristine (1899) 36 C. C. A. 450, 94 Fed. 745. Negligence may be inferred where a switch rail has been in a battered condition for a month. Chicago, L. S. & E. R. Co. v. Hartmann (1897) 71 III. App. 427. The court cannot say, as matter of law, that the interval of six and a half or four and a half hours between the time of the breaking of a drawbar on a car and the accident, caused by a piece of the broken drawbar remaining on the track, was not sufficient to charge the company with knowledge of the presence of such obstacle, and with the re-

rails]). A master is said not to be liable for the death of an engineer by chargeable with negligence by reason of the derailment of his engine, caused by a sudden fall of rain saturating the already moist earth so that the cross ties sunk on one side under the weight of the engine and turned it over, where the place had been twice inspected that morning and appeared to be safe, and two heavy freight trains and a fast express train had passed over it in safety. Binns v. Richmond & D. R. Co. (1892) 88 Va. 891, 14 S. E. 701.

2. Railway bridges .- "Of whatever material bridges are built, they should be subjected periodically, every year, to the closest examination." Toledo, P. & W. R. Co. v. Conroy (1873) 68 Ill. 561. Whether a wooden bridge ought to be inspected during the night as well as the day, to obviate the risk of accidents from fire, is a question for the jury. Maydole v. Denver & R. G. R. Co. (1900) 15 Colo. App. 449, 62 Pac. 964. The fact that a bridge had been properly inspected and tested the day before the accident is conclusive evidence of the company's exercise of due care. Faulkner v. Erie R. Co. (1867) 49 Barb, 324. See also Warner v. Erie R. Co. (1868) 39 N. Y. 468.

3. Switches.—A switch on a grade and curve, and near a large city where there are lawless characters who may interfere with it, ought to be inspected at least once every six hours. International & G. N. R. Co. v. Johnson (1900) 23 Tex. Civ. App. 160, 55 S. W. 772.

4. Locomotives.—In Pierson v. New sponsibility for the danger thus created. York, N. H. & H. R. Co. (1900) 53 App. Chicago & N. W. R. Co. v. Delaney Div. 363, 65 N. Y. Supp. 1039, a verdict (1897) 169 Ill. 581, 48 N. E. 476, Affor the plaintiff was upheld where he firming (1896) 68 Ill. App. 307. Where it is shown that a track inspector and brakes to work because of a leak in the his gang carefully examined and resteam pipe in the smoke box, the evipaired a curve about two weeks before dence being that the engine had not paired a curve about two weeks before dence being that the engine had not an accident, an employee of the railbeen inspected for several days before road company working upon an engine the accident. In Atchison, T. & S. F. cannot recover for injuries alleged to be R. Co. v. Holt (1883) 29 Kan. 149, the due to a defect in the rails at that place.

Burrell v. Gowen (1890) 134 Pa. 527, an engine had been unsafe and danger-19 Atl. 678. A railway company is not ous for "some considerable time." A

It has been laid down that the master's freedom from culpability cannot be affirmed, as a matter of law, where the evidence is that a defect is one produced by gradual wear. The reasonable inference then

railroad company which every month car which had been at an inspecting sta-

injuries as may have been received en mediately on its arrival at an inspectroute." St. Louis, I. M. & S. R. Co. v. ing point, and the servant was allowed
Rice (1888) 51 Ark. 467, 4 L. R. A. to recover for an injury received two
173, 11 S. W. 699. But in Brann v. Chior three hours after its arrival. Misthe court, while holding that the evi- company is, as matter of law, not reinspection of certain coal cars within & P. R. Co. (1901) 179 U. S. 658, 45 L. 20 miles, besides other alleged inspected. 361, 21 Sup. Ct. Rep. 275, Affirming tions at the coal chutes by an employee (1899) 37 C. C. A. 56, 95 Fed. 244. who had these cars in his special charge, Negligence in regard to inspection canthe court said: "The inspections at not be predicated where a drawhead the court said: "The inspections at not be predicated where a drawhead the court said: "The inspections at not be predicated where a drawhead the court said: "The inspections at not be predicated where a drawhead the court said: "The inspections at not be predicated where a drawhead the court said: "The inspections at not be predicated where a drawhead the court said: "The inspection at not be predicated where a drawhead the court said: "The inspection at not be predicated where a drawhead the court said: "The inspection at not be predicated where a drawhead the court said: "The inspection at not be predicated where a drawhead the court said: "The inspection at not be predicated where a drawhead the court said: "The inspection at not be predicated where a drawhead the court said: "The inspection at not be predicated where a drawhead the court said: "The inspection at not be predicated where a drawhead the court said: "The inspection at not be predicated where a drawhead the court said: "The inspection at not be predicated where a drawhead the court said: "The inspection at not be predicated where a drawhead the court said: "The inspection at not be predicated where a drawhead the court said: "The inspection at not be predicated where a drawhead the court said: "The inspection at not be predicated where a drawhead the court said: "The inspection at not be predicated where a drawhead the court said: "The inspection at not be predicated where a drawhead the court said: "The inspection at not be predicated where a drawhead the court said: "The inspection at not be predicated where a drawhead the court said: "The inspection at not be pre these points were not minute or critifor the determination of the jury." 19, 14 N. Y. Supp. 408, Affirmed in 128 Philadelphia & R. R. Co. v. Hughes N. Y. 659, 29 N. E. 148).

(1888) 119 Pa. 301, 13 Atl. 286. Evi
6. Elevators.—It has been held that

death of an engineer from an explosion and where a nut which held the wheel of the boiler due to broken stay bolts, on the brakestaff had been absent for eight days after such inspection. Chiseveral weeks (Chicago & E. I. R. Co. cago & A. R. Co. v. Du Bois (1894) 56

The App. 181.

En 324); and where, during the night of a certain day the ladder gave way on 5. Railway cars.—It has been laid of a certain day, the ladder gave way on down that a "railway company must a car which had not been inspected since have its inspectors not only at the previous day (Missouri, K. & T. R. its termini, where a general overhauling Co. v. Miller [1901; Tex. Civ. App.] 61 of property is had, but at convenient S. W. 978). In one case it was laid stations along its line, to detect such down that a car should be inspected implicitly as many have been received as medictally on its arrival at an inspect. cago, R. I. & P. R. Co. (1880) 53 souri, K. & T. R. Co. v. Murphy (1898) Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5, 59 Kan. 774, 52 Pac. 863. A railway dence warranted the conclusion that the sponsible to a fireman who, in proceed-"hand-hold" of a car had got out of re-ing to clean his engine at the end of a pair at some time on a trip to and from trip, was injured by a defect in the step a certain city, which lasted several of the locomotive, the evidence being days, declined to say, as a matter of that it was in good condition at the belaw, whether the car should have been ginning of the trip, and that he did not inspected during the trip. In a case wait for the regular inspection at the where there were three points for the arrival of the train. Patton v. Texas had been properly inspected a few hours cal; they were limited to a hurried expendence of the accident (Johnson v. Chesamination of the most exposed and impeake & O. R. Co. [1892] 36 W. Va. 73, portant points; the cars were subjected 14 S. E. 432); nor where a brake wheel to a thorough examination only when which had been inspected on the previturned into the shop for repairs ous day came off (Ahearn v. Central R. Whether this provision of the company, Co. [1900; N. J. L.] 45 Atl. 1032); in view of the heavy grades along the nor where the king bolt of a coupling road and the number of cars to be inapparatus had been tested eight days spected, was a reasonably adequate one, before it gave way (Powers v. New would, if the question were material, be York C. & H. R. R. Co. [1891] 60 Hun,

dence that the employer had formerly an employer cannot be held liable where had two inspectors at the place of the the safety device of an elevator was injury, but had none at the time of the properly tested two weeks before the acaccident, is competent as tending to cident (Biddiscomb v. Cameron [1898] prove the want of ordinary care. Miss. 35 App. Div. 561, 55 N. Y. Supp. 127, souri, K. & T. R. Co. v. Miller (1901; Affirmed in [1900] 161 N. Y. 637, 57 N. Tex. Civ. App.) 61 S. W. 978. The case E. 1104); nor where the hook which supis for the jury where the injury was ported the wire cable by which a freight caused by a defect in the door of a box elevator was started and stopped had is that it has existed for a considerable time, and might, therefore, have been discovered if the appliance had been inspected with rea-

126, 45 N. Y. Supp. 972); nor where secure at the beginning of the next the whole appliance (here one used for working day. Krampe v. St. Louis freight) had been inspected four months Brewing Asso. (1894) 59 Mo. App. 277. prior to an accident caused by its ec- 11. Poles.—A jury may properly centric motion, which produced a jerk, find that two years is too long a period an incline in its floor which caused the to leave a telegraph pole without inservant's foot to slip, and an open-ing under the gate, which allowed her foot to come in contact with the casing of the elevator (Montgomery v. Bloomingdale [1898] 34 App. Div. 375, 54 N. Y. Supp. 329).

7. Other vehicles.-Negligence is inferable where a truck has not been inspected for two years. Boyce v. Schroeder (1898) 21 Ind. App. 28, 51 N. E. 376. As regards an employee whom his master is driving in a buggy to his place of work, negligence cannot be predicated of the omission of the latter to examine the bolts and fastenings before starting, where it is also shown that the vehicle was examined every three months by a blacksmith. Moffatt v. Bateman (1869) L. R. 3 P. C. 115, 22 L. T. N. S. 140, 6 Moore P. C. C. N. S. 369.

8. Roofs of tunnels.—Evidence that the roof of a mine had been carefully inspected on the day on which the accident occurred conclusively proves the exercise of due care. Southwest Virginia Improv. Co. v. Andrew (1889) 86 Va. 270, 9 S. E. 1015.

9. Derricks.-Verdicts for the plaintiff have been sustained where the clamp to which a derrick guy rope was fastened was only inspected once a week (Welsh v. Cornell [1900] 49 App. Div. 203, 63 N. Y. Supp. 44 [court suggested that there should have been a daily inspection]); where a derrick gave way owing safely left in the ground for two years, to the working out of a pin which was, almost every day, subjected to the strain of lifting heavy loads, and had not been inspected for about thirty days before the accident (Houston v. Brush [1894] 66 Vt. 331, 29 Atl. 380); where the attachments which held the boom in its place had not been examined for over two years (Scandell v. Columbia Constr. juries in a reasonable way, and with ref-Co. [1900] 50 App. Div. 512, 64 N. Y. erence to reasonable care. No man Supp. 232); or, as another case has it, could be safe against the occurrence of for several years (*Dyer v. Pittsburg* accidents from causes quite casual, for *Bridge Co.* [1901] 198 Fa. 182, 47 Atl. tuitous, and unforeseen. A man might

been examined one week before it in acting on the assumption that steps straightened and let the cable fall leading to a platform, which were safe (Bucher v. Pryibil [1897] 19 App. Div. at the close of one working day, will be

spection. Essex County Electric Co. v. Kelly (1897) 60 N. J. L. 306, 37 Atl. 619, Affirmed in 61 N. J. L. 289, 41 Atl. 1115. In Webb v. Rennie (1865) 4 Fost. & F. 614, the question left to the jury was whether the defendant had been negligent in not examining the poles of a scaffolding, and Cockburn, Ch. J., charged as follows: "It appeared that a pole had been two years in the earth, and that during that time it had not been examined, and at the end of that time it was unsound. . . . If the jury were satisfied that, according to the general practice of ship builders, poles were allowed to remain two, three, or four years in the ground without being examined, and that the usual mode of raising them was adopted in this case, and that all this had gone on in shipbuilding yards for years without any accident, then it would be for the jury to say whether, looking to the experience of the past (which, of course, though not conclusive, was always material as an element of judgment), there was any negligence on the part of the defendants; or whether, by leaving the poles so long in the ground without examination, there was, in this respect, a want of due and ordinary care on the part of the defendants. But it was not because, in a single instance, it had turned out that a pole could not be and that the accident might have been prevented by a timely examination,—it did not necessarily follow from this that therefore there was a want of due and reasonable care on the part of the employer, who had acted in accordance with all his past experience. Such a matter must always be dealt with by 9). have 1,000 poles used on his premises 10. Steps.—A master is not negligent with safety, and then by some chance

sonable frequency.<sup>8</sup> But this rule is doubtless to be taken as being subject to the qualification indicated by an Irish decision, that neither a court nor a jury should undertake to declare how often an appliance should be examined, where no expert evidence is proffered to show what is usual or requisite as to inspections in the business in question, nor how long such an appliance would, in the ordinary course, remain in repair, and adequate to its work. In the absence of such testimony any opinion formed would be purely speculative.4

A master who chooses to adopt inferior appliances and methods in

one might turn out to be unsound and from the jury where the plaintiff is the cause an accident for which the master only witness in his own behalf, and he was not necessarily liable. . . . If merely testifies that he noticed nothing any instances had been proved of poles out of the way in the appliance (a key having previously broken by reason of of the coupling which held the gang their having been left so long in the saws together), and that the key had ground, it would have been strong to not been taken out and examined since show negligence; but there was no such it had been put into the coupling, about evidence. On the other hand, evidence that poles had been left in the ground much longer without any accident occurring went strongly to a contrary con-

13. Iron rods. —The fact that there had been no inspection for two years of an iron rod which had been sub-jected to twice the strain it had been originally designed to bear, and used for a purpose which tended to crystallize it, warrants the inference of negligence. Moynihan v. Hills Co. (1888) 146 Mass. 586, 16 N. E. 574. 14. Chains.—There is sufficient evi-

dence to go to the jury where a chain supporting a weight of over 250 pounds had been mended by joining two of its links with five strands of fine wire, and suffered to remain in that condition without inspection for eight years. Tungncy v. J. B. Wilson & Co. (1891) 87 Mich. 453, 49 N. E. 666.

15. Ropes. - A master is not, as matter of law, free from negligence, where for six months he had not inspected a rope supporting a heavy weight and subject to constant friction. McGuigan v. Beatty (1898) 186 Pa. 329, 40 Atl.

16. Eyebolts, keys, etc.—A master is

six months before the accident. Brown v. Hershey Land & Lumber Co. (1896) 65 Mo. App. 162.

17. Miscellaneous. - Negligence may be inferred where a servant engaged in depositing hot slag on a piece of wet ground, where the action of the tide was constantly opening cracks in the slag, and so exposing the water underneath, is injured by an explosion resulting from a portion of a load of slag drop-ping into a crack of that kind which had opened about three days before. Kiras v. Nichols Chemical Co. (1901) 59 App. Div. 79, 69 N. Y. Supp. 44. The master's liability for an injury to a servant, due to the fact that the elbow of an exhaust steam pipe in a privy vault had become turned so as to point directly upward, is for the jury upon evidence that, although the elbow pointed downward when first put in position, it had not been inspected for more than four years. Russell v. Pacific Can Co. (1897) 116 Cal. 527, 48 Pac. 616.

<sup>8</sup> Paine v. Eastern R. Co. (1895) 91 Wis. 340, 64 N. W. 1005.

<sup>4</sup> Hanrahan v. Ardnamult S. S. Co. (1887) Ir. L. R. 22 C. L. 55 (death resulted from the fall of a derrick on an not negligent in failing to take out an iron ship in consequence of the breaking eyebolt, after about a year and a half of a bolt, which, at the time, was de-of use, for the purpose of examining its fective to the extent of two thirds of its condition at places not visible. Kill- thickness, but the defect was not visible man v. Robert Palmer & Son Shipbuild- unless the bolt was drawn out of its ing & M. R. Co. (1900) 42 C. C. A. 281, socket. Held, that a verdict for the de-102 Fed. 224. The case should be taken fendant was rightly directed). his business must use proportionately greater care to see that the servant is not injured, and must make more frequent examinations.<sup>5</sup>

Where a part of an instrumentality had been temporarily displaced by a workman for the purpose of oiling or cleaning it, the master's failure to discover, immediately after the work was finished, that the part had not been restored to its position is not imputable as negligence.6

- 159. Specific circumstances putting an employer upon inquiry as to the condition of instrumentalities.— In §§ 129-147a, ante, the evidential significance of various circumstances, as justifying or negativing the inference that the master ought to have known of existing dangerous conditions, or anticipated the probability of their supervening at some future time, was considered at length. It is clear that, if the logical standpoint is slightly changed, such testimony may always be viewed as an element bearing upon the question whether the employer should have taken any active steps for the purpose of ascertaining whether some particular instrumentality had become defective. This aspect of the circumstances adverted to, as well as of some others which were not dealt with in the sections referred to from the standpoint there exemplified, it is proposed to discuss in the present section.
- a. External appearance of instrumentality.—If any conditions visible upon a superficial examination indicate that there may be defects, only discoverable by a closer inspection, it is the duty of the employer to make such an inspection.1 This rule is sometimes appli-

as is necessary to prevent accident from condition of the grab-iron by a reasonthe collapse of the roof.

appearance indicated a possible lack of the outside, the inspection should have cohesion throughout its structure, even been extended to the inside, if the acif, when the shelly place was turned off, it then appeared sound and its use tained only in this manner. *Missouri*, seemed to be justified, still, if the original apparent defect was such as to suggest a doubt as to its interior cohesive car ladder should be inspected when one quality to a man of ordinary prudence, of the rings is bent. Jones v. New York it was the duty of the defendant to re- C. & H. R. Co. (1882) 28 Hun, 364.

<sup>6</sup> Eddy v. Aurora Iron Min. Co. solve the doubt by subsequent examina-(1890) 81 Mich. 548, 46 N. W. 17, tion. Hall v. Emerson-Stevens Mfg. Co. where it was held that a mine owner (1900) 94 Me. 445, 47 Atl. 924. Eviwho employs a method of bracing and dence that a grab-iron on a railway car support for timbers and staging which was out of place, and that such defect renders the piece more subject to be discould be easily detected by an inspector, placed by blasts than other methods in is sufficient to sustain a finding of neguse must adopt such frequent inspection ligence in failing to discover the unsafe ably careful inspection of the car. <sup>6</sup> Wosbigian v. Washburn & M. Mfg. Thompson v. Great Northern R. Co. Co. (1896) 167 Mass. 20, 44 N. E. 1058. (1900) 79 Minn. 291, 82 N. W. 637.

<sup>1</sup> Where a grindstone before hanging where the ladder of a car shows signs presented a shelly appearance, and such of being defective when looked at from the control of the c cable so as to charge him with negligence in failing to examine some particular part of an instrumentality, although the visible indications of danger were confined to other parts.2

- b. Unsatisfactory operation of instrumentalities prior to the accident.—That negligence may be inferred on the ground of a breach of the specific duty to inspect some particular instrumentality has been laid down in cases where it had not been working properly before the accident.3
- c. Length of time an instrumentality has been in use.—In view of the natural tendency of an inorganic instrumentality to become less and less safe the longer it is used,4 a court will not set aside a verdict for the servant which is based upon the theory that the failure to inspect it was culpable, where the evidence shows that it had been a part of the master's plant for such a period that, taking into account the nature of the materials of which it was composed, the functions it was performing, and the various influences to which it was exposed by climatic changes or physical forces, it is not an unreasonable inference that a prudent man would have examined it for the purpose of ascertaining what its actual condition was.<sup>5</sup>

<sup>2</sup> Whether or not a railroad company fective, though not apparently dangerexercised reasonable care in putting ous). into its train a car with a brake in which there was a defect, not apparent material factor where the instrumen-upon an ordinary train inspection, is tality is a living creature. See chapters was the oldest in defendant's service, that the paint was very much faded, (1873) 68 Ill. 561, the court refused to timbers and flooring cracked, worn in set aside a verdict for a plaintiff who and shivered from use, and sides badly had been injured by the fall of a wooden

'This tendency is ordinarily not a

worn. Campbell v. Louisville & N. R. trestle on a railway, remarking that an Co. (1895) 109 Ala. 520, 19 So. 975, ordinary wooden bridge of this kind, un(for first appeal, see [1893] 97 Ala. covered and unpainted and exposed to 147, where, however, this point was not climatic influences for fifteen years, presented by the evidence). <sup>3</sup>Re California Nav. & Improv. Co. decay, demanding the utmost vigilance (1901) 110 Fed. 670 (drum of donkey of the company. On the previous apengine had been leaking); Mooney v. peal of this case (1871; 61 Ill. 162) the Connecticut River Lumber Co. (1891) court said that it could not be assumed, 154 Mass. 407, 28 N. E. 352 (machine as a matter of law, that the decay of had run away); Chicago & A. R. Co. the timbers of a bridge, being necessary. Shannon (1867) 43 Ill. 338 (engine rily gradual, could always be ascertained reported unsafe); Purcell Mill & Elevaby the use of due diligence; that this tor Co. v. Kirkland (1898) 2 Ind. Terr. question is entirely one of fact which 169, 47 S. W. 311 (employer told that a cannot be withdrawn from the jury. galvanized iron rope had rusted); Hoff- In Lehigh Valley Coal Co. v. Kiszel man v. Dickinson (1888) 31 W. Va. 142, (1897) 25 C. C. A. 566, 51 U. S. App. 6 S. E. 53 (machinery had emitted an 265, 80 Fed. 470, the defendant called unusual sound which startled an em- witnesses to testify in regard to the ployee, and machine was stopped in the usual duration of the life of a boiler. master's presence); Union Show Case One said: "I have known some of them Co. v. Blindauer (1898) 75 Ill. App. [the Hazelton boilers] to last eighteen 358 (elevator known to be obviously de- or twenty years." Another said that they lasted from twenty to twenty-two furnished a rope of the proper size for years. Another said: "I have known the purpose, to all appearance sound. them to last twenty years." The exploded boiler was eighteen years old. But there was evidence in this case, sufploded boiler was eighteen years old. Experts thought the crack and the resulting explosion were due to the unequal expansion of the bottom and the top of the boiler, caused by too sudden and hot a fire when the boiler was cold and the masonry was still damp, and there was not enough water in the boiler cay. The master is bound to know that a rope, under such circumstances, will of the evidence, especially in regard to only last a limited time. It will not of the evidence, especially in regard to only last a limited time. It will not the time when a boiler must be expected do for him to furnish a sound rope and ness which ought to have been ascer-tained by the defendant's agents or cure. It will not do to say that the representatives could not be taken from servant is bound to know this as well the jury." In Brann v. Chicago, R. I. as his master, and to warn him that & P. R. Co. (1880) 53 Iowa, 595, 36 after such a time he ought to procure condition, and in every respect suitable out such information? He knows how for its intended use. But it is a well-long the rope has been in use. The servknown fact that in time it will become ant may not know. In this case the deout of repair, and unfit for use. It is ceased did not know." Murphy v. not the duty of the employee, who is re-Phillips (1876) 24 Week. Rep. 647, 35 quired to simply use said car when it L. T. N. S. 477, says that a master is composes a part of a train, to ascertain liable for an injury caused by the breakand know, at his peril, when such time ing of a chain, partly from wear and occurs. Such, however, is the duty of partly from bad welding, where he has the corporation, and ordinary care must not had it examined or tested, although fit to be used; and what is such care so. In Moynihan v. Hills Co. (1888) must be measured by the character of 146 Mass. 586, 16 N. E. 574, the quesable and proper machinery and appli- broke was designed to carry one iron ances, the corporation can thereafter re- ball weighing about 113 pounds, and main passive. The duty of inspection that under the defendant's direction the or not, the character of the business which caused the iron in the rod to vishould be considered." Warden v. Old brate while under a strain, which tended Colony R. Co. (1884) 137 Mass. 204, to crystallize it and make it brittle; holds that a railroad company is bound that there had been no inspection of it to make due provision for examining a to ascertain its condition for nearly "telltale" near low overhead bridge, two years before the accident; that the The failure to test a rope on a steamer rod was slightly discolored at the place is negligence, where it has been in use of the fracture, as if the break was not for a number of voyages, and has been fresh, and that it appeared as if the in a position where it was exposed to iron had not freshly parted. Hackett injury from heat and smoke. The v. Middlesex Mfg. Co. (1869) 101 Mass. v. Allegheny Valley R. Co. (1880) 95 ployer a question for the jury, where it Pa. 211, 40 Am. Rep. 634, the court is in evidence, on the one hand, that the said: "No doubt, a perfectly new rope, iron of a chain supporting an elevator

to wear out, the question of an unsound- then fold his arms until, by actually Am. Rep. 243, 6 N. W. 5, the court said: a new rope. Is the servant bound to "It may be assumed that a car when notify the master of that which he first placed upon the track is in proper knows or ought to know himself withbe used to ascertain whether the car is there are well-known methods for doing the business, and the risks attending its tion whether the defendant had been prosecution. . . . For it will not negligent was held to be for the jury, do to say that, having furnished suit- where it was proved that a rod which is affirmative, and must be continuously machine had been reconstructed, and fulfilled, and positively performed. In the rod made to carry two such balls; ascertaining whether this has been done that it had been subjected to a use Ethelred (1899) 96 Fed. 446. In Baker 101, holds the negligence of the emand one to all appearances sound, may was worn down in the link which broke break, and the master would not be reto one third of its original thickness, sponsible for the consequence, having and at another place had been worn even

There is a specially strong obligation incumbent upon an employer to examine carefully any apparatus which has not been used for a considerable period.6

In one Massachusetts case it was laid down that, where an appliance has been in use a long time, but shows no special signs of wear at the point of strain, it is not permissible for a jury to find that the master should have known it to be defective because of its age alone.7 But this doctrine is inconsistent with several of the decisions of other courts which are cited in note 5, supra, and seems to be an unwarrantable limitation of the functions of a jury.

d. Operation of physical laws.— The principle that the master is bound to foresee the ordinary results of the action of physical laws upon the materials of which his instrumentalities are composed, or the materials which those instrumentalities are designed to deal with (see § 141, ante), entails the consequence that he is bound to examine the instrumentalities when there is any reason for apprehending that they may have become abnormally dangerous from this cause.8

derrick) will become out of repair and out; Bartley v. Trorticht (1892) 49 Mo. unfit for use. It is not the duty of the servant who is required to use it, to v. Holt (1883) 29 Kan. 149, 152. know, at his peril, when such time "Crowell v. Thomas (1897) 18 App. occurs. Such, however, is the duty Div. 520, 46 N. Y. Supp. 137 (barrel exoff the master, and ordinary care ploded owing to insertion of a plug in must be used to ascertain whether a steam escape pipe since the time the it is fit to be used; and what is such barrel had been used, several weeks becare must be measured by the character fore) care must be measured by the character fore). of the business, and the risks attending its prosecution. Negligence on the part of the master may consist of acts of omission or commission, and it necesof inspection and supervision rests on Co. (1885) 99 N. Y. 368, 2 N. E. 24, the master. It will not do to say that, where the plaintiff was injured by the having furnished suitable and proper fall of a cliff, the defendant sought to machinery and appliances, the master avoid liability on the ground that the can thereafter remain passive so long evidence showed that it is the nature as they work well and seem safe. The

thinner; and, on the other hand, that duty of inspection is affirmative, and the chain was new when it was put up, and that, after it broke, a slight flaw itively performed. Anything short of was found at the place of fracture, this would not be ordinary care." For which could not have been discovered at the could not have been discovered at the time its use began. Houston v. is predicated on the ground that ordinary (1894) 66 Vt. 331, 29 Atl. 380, nary care requires that the master shall holds that there is no error in refusing take notice of the liability of his plant a request to charge that, when an appliance or machinery not obviously danseed and the could not be refused to the reason of the liability of his plant as request to charge that, when an appliance or machinery not obviously danseed and the continuously fulfilled and possible to the continuously fulfilled an pliance or machinery not obviously dangerous has been in daily use for a long 100 Ind. 181; Chicago & E. R. Co. v. gerous has been in daily use for a long 100 Ind. 181; Unicago & E. K. Uo. v. time, and has uniformly proved safe Branyan (1894) 10 Ind. App. 570, 37 and efficient, its use may be continued N. E. 190; Louisville, E. & St. L. Conwithout the imputation of imprudence sol. R. Co. v. Utz (1892) 133 Ind. 265, or carelessness. The court said: "It is 32 N. E. 881; Wabash & W. R. Co. v. a well-known fact that in time it (a Morgan (1892) 132 Ind. 430, 31 N. E. derrick) will become out of repair and 601; Bartley v. Trorlicht (1892) 49 Mo.

<sup>7</sup> Allen v. G. W. & F. Smith Iron Co.

(1894) 160 Mass. 557, 36 N. E. 581 (wooden lever used to raise the iron

door of a furnace).

- e. Accidents subjecting instrumentalities to extraordinary strains. -The obligation to overhaul an instrumentality which has been subjected to a shock of an uncommonly severe character is sufficiently clear.9 The obligation to make a thorough examination for concealed defects is especially strong where an appliance has been injured in the parts open to view, and there is a strong probability that the same accident may have weakened it in other places. 10
- f. Inexperience of employees who erected an appliance.—An employer is negligent if he fails to examine an appliance which has been erected by inexperienced men. 11

from time to time at unexpected inter- a privy for the use of his operatives in vals, through the action of the elements such a dangerous place as in a wheel operating upon it. The court said: house, directly over the water wheel, is "It does not follow from this fact that under a specially imperative obligation the master is excused from using proper to see that the foundations of the struc-precautions to protect his workmen ture are made and kept sound and safe from danger known to the master, aris-beyond contingency. It is his duty to ing from such a cause. The very fact know that the privy is safe, and that that the material was likely to fall upon the servants for whose use it is designed and injure the defendant's servants at may resort to it without personal risk unexpected times imposed upon defend-or peril to life or limb. The track and ant the duty of inspection, and frequent every exposed place on a line of railway and careful examinations, and, upon the ought to be examined after every discovery of any indications of danger, storm, before a train is allowed to proto adopt all suitable precautions to protect its servants from injury." McGov-ect its servants from injury." McGov-ern v. Central Vermont R. Co. (1890) that a large rock left in the slope of a 123 N. Y. 280, 25 N. E. 373, held it er-ror to nonsuit a plaintiff whose intes-the action of frost and water imposes tate was killed through the fall of a an obligation to subject the track unquantity of wheat from the sides of an derneath it to frequent examination. elevator bin, where the liability of the Clune v. Ristine (1899) 36 C. C. A. 450, wheat to accumulate, and the consequent peril to those working in the bin, rust and damp in the holes of defective were well known to the defendant's vice principal. It is for the jury to say the there was a proper inspection before the intestate was sent inside the bin. Malone v. Hathaway (1875) 6 Thomp. & C. 1, 3 Hun, 553, holds that the fact that the timbers supporting a washtub, being constantly in a damp condition, will be apt to grow rotten, is sufficient notice to an employer of the necessity for watchfulness and for frequent inspections, with a view to ascertaining whether those timbers are capable of sustaining the strain to which were well known to the defendant's vice castings caused an explosion when moltaining whether those timbers are capable of sustaining the strain to which they are subjected. This case was reversed in (1876) 64 N. Y. 5, 21 Am. Rep. 573, but merely on the ground that the dary of the carpenter charged with the duty of looking after the structure was a fellow servant of the plaintiff. Ryan v. Fowler (1862) 24 N. Y. 410, 82 Am. Dec. 315, holds that a master who erects

160. Sufficiency of the inspection; generally. - Negligence is inferable where the inspectors employed are not reasonably competent for the duty to be performed by them<sup>1</sup> (see chapter xiii., post), or where they are not sufficient in number,2 or where they are not stationed at places where their services are especially required,3 or where they are not allowed sufficient time for the discharge of their functions4 (see chapter xv.), or have not been supplied with suitable appliances for the purpose of making the inspection which is appropriate under the circumstances,5 or where the arrangements of the employer are in any other way inadequate to secure a proper inspection.<sup>6</sup>

The effect of a statute requiring steam boilers to be tested in a certain manner every year is merely to provide an additional safeguard, and, since the duty of an employer to use care in inspecting the appliances used by the servants does not arise out of statute, but is imposed by the common law, the fact that such a statute has been complied with by such employer does not necessarily establish that his duty has been performed.7

<sup>1</sup>Beardsley v. Minneapolis Street R. inspectors did not have sufficient time Co. (1893) 54 Minn. 504, 56 N. W. 176; at their disposal to discover the defects Chicago & A. R. Co. v. Du Bois (1895) in cars and machinery examined by 65 Ill. App. 142 (where, however, it was them. Missouri P. R. Co. v. Dwyer held that a railroad company is not lia—
the for the death of an engineer by the explosion of a boiler because it employs, Co. (1893) 54 Minn. 504, 56 N. W. 176 to test the boiler for broken stay bolts, ("bucking" of street car, caused by the an inspector who is partly deaf in one worn-out condition of the electrical explosion of a boller because it employs, to test the boiler for broken stay bolts, an inspector who is partly deaf in one ear, but whose hearing is good enough to determine whether a bolt struck with a hammer is sound or broken).

<sup>2</sup> Toledo, P. & W. R. Co. v. Conroy (1873) 68 Ill. 561.

<sup>8</sup> Evidence that the defendant railway company had no car inspector at a town containing about 8,000 people, where there is a busy junction, is not irreleregards the examination of its cars. Court).

Where the evidence tends to show that, considering the number of cars to be done; that better inspection was needed at such a station than at way stations,-it is a fair inference that the

fields).

<sup>6</sup> In Coffee v. New York, N. H. & H. R. Co. (1891) 155 Mass. 21, 28 N. E. 1128, the court remarked that proof of negligence on the part of the inspectors on a single occasion would properly have been excluded on the ground stated in Mackin v. Boston & A. R. Co. (1883) 135 Mass. 201, 46 Am. Rep. 456, that vant, as it tends to show that the de- the inspectors were fellow servants with fendant did not exercise proper care as the plaintiff; but that evidence of the custom to make no inspection of such Missouri, K. & T. R. Co. v. Crowder cars would have a tendency to show the (1899; Tex. Civ. App.) 55 S. W. 380 rules, instructions, and superintendence (writ of error denied by Supreme under which the inspectors were acting, and would be proper for the consideration of the jury, as foundation for the argument that such rules, etc., were inthat, considering the number of cars to argument that such rules, etc., were inbe examined, there were not enough inspectors to make a proper inspection of
punn v. Connell (1897) 21 Misc. 295,
the cars passing through a certain june47 N. Y. Supp. 185, holds that the question; that the thoroughness of the work
depended upon the amount of time they
had at their disposal and the labor to
be done; that better inspection was the waste pipe of a toilet room, is for the jury.

\*Egan v. Dry Dock, E. B. & B. R. Co.

161. Nature of the inspection required.— The character of the inspection which the master is bound to make is described by various epithets and phrases, all of which, as will be seen from the subjoined note, are essentially the logical equivalent of the proposition that the examination must be such as a person of ordinary prudence would have made under the circumstances.<sup>1</sup> The question whether the examination to which the instrumentality which caused the injury was actually subjected before the accident was such as to satisfy the standard thus indicated is primarily one for the jury.2 This principle is

R. Co. v. Bancon (1894) 107 Ala. 643, tory in Alcanson, T. & S. F. A. Co. v. 18 So. 75; Mayer v. Liebmann (1897) Holt (1883) 29 Kan. 149. An instruction of the control of Coal & Min. Co. v. Persons (1894) 11 ordinarily careful persons in the same Ind. App. 264, 39 N. E. 214; Parsons line of business give under like circumv. Missouri P. R. Co. (1887) 94 Mo. stances. McGar v. National & Proviv. Missouri P. R. Co. (1887) 94 Mo. 286, 6 S. W. 464; Mulligan v. Crimmins (1894) 75 Hun, 578, 27 N. Y. Supp. 819. In others it is laid down that the employer must make a "proper test" (Beardsley v. Minneapolis Street R. Co. [1893] 54 Minn. 504, 56 N. W. 176); or a "reasonably" practical test (Scherer v. Holly Mfg. Co. [1895] 86 Hun, 37, 33 N. Y. Supp. 205).

In a second group of phrases the conception that the standard to be attained is the exercise of due care emerges more distinctly than in those just adverted to. "Careful inspection." Spicer v. South Boston Iron Co. (1885) 138 Mass. 426; Richmond & D. R. Co. v. Burnett (1892) 88 Va. 538, 14 S. E. 372. "Reasonably careful inspection." 772. "Reasonably careful inspection."

Parsons v. Missouri P. R. Co. (1887)

94 Mo. 286, 6 S. W. 464; Murphy v.

Phillips (1876) 24 Week. Rep. 647, 35

L. T. N. S. 477. "Careful and prudent examination." Perry v. Rogers (1895)

91 Hun, 243, 36 N. Y. Supp. 208. "Rea-

(1896) 12 App. Div. 556, 42 N. Y. Supp. 75; "Such an inspection as ordinary (1896) 12 App. Div. 556, 42 N. Y. Supp.

188.

1 In some of the cases it is merely ark Lime & Coment Mfg. Co. (1896) 59 said that the inspection or examination must be "proper." Sack v. Dolese (1891) 137 Ill. 129, 27 N. E. 62; North(1891) 137 Ill. 129, 27 N. E. 62; NorthR. Co. (1895) 91 Wis. 340, 64 N. W.
ern P. R. Co. v. Herbert (1885) 116 U.
1005. "Careful tests." Morton v. DeS. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. troit, B. C. & A. R. Co. (1890) 81 Mich.
590; Benzing v. Steinway (1886) 101
1005. "Careful tests." Morton v. DeS. 647, 5 N. E. 449; Louisville & N. proper vigilance" is said to be obligand. Co. v. Binion (1894) 107 Ala. 645, tory in Atchison, T. & S. F. R. Co. v.
18 So. 75; Mayer v. Liebmann (1897) Holt (1883) 29 Kan. 149. An instrucdence Worsted Mills (1901) 22 R. I.

<sup>2</sup> Geary v. Kansas City, O. & S. R. Co. (1896) 138 Mo. 251, 39 S. W. 774; Coffee v. New York, N. H. & H. R. Co. (1891) 155 Mass. 21, 28 N. E. 1128; Carruthers v. Chicago, R. I. & P. R. Co. (1895) 55 Kan. 600, 40 Pac. 915; Coontz v. Missouri P. R. Co. (1894) 121 Mo. 652, 26 S. W. 661; Missouri, K. & T. R. Co. v. Young (1896) 4 Kan. App. 219, 45 Pac. 963; Standard Oil Co. v. Bowker (1894) 141 Ind. 12, 40 N. E. 128; Consolidated Ice Mach. Co. v. Kiefer (1887) 26 Ill. App. 466; Toy v. United States Cartridge Co. (1893) 159 Mass. 313, 34 N. E. 461; Dedrick v. Missouri P. R. Co. (1886) 21 Mo. App. 433; Brann v. Chicago, R. I. & P. R. Co. (1880) 53 Iowa, 595, 36 Am. Rep. 243, 6 N. W. 5; Fuchs v. Wm. H. Sweeney Mfg. Co. (1890) 34 N. Y. S. R. 925, 12 N. Y. Supp. 870; Crowell v. Thomas (1897) 18 App. Div. 520, 46 N. Y. Supp. sonable, proper, and careful examina- 137; Tissue v. Baltimore & O. R. Co. tion." Illinois C. R. Co. v. Hilliard (1886) 112 Pa. 91, 56 Am. Rep. 310, 3 (1896) 18 Ky. L. Rep. 505, 37 S. W. Atl. 667; Everson v. Rollinson (1887;

not affected by the fact that the preponderance of the testimony, whether measured by the number of the witnesses or the comparative credit which the court may think to be due to each, is in favor of one litigant.3

review is, of course, particularly averse to setting aside a verdict which was based to a large extent upon the conclusions which the jury drew from a view of an accurate model of the apa boiler were such as were known or discoverable by examination, or the apno evidence offered to show what known tests existed which the defendant could have applied, and the jury were thus what tests ought to have been applied, side of the stake was "spongy and like Ballard v. Hitchcock Mfg. Co. (1889) a cork where it had been shaved off 51 Hun, 188, 4 N. Y. Supp. 940. The with an ax." Bushby v. New York, L. court refused to set aside a judgment E. & W. R. Co. (1885) 37 Hun, 104. for the plaintiff, where he was injured St. Louis, I. M. & S. R. Co. v. Harper

Pa.) 6 Cent. Rep. 745; Lake Shore & where a subsequent examination showed M. S. R. Co. v. Ryan (1897) 70 Ill. App. that there was an old fracture in the 45; Missouri, K. & T. R. Co. v. Cox shaft, and a weld at the place of the (1900; Tex. Civ. App.) 55 S. W. 354; fracture and a sliver just above it. It and the cases cited infra. In an action was considered reasonable to infer that, for an injury caused by a railway coal enter the evidence showing that there was ances would have invited scrutiny, and a daily inspection of the chutes, and, on led to a discovery of the defect. Texas the other hand, that, ten days after the & P. R. Co. v. O'Fiel (1890) 78 Tex. accident, only one chute out of the twelve in the same shed would operate on a lumber car is "decayed, rotten, and properly, warrants the submission to dozy," according to the uncontradicted properly, warrants the submission to dozy," according to the uncontradicted the jury of the question whether the testimony, shows that there has been chute was in good repair, and, if not, no efficient inspection of the loading of whether the defendant knew or should the cars. Ryan v. New York C. & H. R. have known of it. Great Northern R. R. Co. (1895) 88 Hun, 269, 34 N. Y. Co. v. Kasischke (1900) 43 C. C. A. 626, Supp. 665. It is negligence to send out 104 Fed. 440. The case is for the jury a car with a hand-hold so defective that where a bridge fell owing to the vibraits condition is obvious to one making tions caused by the operation of a pile the most casual inspection. Settle v. driver upon it, and one employee testi- St. Louis & S. F. R. Co. (1894) 127 Mo. fied that he had inspected it three or 336, 30 S. W. 125. A loose bolt or four times a day, and another that he screw on one end of a hand-hold on a had inspected it at least twice a day; railroad car is a defect which could and it was also in evidence that forces have been discovered by an inspection of men were at work on both sides of conducted with ordinary care. Brann the river, and at different places on the v. Chicago, R. I. & P. R. Co. (1880) 53 bridge, and that some of these inspectiona, 595, 36 Am. Rep. 243, 6 N. W. 5. tions were made in going from one place A railroad company is liable for an acto the other to give directions. Bowen cident to a brakeman, free from contrib-v. Chicago, B. & K. C. R. Co. (1888) utory negligence, caused by the absence 95 Mo. 268, 8 S. W. 230. A court of of a nut from the top of a brake staff, which held the lever fast to it, notwithstanding an imperfect inspection made a short time before the injury. Hayden v. Platt (1895) 84 Hun, 487, 32 N. Y. clusions which the jury drew from a v. Platt (1895) 84 Hun, 481, 32 N. x. view of an accurate model of the appliance which proved defective. Mc-Hale (1899) 174 Mass. 320, 54 N. E. Knight v. Chicago, M. & St. P. R. Co. 854 (displacement of key caused fall (1890) 44 Minn. 141, 46 N. W. 294. of derrick); Hatton v. Hilton Bridge But a charge is erroneous which declares the defendant to be liable if the 59 N. Y. Supp. 272 (clamps fastening defects which caused the explosion of the rods by which a scaffold was supported by the second of the second by the second of the rods by which a scaffold was supported by the second of the rods by which a scaffold was supported by the second of the rods by which a scaffold was supported by the second of the rods by which a scaffold was supported by the second of the rods by which a scaffold was supported by the second of the rods by which a scaffold was supported by the second of the rods by which a scaffold was supported by the second of the rods by which a scaffold was supported by the second of the rods by which a scaffold was supported by the second of the rods by which a scaffold was supported by the second of the rods by which a scaffold was supported by the second of the rods by which a scaffold was supported by the second of the rods by which a scaffold was supported by the second of the rods by the rods of the rods by the second of t ported became loose).

<sup>8</sup> So held where there was much testiplication of known tests, where there is mony showing that a car stake was apparently sound, and that there was no defect about it which could be discovered by a reasonably careful inspection, left to determine by their own judgment but one witness testifies that the outby the giving way of a brake shaft, (1884) 44 Ark. 524, where the witnesses

Whether or not the duty of a master with regard to proper inspection has been performed by the application of any given test is to be determined by considering whether that test will give indications as to the actual condition of the instrumentality in question.<sup>4</sup> In the application of this principle the courts have usually proceeded upon the theory that a merely visual or ocular inspection of external conditions does not satisfy the full measure of a master's obligations, where the servant's safety depends upon the soundness of the material of which an instrumentality is composed,<sup>5</sup> or upon the firmness with which the separate parts of an instrumentality are attached to each

est credit declared that the best tests use, which reduced its thickness considhad been employed.

the purpose of detecting any hidden de- the defendant had been guilty of neglithe purpose of detecting any hidden detendant had been guilty of neglifects. Toledo, P. & W. R. Co. v. Congence in regard to a passenger who was roy (1873) 68 Ill. 561; Chicago G. W. injured through the breaking of the R. Co. v. Healy (1898) 30 C. C. A. 11, wheel. Manser v. Bastern Counties R. 57 U. S. App. 513, 86 Fed. 245; Jarvis Co. (1861) 3 L. T. N. S. 585. It is not v. Northern New York Marble Co. error to submit to the jury the question (1900) 55 App. Div. 272, 67 N. Y. whether a railroad company had been Supp. 78. It is the duty of a master to negligent in its inspection of a boiler text player which are knotty by sub-fourteen days before it exployed where 529. A rope must be tested by subjectifier the hydrostatic or the hammer ing it to a strain. The Ethelred (1899) test was, when properly conducted, suf96 Fed. 446. Evidence that the fracficient to show the presence of broken tured surface on a pair of shears used bolts; and that, by the hammer test, at for cutting boiler plate showed indicaleast 90 per cent of the broken bolts tions of a crack of long standing, and could be discovered. Woods v. Chicago that such crack, if it existed, could have & G. T. R. Co. (1896) 108 Mich. 396, 66 been discovered by sounding the casting with hammers, which was never done, The "hammer test" being regarded as and that such shears were liable to the best-known method of examining break, raises a question for the jury as steam boilers, negligence will not be imbreak, raises a question for the jury as steam boilers, negligence will not be imto whether the employer was negligent puted to an employer where that test in not discovering the crack. Pacheco had been applied to a boiler six days v. Judson Mfg. Co. (1896) 113 Cal. 541, before it exploded, by an inspector reating it was shown that a wheel of a passenger it was shown that a wheel of a passenger car had been examined by the 65 Ill. App. 144. "hammer" test when new, and found

who seemed to be entitled to the great- to be apparently sound. After much erably, it was returned, but not sub-<sup>4</sup> Egan v. Dry Dock, E. B. & B. R. Co. jected to the same test. There being (1896) 12 App. Div. 556, 42 N. Y. Supp. evidence to the effect that if the same test had been applied a defective weld <sup>6</sup> A wooden bridge must be tested by would have been discovered, it was held boring or chopping into its timbers for that it was for the jury to say whether test planks which are knotty by sub- fourteen days before it exploded, where jecting them to a strain of a weight, the plaintiff's testimony is to the effect at least equal, if not superior, to the that the stay bolts had become broken, weight they are designed to bear, before to the number of fifty or sixty, and had placing them in a scaffold. Flynn v. been broken so long before the explosion  $Union\ Bridge\ Co.\ (1890)\ 42\ Mo.\ App.$  that the ends were worn smooth; that

other,6 or upon the stability of some heavy substance.7 Nor is it regarded as sufficient to examine a piece of machinery while it is stationary, if its actual condition and efficiency can be ascertained only by the practical test of operating it.8

But the position has also been taken that, in the case of some instrumentalities, at all events, there is no obligation to apply the test of a strain or other physical force for the purpose of ascertaining their condition, unless a careful inspection by the eye discloses some defect or probable weakness.9

The grab-iron of a freight car must was held in place only by the stub of a spection of a locomotive lever, which next two sections.

<sup>7</sup> In Finalyson v. Utica Min. & Mill. Co. (1895) 14 C. C. A. 492, 32 U. S. App. 143, 67 Fed. 519, it was laid down to remain at a place where the miners fall. It has also been held that neglievidence is that, after a blast, an employee was sent round to dislodge with a bar all rocks that seemed to be loose. only bars, but a derrick, was used to turn or pull over the rock which ulti-Y. Supp. 409.

(safety clutch of elevator). Compare be tested by throwing some weight upon Biddiscomb v. Cameron (1898) 35 App. it. Felton v. Bullard (1899) 37 C. C. Div. 561, 55 N. Y. Supp. 127, where the A. 1, 94 Fed. 781 (here the accident dismaster was absolved because the proper closed the fact that one end of the iron test had been applied. Where an inscrew ½ inch long, imbedded in rotten causes injury by jumping out of the wood, while the iron itself was about 2 notch in which it is placed, when refeet in length, so as to make it obvious versed, is made merely by an examinathat any strain thrown upon that end tion of the part, and not by a practical of it would make its weakness appartest with the engine in motion, the fact ent). The inspection of a brake staff is that no defect is thus disclosed is not not adequate unless it extends to the conclusive, and it is properly left to the portion which rests within the socket. jury to say whether the lever became Moon v. Northern P. R. Co. (1891) 46 detached by reason of the carelessness Minn. 106, 48 N. W. 679. But see the of the engineer or of some defect. Burlington & M. R. Co. v. Wallace (1889) 28 Neb. 179, 44 N. W. 223. An allega-tion that the plaintiff was injured by reason of a defective brake staff, and App. 143, 67 Fed. 519, it was laid down reason of a defective brake staff, and as a rule of law (Caldwell, J., dissenting), that a foreman of a mine, having knowledge of a gouge or threatening tion, was held to have been sufficiently mass protruding from the wall of a proved where the inspector himself tesmine, brought out by a blast, is not required to resort to any other tool or agency than a pick to dislodge such acquainted with stuck brakes put up threatening mass, and that, if it cannot be dislodged with a pick, then he is tified that there was nothing to indinot guilty of negligence in suffering it cate, when a brake was applied that it not be dislodged with a pick, then he is tified that there was nothing to indinot guilty of negligence in suffering it cate, when a brake was applied, that it was stuck, but that fact became apparare liable to be injured or killed by its ent only when the brakeman attempted to let it off. Louisville & N. R. Co. v. gence cannot be predicated where the Binion (1894) 107 Ala. 645, 18 So. 75.

<sup>o</sup> Thompson v. Great Northern R. Co. (1900) 79 Minn. 291, 82 N. W. 637 (grab-iron on railway car; contrast Bennett v. Tintic Iron Co. (1893) 9 similar case in preceding note). In Utah, 291, 34 Pac. 61. Still less can Flood v. Western U. Teleg. Co. (1892) the master be found liable where not 131 N. Y. 603, 30 N. E. 196, the defendant was held not to be liable for injuries caused by the breaking of an arm mately fell. Capasso v. Woolfolk on one of its telegraph poles, where (1900) 163 N. Y. 472, 57 N. E. 760, Rethere was a system of inspection for the versing (1898) 25 App. Div. 234, 49 N. arms when purchased, and it does not appear that there was anything in the Baltimore Boot & Shoe Mfg. Co. v. external appearance of the defective Jamar (1901) 93 Md. 404, 49 Atl. 847 arm when it was new which indicated

For other cases as to adequate modes of testing appliances, see the next two sections.

162. Limits of the master's duty in regard to inspection.— (See also next section, and compare § 174, post.)—A master is not required to exercise that exhaustive care in the examination of machinery which is incompatible with the proper furtherance of business.1 This principle seems to be the main factor in the determination of the extent and character of a railway company's duty in respect to the examination of rolling stock, while it is in use.2 The courts decline to

any weakness, or that there was any tests that are impracticable, or unreadefect therein discernible by any or-sonable and oppressive, or which would dinary inspection. The court said: be incompatible with the proper fur-This arm had been in use for about therance of business, and which are only practicable. Its inspectors went along the road," but simply to exercise ordithe line of telegraph poles and wires, nary care. Smoot v. Mobile & M. R. and carefully looked at them and tried Co. (1880) 67 Ala. 13 (court refused to the poles to see if they were still strong say that there should have been an inand adequate. . . . They were not spection of cars at every station). It and adequate. . . . They were not expected to climb up every pole and examine the arms thereon. Such an inspection would be manifestly impracticable and unnecessary." In one case the court set aside a verdict based on the theory that a contractor owes massons employed by him the duty of testing the strength of every timber in a system of the strength of every timber in a external examination shows no defect. Inspectors of cars are not required that the tests made by car inspectors should be as thorough and exhaustive as the tests made at the general construction or repair shops. Atchison, T. & S. F. R. Co. v. Ledbetter (1885) 34 Kan. 326, 8 Pac. 411. In some properties of the strength of every timber in a (1885) 33 Minn. 311, 53 Am. Rcp. 35, scaffold used by the masons, where an external examination shows no defect. difficult to lay down a general rule which will be applicable in practice, and define accurately the limits of the to apply tests of physical force to the master's liability in this class of cases.

the employer's duty to provide for the company is reasonable care, which must safety of the workmen are "set by what be determined by the circumstances in is practicable in a commercial sense, each case. Experience in the compeand by what is naturally to be expected tent and practical management of rail-under the circumstances." Kanz v. roads will naturally determine the naPage (1897) 168 Mass. 217, 46 N. E. ture and frequency of inspections which 620.

its duty towards its employees to in- minute examinations at the general respect cars "is not required to resort to pair shops. But the general examina-Vol. I. M. & S.—23.

six years, and during all that time had required to insure absolute safety."
perfectly answered its purpose. There Louisville, N. A. & C. R. Co. v. Bates
was no proof showing how long such an (1896) 146 Ind. 564, 45 N. E. 108. It
arm ought to last, or be used. The de"is not bound to pursue a system of infendant had a system of inspection spection of its cars and locomotives which appears to have been all that was which would embarrass the operation of 104. Inspectors of cars are not required and define accurately the limits of the to apply tests of physical force to the master's liability in this class of cases. Steps of a ladder upon a freight car, But if the special duty and responsibilin order to absolve the company from liability for defects therein, unless some ine and determine whether a car is unindication of weakness or defect is perceived upon a careful inspection by the eye. Allen v. Union P. R. Co. (1891) is difficult to discover any distinction in kind between his duty and that of a Philadelphia & R. R. Co. v. Hughes 7 Utah, 239, 26 Pac. 297.

1 Philadelphia & R. R. Co. v. Hughes the mechanics who make the repairs. It (1888) 119 Pa. 301, 13 Atl. 286, citing will also be borne in mind that the Wharton, Neg. § 213. The limits of measure of liability on the part of the ordinary care would require should be <sup>2</sup> A railroad company in discharging made between the intervals of the more

allow a servant to recover on the theory that there is an obligation to remove the bolts, screws, pins, or other machinery of a car en route, in order to detect any possible imperfections.3

A master is not chargeable with knowledge of an unsound place in an appliance, which could not have been discovered by any examination short of severing it, and thus destroying it for use.4

## 163. Common usage as a test of the adequacy of an inspection.—

tions which experience has shown prac- crack, which could have been discovered ticable and necessary to be made of cars only by taking it out or lifting it up. at the yards designated for such pur- The court said: "We have seen that pose, without causing undue delay the undisputed evidence shows that or-while in the course of transportation, dinary inspections of brakes are never would at least include such patent de- made on well-regulated railroads by fects as would be readily discoverable taking out or removing the rods; and upon inspection by a competent person that it would be impracticable to do so. in the exercise of reasonable care."

pensable that every brake chain should Co. v. Hinder (1895) 16 Ky. L. Rep. be perfect, as but a few of that number 841, 30 S. W. 399. could or would be used in controlling 'Essex County Electric Co. v. Kelly the train; and again, it does not appear (1894) 57 N. J. L. 100, 29 Atl. 427. In that the breaking of a chain would or Warner v. Erie R. Co. (1868) 39 N. Y. dinarily result in such an accident. 468, the court, replying to the objection idence shows, but there is no evidence not applied, remarked that this is no that an injury ever resulted from such breaking, nor that it would ordinarily do so." In Louisville & N. R. Co. v. been used upon the bridges on the de-Campbell (1893) 97 Ala. 147, 12 So. fendant's road, or, so far as the testistory, it was held that there was no case mony showed, upon any other; that, to go to the jury where a brakeman was injured through the giving way of a source of weakness. brake rod in which there was an old

Indeed, common observation and expe-<sup>3</sup> Philadelphia & R. R. Co. v. Hughes rience suggest the impracticability of (1888) 119 Pa. 301, 13 Atl. 286. In such a system. If one brake should be DeGraff v. New York C. & H. R. R. Co. taken apart and examined, all should; (1879) 76 N. Y. 125, the court, in com- and if all, then every other machine or menting on the contention of the plain- appliance connected with the train and tiff that the exercise of ordinary care composed of adjustable parts. To do would have discovered the defect in the this would cripple and embarrass the coupling chain which broke and injured operation of the road beyond any rehim, and that these chains should be detached at intervals, and their strength ion that such an inspection is an extested by hydraulic pressure, or dead weight, or by some other mode which by some exigency which would suggest to would be effectual for that purpose, the mind of a reasonably prudent personable and unnecessary, either to insure the safety of the public or employees. . . As a general rule the degree of vigilance required is measured by the dangers to be apprehended or avoided. It does not appear to be necessary that the full strength of these breaking of the lever of a hand car, chains should be kept up. That would involve a test on every trip, and a possible renewal on every trip. Again, on a part of the wood which is concealed a train of thirty cars, each one having have discovered the defect by an exabrake, it would not seem to be indistruction. coupling chain which broke and injured operation of the road beyond any rea brake, it would not seem to be indisternal inspection. Louisville & N. R.

Such chains frequently break, as the ev-that the test of boring the timbers was idence shows, but there is no evidence not applied, remarked that this is no

In chapter v., ante, it has been shown that the common usage of employers in the same line of business as the defendant is, by all the courts, recognized as a material factor in the determination of the question whether the master had furnished reasonably safe instrumentalities. The same standard has frequently been applied as a gauge of the master's performance of the duty of inspection.1

As in cases where the quality of the instrumentalities themselves is in question, it is agreed by all the authorities that a jury may properly infer negligence from the master's failure to conform to usage in regard to the methods of inspection adopted.2

'In referring to this standard the courts have used the following phrases:

"Such tests as are ordinary and usual it be a useful one and may reasonably in the business." Chicago G. W. R. Co.
V. Healy (1898) 30 C. C. A. 11, 57 U.
S. App. 513, 86 Fed. 245. "Such tests as custom and experience have sanctioned and prescribed." Warner v. 585. The fact that the custom of other Erie R. Co. (1868) 39 N. Y. 468. Methods of testing "ordinarily in use by prudently conducted roads engaged in like business, and surrounded by like circumstances." Louisville & N. R. Co. v. Allen (1885) 78 Ala. 494, repeated in Jukanian and Erist. "Such tests (1885) 78 Ala. 494, repeated in Jukanian and Erist." Ranoville Iron Co. v. Jones (1890) 44 Richmond & D. R. Co. v. Jones (1890) 49. Ala. 218, 9 So. 276. "Ordinary and proper tests." Knowville Iron Co. v. Dobson (1881) 7 Lea, 367. "Reasonable and usual tests." Smith v. Chicago M. & St. P. R. Co. (1877) 42 Wisselberg and tests." Southof the ordinary and approved tests." Southof the ordinary and approved tests." Southof the ordinary and approved tests." Southof the ordinary inspection." Covan v. Chicago, M. & St. P. R. Co. (1891) 80 Wis. 284, 28. "Usual tests." Southof N. W. 180; McKnight v. Chicago, M. & St. P. R. Co. (1891) 80 Wis. 284, 20 N. W. 180; McKnight v. Chicago, M. & St. P. R. Co. (1891) 80 Wis. 284, 20 N. W. 180; McKnight v. Chicago, M. & St. P. R. Co. (1890) 44 Minn. 141, 46 (St. P. R. Co. (1890) 44 Minn. 141, 46 (St. P. R. Co. (1890) 44 Minn. 141, 46 (St. P. R. Co. (1890) 44 Minn. 141, 46 (St. P. R. Co. (1890) 44 Minn. 141, 46 (St. P. R. Co. (1890) 44 Minn. 141, 46 (St. P. R. Co. (1890) 44 Minn. 141, 46 (St. P. R. Co. (1890) 44 Minn. 141, 46 (St. P. R. Co. (1890) 44 Minn. 141, 46 (St. P. R. Co. (1890) 44 Minn. 141, 46 (St. P. R. Co. (1890) 44 Minn. 141, 46 (St. P. R. Co. (1890) 44 Minn. 141, 46 (St. P. R. Co. (1890) 44 Minn. 141, 46 (St. P. R. Co. (1890) 44 Minn. 141, 46 (St. P. R. Co. (1890) 44 Minn. 141, 46 (St. P. R. Co. (1890) 44 Minn. 141, 46 (St. P. R. Co. (1890) 44 Minn.

v. Penfold (1896) 57 Kan. 148, 45 Pac. troduced a person engaged in the mill-574; Flood v. Western U. Teleg. Co. (1892) 131 N. Y. 603, 30 N. E. 196.

<sup>2</sup> A verdict holding a railroad company liable for injuries caused by the explosion of an engine, due to defective stay bolts, will not be disturbed where there is testimony to the effect that, if any one out of several recognized tests had been applied within a reasonable time before the explosion, the true condition of the stay bolts would have been discovered. Texas & P. R. Co. v. Barthink the question was proper, as elicitarett (1895) 14 C. C. A. 373, 30 U. S. applied, so far as he knew." The court servants did not require it to resort to unusual or impracticable tests; and we have defendent's duty to its impracticable tests; and we defendent to show that one of the vicinity generally applied to the steam boilers used in the mill men of the vicinity generally applied to the steam boilers used in the mill men of the vicinity generally applied to the steam boilers used in the mill men of the vicinity generally applied to the steam boilers used in the mill men of the vicinity generally applied to the steam boilers used in the mill men of the vicinity generally applied to the steam boilers used in the mill men of the vicinity generally applied to the steam boilers used in their business. The question was objected to, but the court permitted the witness to answer and he stated that "have applied to the vicinity generally applied t

With regard to the evidential significance of conformity to usage, most of the cases apply the principle adopted in the decisions cited in § 44, ante, viz., that a jury is not warranted in finding the master to be negligent if such conformity is clearly established.<sup>3</sup> In

ployed by persons engaged in operating & S. F. R. Co. v. Ledbetter (1885) 34

similar machinery."

Kan. 326, 8 Pac. 411. An employer is <sup>8</sup> Warner v. Erie R. Co. (1868) 39 N. not liable for the death of his engineer Y. 468; Knoaville Iron Co. v. Dobson from explosion of a boiler, though the (1881) 7 Lea, 367; Southwest Virginia repairer, who had stopped a leak at a Improv. Co. v. Andrew (1889) 86 Va. seam by calking, did not apply the 270, 9 S. E. 1015. The master is not water test, the evidence being that cusrequired to apply extraordinary tests tomarily nothing of the sort was done "not approved, practicable, or custo- if calking proved effective. Kramer v. mary." Louisville & N. R. Co. v. Allen Willy (1901) 109 Wis. 602, 85 N. W. (1885) 78 Ala. 494. A railroad com- 499. Where a boiler of a locomotive pany is not required to adopt extraor- engine bursts, owing to a flaw which dinary tests for discovering defects in is latent, and discoverable only by a locomotive boiler, or any of its mathe steam and hydraulic tests, which chinery, which are not approved, practice are not in ordinary use with railroad ticable, and customary; but it fulfils corporations, and rarely applied except its duty in this regard if it adopts such when boilers are first put in use or tests as are ordinarily in use by pru-when the engines undergo their periodidently conducted roads engaged in like cal examination in the workshop, the dentry conducted roads engaged in like cal examination in the workshop, the business and surrounded by like circumstances. Texas & P. R. Co. v. Barrett R. Co. v. Allen (1885) 78 Ala. 494. In (1897) 166 U. S. 617, 41 L. ed. 1136, Smith v. Chicago, M. & St. P. R. Co. 17 Sup. Ct. Rep. 707. Negligence as (1877) 42 Wis. 520, the court reregards inspection cannot be predicated marked, with regard to the tests apon the ground that a spindle which plied to the defendant's brake rods: broke was not removed from the draw-"The defendant proved by John Baillie, bar for the purpose of examining it, its master car builder, that the iron was where no testimony is adduced to show purchased of the best makers, and was that it is customary for railway compa- of the best quality; that samples of nies, or that it has ever been considered each lot were tested in the defendant's essential by prudent men engaged in the shops in the usual and most approved same business, to adopt this method of manner; that all materials were ininspection. Burns v. New York, P. & spected, as well as the work done, by B. R. Co. (1892) 20 R. I. 789, 38 Atl. first-class inspectors; that he himself 926. A verdict for the plaintiff was set examined thoroughly all cars purchased aside where the evidence on the part of by the company, as to the character of the defendant tended to show that a the cars, the material used, and their flaw in a brake rod was not discover- manufacture; and that no car was alable, owing to rust on the rod, by the lowed to go on the road, in which he usual methods of inspection, and there could discover any defect which would was no evidence on the part of the make it unsafe. It appeared that the plaintiff to rebut this, his testimony to system of inspection of cars which were the effect that the defect would have purchased, and the tests applied to the been discernible by the eye if it had materials of which its cars were manubeen daylight being held to be merely factured, were the same as those his inference from the fact that the adopted or applied by railroad corporahis inference from the fact that the adopted or applied by railroad corporabrake rod was so easily twisted off in this attempt to set the brake. Read v. are able to judge from the testimony, New York, N. H. & H. R. Co. (1897) the defect in the brake rod was a latent 20 R. I. 209, 37 Atl. 947. A verdict for a railway servant injured by a defective drawbar will be set aside if no evidence was adduced by him to show that the defect could have been discovered by the usual examination in show that the defect could have been discovered by any of the ordinary tests employed by car inspectors. Atchison, T. were inadequate, and not in accordance one case where this view was adopted it was laid down that, in determining whether an inspection was made with ordinary care, a jury can only find facts showing whether it was made in the usual and ordinary manner,—the one commonly adopted by men of ordinary care and prudence in the same business, under like circumstances.4 But the opposite view, that compliance with the practice usual under similar circumstances is merely evidence for the jury to consider in determining the question of due care (see § 50, ante), is also embodied in some decisions.5

164. Duty of inspection with regard to conditions arising from the progress of the work.— That the master is not under any obligation to examine into the condition of his appliances from time to time, for the purpose of ascertaining whether they expose the servant to those elements of insecurity which arise from the manner in which the details of the work are carried out, is an obvious and necessary infer-

justify the finding of the jury." quirements an \*Louisville, N. A. & C. R. Co. v. will permit."

Bates (1896) 146 Ind. 564, 45 N. E. In Misson Bates (1896) 146 Ind. 564, 45 N. E. <sup>6</sup> In Missouri P. R. Co. v. Dwyer 108. There a special verdict was set (1886) 36 Kan. 58, 12 Pac. 352, with the inspection was such as the time, spection.

with the most approved methods, to place, means, opportunity, and the requirements and exigencies of the traffic

aside on the ground that it did not respect to a custom or practice of the state facts sufficient to sustain the inspectors to do nothing more than to judgment. "This court cannot," it was make a casual examination of brake declared, "say, as a matter of law, that staffs which were straight and apparthe car could not have been inspected ently all right, by which it was not properly in less than five minutes, or probable a crack or break of the kind that it was necessary to use "tools or stated would be observable, the court other manual tests." Neither are there said: "Upon the grounds of public polany facts found from which we can de-termine whether the standard of inspec-tion designated as an 'efficient and prop-erated with a defective brake staff, er inspection and examination thereof,' when, by the exercise of reasonable and and 'a reasonable and ordinary inspection thereof,' is the one required by law. could have been discovered and reme... The finding 'that to have made died, can hardly be sustained as a valid an efficient and proper inspection and custom. Atchison, T. & S. F. R. Co. v. examination thereof would have taken Holt (1883) 29 Kan. 149; Berg v. Chififteen minutes' is a mere conclusion. cago, M. & St. P. R. Co. (1880) 50 Wis. The standard thus fixed by the jury 419, 7 N. W. 347. If a brake staff is may be predicated upon the proposition not to be examined for visible defects or that such searching and critical inspection must be made as would insure abspection would be almost useless; in solute safety to the employees. This, any event, it would be no protection for some safety to the employees. This, any event, it would be no protection for as we have shown, is not required, the safety of the employees using the Facts, not conclusions, must be stated, brake." In International & G. N. The special verdict should state such R. Co. v. Hawes (1899; Tex. Civ. App.) facts as would show whether the inspection of the safety of the employees. tion made was such as is usually made that a railroad car was inspected by a under like circumstances by inspectors competent inspector in the ordinary of ordinary care and prudence, and this way does not conclusively show that orwould include all facts showing whether dinary care was used in making the inence from the doctrine developed in chapter xxxII., post.1 But it is by no means easy to define with precision the spheres of operation covered by this doctrine and that which requires the master to maintain the place of work in safe condition. Some cases are cited below which indicate the extent to which the courts have gone in allowing recovery on the ground that the master failed to keep a reasonably careful watch upon the various parts of his plant, to the end that they might not unduly imperil the safety of his servants by any of the temporary conditions which the progress of the work might create in their local relations to each other or to the servants.2

165. Inspection by parties other than the proprietor himself, effect of.—a. Public officials.—On the one hand it has been laid down that the mere fact that an instrumentality—here a freight elevator—is inspected at stated intervals by city officers and the agent of an indemnity company does not, as matter of law, release the master from his duty to make frequent examinations, and apply frequent tests to the elevator, to see that it is in working order and in a safe condition. On the other hand it has been said that an employer who has no knowledge fitting him to inspect a boiler may rely on the certificate of the official boiler inspector of the city where the business is carried on.2

If these cases are to stand together, they are presumably to be dif-

cleaning and oiling).

that posts are properly secured before stone from which the servant's injury the orders workmen to go upon them for resulted. Neveu v. Sears (1892) 155 the purpose of placing girders in position. Herdler v. Buck's Stove & Range whose duty it is to empty buggies of Co. (1896) 136 Mo. 3, 37 S. W. 115. It molten slag on a dumping ground designate of the duty of company states of the state of th is the duty of an employer, in ordering nated by his superiors does not, in pera laborer to work near or alongside a forming that duty, "make the place of pile of ore packed into such a mass that work," in such a sense as to absolve the the use of explosives is required to loos- master from the obligation of using en it, to observe carefully the condition proper care to see that the dumping of the material as to looseness or com- ground itself remains in such a condiof the material as to looseness or compactness, and all other features of its structure, so as to be able to determine what shall be done to prevent the fall Co. (1901) 59 App. Div. 79, 69 N. Y. of the ore upon such employee. Illinois Steel Co. v. Schymanowski (1896) 162 Ill. 447, 44 N. E. 876. Where a mason is injured by the explosion of a dynamite cartridge left in a stone taken from a quarry at some distance from the work, an instruction is correct ground itself remains in such a condition that the slag may be safely thrown upon it. Kiras v. Nichols Chemical Co. (1901) 59 App. Div. 79, 69 N. Y. Supp. 44.

1 McGregor v. Reid, M. & Co. (1899) 178 Ill. 464, 53 N. E. 323, Reversing (1898) 76 Ill. App. 610.

2 Service v. Shoneman (1900) 196 Pa. 63, 46 Atl. 292.

i On this ground recovery was denied which leaves it to the jury to say in Quigley v. Levering (1901) 167 N. whether the defendant, knowing the Y. 58, 54 L. R. A. 62, 60 N. E. 276, Afmanner in which the operations at the firming (1900) 50 App. Div. 354, 63 N. quarry were conducted, and the risk Y. Supp. 1059 (trolley ran off traveltat unexploded cartridges might reing bar owing to the want of proper main in the stones carted away for health and the stones carted away for health are readed. building purposes, ought, as an ordina-<sup>2</sup> A master is bound to inspect and see rily prudent man, to have examined the

ferentiated on the basis indicated by the qualifying clause in the second one,— viz., that the want of expert knowledge entitles the master to rely on the adequacy of the official inspection. But it is difficult to admit that the fact of an appliance having been pronounced sound by an official inspector should be deemed to preclude the jury from considering whether his inspection was really an adequate one. Such an inference seems to be unwarrantable without assuming the possession by such inspectors of a much larger measure of skill and diligence than can fairly be credited to any class of employees. Another objection to holding the master not liable, as a matter of law, is that the doctrine of non-delegable duties is virtually ignored.

b. Manufacturer.—It has been held in one case that the proprietor of an elevator and equipments of the most approved kind, which were personally looked after and inspected both by the proprietor and by the regular inspector of the manufacturer who furnished them, is not liable for injuries caused by defects which were not known to him.<sup>3</sup> Apparently, no case has been decided in which an inspection by the manufacturer's inspector only had been made. But, provided the inspection made by that inspector is shown to have been as thorough as any that the master himself could have made, there seems to be no reason to doubt that he should be deemed to have exercised due care.

<sup>&</sup>lt;sup>8</sup> Hart v. Naumburg (1890) 123 N. Y. 641, 25 N. E. 385, Reversing (1888) 50 Hun, 392, 3 N. Y. Supp. 227.

## CHAPTER XII.

EMPLOYER'S LIABILITY CONSIDERED WITH REFERENCE TO THE OWNERSHIP OF THE INSTRUMENTALITY WHICH CAUSED THE INJURY.

- 166. Instrumentalities both owned and controlled by defendant at the time of the accident.
- 167. Instrumentalities which belong to a third person and become active for mischief, owing to the negligence of his employees.
- 168. Instrumentalities not belonging to the employer, and used by his servants without his authority.
- 169. Instrumentalities neither owned nor controlled by the defendant, but used by his direction; generally.
- 170. Employer held not to be liable.
- 171. Employer held to be liable.

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- 172. Instrumentalities not owned by the employer, but controlled by him, and used by him as a part of his plant.
- 173. Liability of railway companies for the condition of cars received from other roads; generally.
- 174. Obligation of receiving company to inspect foreign cars.
- 175. Manner in which foreign cars are constructed; how far a source of liability.
- 176. Effect of statutory and constitutional provisions requiring railway companies to transport foreign cars.

166. Instrumentalities both owned and controlled by defendant at the time of the accident.— In the absence of any sufficient evidence to show that the instrumentality which caused the injury was not a part of defendant's plant, acquired or constructed by him for the purpose of his business, and controlled by him, as owner, when the injury was received, the doctrine explained in the preceding chapters determines the extent of his responsibility. If the testimony is conflicting, or is susceptible either of the inference that the instrumentality was of this description or that it was not, its true character is a question for the jury to decide.

¹Where an electric railway company company does not assume the risk of a engages a contractor to ballast the collision with the contractor's car. roadbed, allowing the contractor to operate a car thereon, but the company tion Co. (1901) 198 Pa. 586, 48 Atl. retains the right to direct the management of curs and simple a motormen.

ment of cars and signals, a motorman <sup>2</sup> A nonsuit should not be granted in who remains in the occupation of the an action against a company to recover

Where the instrumentality belongs to the movable class, the master's liability for its condition does not cease merely because it is transferred temporarily to the premises of another person, and used for the purpose of furthering work which the latter is doing.3

167. Instrumentalities which belong to a third person and become active for mischief, owing to the negligence of his employees.— An action cannot be maintained for injuries caused by the negligence of the servants of the owner of premises adjoining those of the defendant; at all events, in the absence of evidence showing that the particular event which produced the injury ought to have been foreseen and provided for by him.1

for personal injuries sustained by a duty of him and the master, he was (as workman who fell through a rotten between him and McGatrick) liable for workman who fell through a rotten between him and McGatrick) liable for plankway, on the ground that the unthe injury if it resulted from his negsound planks were not shown to be the lect, or that of the master, to provide property of the defendant, when there suitable machinery,—the defect in the is evidence tending to show that the demachinery being unknown to McGatfendant was operating and conducting rick. The general rule is, that an emthe business in which the plankway was ployer who provides the machinery, and provided for the use of its servants in oversees and controls its operation, when course of their applications. the course of their employment. The must see that it is suitable."

plaintiff is not required to prove that

3 A railroad company is liable for perthe defendant owned the planks of sonal injuries to a fireman in its serv-which the plankway was constructed. ice ordered to work upon an engine fur-Powers v. Standard Oil Co. (1898) 53 nished by it to a contractor engaged in S. C. 358, 31 S. E. 276. Where a laconstructing an extension of its road, borer unloading a vessel, on arriving in occasioned by defects in the engine at the morning finds that a ladder necestributable to its negligence, although sary in the work has been placed in pothe track of the extension is in possession. ploys him, such circumstances are vannah & W. R. Co. v. Phillips (1892) prima facie evidence that the ladder has 90 Ga. 829, 17 S. E. 82. been provided by his employer; and it <sup>1</sup> In a Scotch case it was sought to is error to nonsuit him for lack of such hold a railway company liable to a proof, in an action for an injury reservant who, while working at the junceived while using such ladder. Mills v. tion between the line operated by the Mainc Ice Co. (1889) 51 N. J. L. 342, defendant and a private one leading Maine tee Co. (1909) 51 N. J. L. 542, defendant and a private one leading 17 Atl. 695. In McGatrick v. Wason from a colliery, was injured by a coal (1855) 4 Ohio St. 566, where the plaincar which, owing to its being insuffitiff was assisting in the shipment of ciently blocked, started down an incline his master's goods on a steamer, the and ran on to the defendant's track. law of the case was thus laid down by The court decided, without difficulty, the court: "If Wason had no charge that the only party against whom the the court: "If Wason had no charge that the only party against whom the of, or control over, the operation of action lay was the owner of the colshipping the cars and trucks, but, on liery. M'Laren v. Edinburgh & G. R. the contrary, the duty of shipping them Co. (1861) 23 Sc. Sess. Cas. 2d series, rested solely upon the master of the yessel, and he had the entire control gested, but not decided, the point havover the operation, and Wason acted ing been overlooked by counsel, that, merely as his assistant or servant, then under appropriate allegations and evidence of the railway company might be the action should have been brought dence, the railway company might be against the owner of the vessel, and not held liable on the ground of its having against Wason. But if it was Wason's failed to make suitable regulations in duty to ship them, or if it was the joint view of such a contingency.

sition, and is being used by his fellow sion of the contractor, and the opera-workmen under direction of the supertion and movements of the train are unintendent of the company which em- der the latter's exclusive control. Sa-

168. Instrumentalities not belonging to the employer, and used by his servants without his authority.— There is clearly no ground upon which an employer can be held liable where the servant was injured while using, for the purposes of his work, some material substance which happened to be in a convenient position, but which was not the property of the employer, and which was not used by his authority.1

169. Instrumentalities neither owned nor controlled by the defendant, but used by his direction; generally.—The cases dealing with the right of a servant to sue for injuries received from an instrumentality which belonged to and was under the control of a third person at the time of the accident, but which the servant was required to use in the course of his employment, are irreconcilably conflicting, whether they are collated with reference to the fundamental principles relied upon, or with reference to the specific facts involved. This want of harmony seems to be chiefly due to the same cause that produces most of the disagreement in this branch of jurisprudence, viz., the fact that it is often a mere matter of opinion which of two or more doctrines not disputed as abstract propositions should be applied, for the purpose of testing the legal significance of the testimony introduced. In view of this disagreement between the authorities, a commentator can do nothing more than indicate the effect of the decisions in which the master's liability has been denied or affirmed, and state the reasons by which they are supported.

It should be observed that the conflict of opinion disclosed by the cases cited in the next two sections reappears in those decided under the English employers' liability act of 1880, and the American and Colonial statutes modeled upon it. See chapter xxxvII., post.

170. Employer held not to be liable.— In numerous cases, presenting a considerable variety of facts, the courts have treated the defendant's want of control over the instrumentality as the controlling factor, and regarded this as a decisive reason for exempting him from responsibility.

In some of these cases the unsuccessful plaintiff was sent to the premises of a third person to perform duties in connection with work which his employer had contracted to do, and the injury was caused by some appliance which he found on those premises. In others,

<sup>&</sup>lt;sup>1</sup>A telephone company is not liable not an appliance furnished by the comfor an injury to a lineman caused by pany, or, if so, the lineman assumed the the breaking of a limb of a tree upon risk incident to its use. Yearsley v. which he was standing for the purpose Sunset Teleph. & Teleg. Co. (1896) 110 of removing an obstruction to the stringing of a wire between the poles erected for that purpose, as the tree is 70 Conn. 573, 41 L. R. A. 200, 40 Atl.

an abnormally dangerous situation was permanently created by the position of some substances, relatively to the servant's place of

safe place of work is applicable in a ant into the contract of hiring only case where a servant is seeking to recover damages from his master, one of the contractors working on a building, this were not so, the duty and liability for injuries caused by the fall of a scaffold erected by another contractor, saying: "This genral rule is not ordinally made responsible for the negligence rily applicable to cases where the master of third parties with reference to premises, or control, legal or actual, of the use, or control, legal or actual, of the use, or 'place' where the servant haps could know, nothing. The mermay be at work. The general rule is chant would, in effect, be liable to his based upon such possession, use, and clerk for the negligence of the customer control by the master of the premises with respect to the safety of the premises control. Just as the master's liability for the acts of his servants while engaged in his business is based upon his power to control them, so his duty to provide part, by the negligent failure of the reasonably safe premises is founded esountially upon his occupation, use, and control of such premises. This being tion, has his remedy against such owner the reason of the rule, when the reason or occupier, and, in the absence of some does not exist the rule is inapplicable. agreement to that effect, has none does not exist the rule is inapplicable. agreement to that If an employer sends his servant to against the master." a distant place, by rail, to do a piece A master who ser of work on the premises of B., it would construct an elevator in a building hardly be contended, in the absence of which is in process of construction is a special agreement to that effect, that not liable for an injury caused by the the master would be responsible to the unsafe condition of a scaffold, in the servant for the negligence of the transconstruction of which he had no part. portation company in failing to carry Whallon v. Sprague Electric Elevator the servant safely, or for the negligence Co. (1896) 1 App. Div. 264, 37 N. Y. of B. in failing to keep his premises in Supp. 174. The court laid it down that a reasonably safe condition. In the the rule which requires the master to case supposed, the servant, both while provide the servant a reasonably safe case supposed, the servant, both while being carried and while at work on B.'s premises, is at work for his master, and the railroad car and the premises of B. are places where he is directed to and does perform work for his master, and yet the master, as master merely, would be under no duty to use reasonable care to make such places reasonable care to make such places reasonable care to make such places reasonable safe. The law, in such cases, reads no such duty into the contract of hiring. If the master, it is his duty to take reasonable care that the place is either under the control of the work, should have been under his control, and proceeded as follows: "In a factory, a mill, a shop, or even a mine or excavation occupied or worked by sonable care that the place is secure and safe for his servant; and the servant has the right to assume that the master has discharged his duty in that respect. But where the master sends his working the work there, the result might be different. Such a case might be, under certain circumstances, within the reason of the rule. Ordinarily, however,

462, the court denied that the general we think the law reads such a duty on rule requiring an employer to provide a the part of the master towards the servsafe place of work is applicable in a ant into the contract of hiring only control by the master of the premises with respect to the safety of the premwhere he puts his servants at work for ises upon which the clerk goes to dehim; and, speaking generally, his duty liver his master's goods, and the masto use due care to make and keep such ter plumber or carpenter to his workplace reasonably safe flows from, and is man for the negligence of the housemeasured by, such possession, use, and holder upon whose premises he sends the workman, simply to make some slight repairs. In all such cases the servant, if injured, without fault on his

A master who sends his servants to

work.2 In others, the defendant was the licensee of a railway, and using it jointly with the owner for the running of trains.3 In others, the defendant was the owner of premises over which a railway company had constructed a siding, the operation and maintenance of

no share in the construction of the tent based upon this circumstance. appliances as in regard to the place of 10, infra). work.) This case was followed by Wit- 2 The loc volving similar facts.

In Hughes v. Leonard (1901) 199 Pa. 123, 48 Atl. 862, plaintiff was employed 123, 48 Atl. 862, plaintiff was employed by the defendants, who were contracting wharf and bridge builders, to work on their pile driver in constructing a certain pier. The defendants had purchased the piles from T., who had agreed to bring them to the place in his own vessel, and deliver them over the side. While plaintiff was on T.'s which the road runs, for any cause of boat, assisting in unloading the piles under direction of defendants' foreman, a short guy rope, part of the tackle of the vessel, broke, allowing the boom to georgia act of 1870 relative to the deswing around and tighten another rope fendant company. See also Dunlan v.

provided by the master. I cannot find The extremely improbable character of any reported decision in which it has the event which caused the injury was been attempted to enforce liability in emphasized by the court, but it is not such a case. The defendant here had apparent that the decision is to any ex-

building, save to erect the elevators. A person who contracts to do a por-Its implied license on the premises was tion of the work on a building in confined to such parts as were necessary course of erection is not bound to for it to occupy in the work or in ob- have the building in such a containing access thereto but it had no dition that employees can wander control over nor was it responsible for through it in the darkness, away from the condition of the building. The the regular passageway, without risk of learned counsel for the respondent confalling. Nor is it his duty to maintain cedes that the defendant could not have artificial lights for those who should been held liable for any defect in the choose to attempt to go through after permanent structure, but insists that nightfall. Murphy v. Greeley (1888) there is a distinction to be made be- 146 Mass. 196, 15 N. E. 654. An auctween what is permanent and what is tioneer selling goods on the premises of temporary. We believe that this disastranger is not responsible to his servinction may be well founded, but the ants for the safety of those premises, tinction may be well founded, but the ants for the safety of those premises, necessary result of such a distinction is nor for the sufficiency of the appliances that what is temporary must be considered as an 'appliance,' and only what is goods which are to be sold. Nelson v. permanent as a 'place.' This seems to Scott (1892) 19 Sc. Sess. Cas. 4th sebe the basis of the decision in Butler v. ries, 425 (elevator gave way). To Tournsend (1891) 126 N. Y. 105, 26 N. same effect, see also Hughes v. Malden E. 1017, where it was held that a stage & M. Gaslight Co. (1897) 168 Mass. ing on which calkers stood while at 395, 47 N. E. 125 (note 9, infra); work on a vessel was not a 'place' but Dixon v. Western U. Teleg. Co. (1895) an 'appliance,' by means of which the v. King's Windsor Cement Dry Morntar tion, however, seems to be wholly im—Co. (1897) 168 Mass. 450, 47 N. E. 425 tion, however, seems to be wholly im- Co. (1897) 168 Mass. 450, 47 N. E. 425 material, as the master is just as much (note 10, infra); Regan v. Donovan under a duty to use care in regard to (1893) 159 Mass. 1, 33 N. E. 702 (note

<sup>2</sup> The location of a street railway betenberg v. Friederich (1896) 8 App. ing fixed by the municipal authorities, Div. 433, 40 N. Y. Supp. 895, a case in- the company cannot be charged with negligence in allowing a tree to remain dangerously near the track, unless it had the right to remove the tree. Hall

swing around and tighten another rope fendant company. See also Dunlap v. attached to it, which drew plaintiff into Richmond & D. R. Co. (1888) 81 Ga. the hold of the vessel, injuring him. 136, 7 S. E. 283 (note 11, infra).

which remained entirely under its control.4 In others, the defendant was the tenant of a portion of a building.<sup>5</sup> In others, the distinction relied upon was that the thing which caused the injury was an article to be handled, and not an appliance with which to do work.<sup>6</sup>

In two of the cases already referred to it seems to be considered that the inability of the servant to maintain the action is also deducible through a line of reasoning of which the basis is his comprehension of the situation, and presumable acceptance of the risks to which it exposes him.7 And in the case cited below this consideration is

it exposes him. The case cited below this consideration is

'In Scotland it has been held that the fact that a siding which is the fact that a siding which is the property of a railway company passes the cars and bins. By means of these property of a railway company passes the cars received were handled and unthrough the premises of a steel company, and is used for the transit of the cars which convey materials to and from those premises, does not cast upon the steel company a resulting duty towards its employees to supervise and examine the proceedings of the railway company in regard to the maintenance of the siding and the management of the cars thereon. Smyth v. Caledonian that, 20, (1897) 24 Sc. Sess. Cas. 4th series, 488 (servant of steel company was injured by a derailment due to a defective switch).

'The testimony of an employer in an action by an employee for personal injured, and that the defendant had nothing to do with the covering of the wheel which is claimed to have been defective, is admissible. Havlin v. Krulish (1899) the court, in holding that a coal company is not liable for an injury to an employee caused by defective brakes on a railroad car filled with coal and delivered to such company, on the ground of failure to furnish the employee with safe machinery, said: "The cars were the property of the railroad company that delivered the coal. They were not a part of the machinery of the defendants, used in their business. As was said by the learned judge in granting worked upon, not the things worked upon, not the things worked upon, not the defendants, used in their business. As was said by the learned judge in granting the motion for a nonsuit, they were the things worked upon, not the th

virtually the sole rationale of the decision.<sup>8</sup> But it would seem that there is no logical ground upon which it can be maintained that this conception should be treated as a distinct reason for denying the servant's right to recover. So far as the writer is aware, it has never been even intimated, much less decided, in actions brought against strangers, that the applicability of the fundamental juristic principle, by which the existence or absence of the power of control becomes the test of responsibility, depends upon the injured person's knowledge or ignorance of the fact that the defendant had or had not control of the conditions which caused the injury. And there is no apparent reason why a different rule in this respect should prevail in actions against an employer.

The language used in some of the cases seems to be susceptible, if taken literally, of the construction that the effect of the theory exemplified in the rulings so far noticed is entirely to absolve the master

as to this case, note 6, next section.

N. Y. Supp. 174, the court said: "The The court argued thus: "It is well plaintiff knew that the scaffold was not settled that a master is under an imthe scaffold of his master or provided plied obligation to the servant to fur-by him, but built and in use by persons nish him a reasonably safe place in carrying on a different part of the which to render the services for which work. He made inquiries of the work- he is employed; but this obligation is men whether the scaffold was safe, and not absolute, and circumstances may men whether the scaffold was safe, and not absolute, and circumstances may was told that it was. He was not vary it. Where a driver is employed guilty of negligence in using it, under to drive a truck, he has the right to rely the circumstances, but still, in working on the master taking due care to give on this building, which he knew in the master taking due care to give him a safe truck and a safe seat thereon upon which to ride, provided, in the exception of as small upon which to ride, provided, in the exception, he took the risk of danger from does not discover any defect himself. But where, in the course of the emrisks of his employment." In Dixon v. ployment, the acts of third persons not Western U. Teleg. Co. (1895) 71 Fed. employed by the master may increase 143, the court emphasized the fact that, the danger of the service, and these acts as the pole did not belong to the defend- and their character are under the as the pole did not belong to the defend- and their character are under the eye of ant, the plaintiff knew, or ought to the servant, and, to the servant's knowl-have known, that its maintenance in a edge, are not under the supervision of state of reasonably safe repair was not the master, we do not think the master a duty incumbent on his employer, and is liable if injury results to the servant that no occasion requiring it to inspect from the negligence of the third perthe pole had arisen, or could arise un- sons. For instance, where a servant is til the moment when a necessity for its directed to take his truck to a distant casual use should arise. See further, point, and from there obtain a load of merchandise to be put on by the serv-The owner of a truck hired for use ants of the third person, and the merin a procession is not under an implied chandise is loaded so carelessly that in obligation to his employee, whom he sends to drive it, for defects in a superstructure built upon the truck by the seems clear to us that he cannot hold hirer, when the driver knew who built his master liable therefor. This is the it, and had no reason to believe that his law, because it is reason. Where the employer had taken any part in its erec-servant has greater opportunity than tion or supervision. Hardy v. Shedden the master to know and observe the Co. (1897) 37 L. R. A. 33, 24 C. C. A. probable results from the acts of the 261, 47 U. S. App. 362, 78 Fed. 610. third persons, of which the master, to

even from the duty of inspection.9 But, apparently, nothing more is meant than that there is no obligation in this regard unless there is something to indicate the existence of some abnormal danger. It would be quite contrary to general principles to predicate an absence of culpability in a case where a master, who had observed circumstances calculated to induce a suspicion that an instrumentality was defective, did not take some steps to ascertain its real condition.<sup>10</sup> A fortiori is it impossible for the master to escape liability where he had actual knowledge of a specific defect. Under the general principle discussed in chapter xvi., post, the possession of such knowledge raises, at the very least, a specific obligation to communicate it to the servants, so that they may protect themselves. 11 And if the circumstances

loading of cars on a railway line is usually inspected by a railway inspector before it is received. But where there is no such inspection, and where, in the nature of things, there cannot be, the servant cannot hold the master for the work of third persons."

\*In Hughes v. Malden & M. Gaslight Co. (1897) 168 Mass. 395, 47 N. E. 125, plaintiff was injured while working in a trench which was neither dug nor controlled by the defendant. The court, in discussing the question as to what the plaintiff had a right to expect when sides of the trench, or to make it safer than it was, because, as was manifest, and as the plaintiff must be taken to have known, the defendant had no control over the trench. He had a right to expect that, if the defendant knew of any danger which the plaintiff did not know, and ought not to be assumed to know, and ought not to be assumed to know, and ought not to be assumed to such knowledge on the part of the defendant was shown. It does not appear to have known anything except what was visible anything which the plaintiff with his experience was not equally where it was held that a railroad comable to infer. What more could it have tiff with his experience was not equally where it was held that a railroad comable to infer. What more could it have pany in sending its locomotive engineer done? There is no reason to suppose with one of its engines to haul tempo-

the knowledge of the servant, has had that inspection would have disclosed no opportunity to judge, then it is un-reasonable to hold that, with respect to therefore it is not necessary to consider such acts, the master has any obliga-tion to the servant. Of course, there with regard to cars received from con-are cases where the circumstances nec-necting lines to be forwarded on a railof supervising and inspecting the work case as this." In Dixon v. Western U. of third persons which may subject the Teleg. Co. (1895) 71 Fed. 143, it was servant to risk and danger. Thus, the held that when, in the course of the loading of cars on a railway line is userction of a telegraph pole, an occaually inspected by a railway inspector sion arises for the casual and sporadic

are such that a warning is not sufficient to enable the servants to secure their own safety, it is clearly the master's duty to remove them altogether from the dangerous environment.12

It is, of course, not denied by the courts whose decisions we have been considering, that a master may sometimes so act and speak as to justify the inference that he intended to make himself responsible for the condition of instrumentalities not owned by him. Whether he has assumed that responsibility is a mere question of evidence.<sup>13</sup>

7 S. E. 283 (demurrer upheld). The Cochran v. Sess (1900) 49 App. Div. court said: "It is not alleged that the 223, 62 N. Y. Supp. 1088. employer knew either of the bad condi-The employer could not, by authority of the contract, order him to go, for the duty of going was not embraced in the holes in it, for instance, or the plow is not adapted to the soil, and from one or both of these causes the hired man is injured, his employer, it seems to us, would not be to blame, and would not be responsible unless he knew the facts failed to communicate it."

rarily for another company, was not lithe walls thereon, he may not negliable to him for the bad condition of the gently proceed with the work, and estrack, nor for want of adaptation of the cape liability, as against an employee, engine to the track. Dunlap v. Richfor injuries caused by the fall of the mond & D. R. Co. (1888) 81 Ga. 136, walls due to such insufficient bottom.

<sup>18</sup> In Channon v. Sanford Co. (1898)

tion, or the want of adaptation. For 70 Conn. 573, 41 L. R. A. 200, 40 Atl. aught that appears, the parties were on 462 (already mentioned in note 1, equal terms as to their knowledge or supra), a plasterer had been sent by his information touching both these mat- employer to do some ornamental work ters. Had the engineer needed infor- in a church. When he arrived, a solid mation more than he had, he should scaffold had for some time been in place have obtained it or declined to go. The and used by the employees of the conquestion is, whether he had a right to tractor for the erection of the building, take for granted, as against his em- and during the conversation which ployer, that the track of the other com- plaintiff had had with the defendant bepany was not defective, but in a fit confore starting, the latter, in reply to a dition to be used under this particular statement of the former that he knew engine with safety. Did the employer nothing about working on staging, and owe to him the diligence of seeing that knew nothing about building it, assured this was so, before requesting him to him that the scaffold would be entirely safe. The plaintiff found that the scaffold already built was not high enough for his purpose, and requested the con-tractor to make an addition to it. This contract of employment. Had he objected, and been discharged for it, his and the new piece of staging gave way wages for the unexpired month would under the plaintiff. The defendant was have gone on notwithstanding. We held not to be liable. The court, after thing the case is much like that of a referring to the principle that a master farmer sending his hired man to plow must use due care to provide a safe for a neighbor a few days. If the place of work, said: "If the defendant neighbor's field is not safe, has sink specially assumed any such duty, that was a fact to be found by the trial court, either expressly or by necessary implication. It is not found expressly nor by necessary implication. question on this part of the case is whether, if no such duty rested upon which exposed his servant to unusual the defendant by law, the facts found peril, and concealed his knowledge, or warrant the conclusion, as matter of law, that it assumed such a duty. 12 Although a contractor was not re- strongest thing in the finding in favor quired by his contract to lay the bot- of such a conclusion is the fact that the tom for foundation walls, yet, where he defendant assured the plaintiff that the knew, or the conditions were such that staging would be entirely safe; but this he should have known, that the bottom fact, taken either alone or with the laid was insufficient for the erection of other facts found, clearly does not war-

171. Employer held to be liable.— The servant's right to recover has frequently been affirmed in cases which involve circumstances which are either identical with, or not essentially dissimilar from, those mentioned in the preceding section. The broad ground relied upon is simply that, as between a servant and his employer, all appliances which he is authorized or directed to use ought, in fairness, to be placed upon the same footing as those which actually belong to the employer. In other words, the owner of the appliance and his servants are, for the purpose of determining the injured person's right of action, treated as being constructively the agents of that person's employer for the performance of a non-delegable duty incumbent on the latter. The mere fact that the employer, having no control over the appliance, is unable to remedy defective conditions is, in this point of view, manifestly insufficient to absolve him, since he always has it in his power to safeguard his servants by refraining from giving them orders which will put them in a position where their safety will be imperiled by those conditions. See § 114, ante. It will be observed that, in some of the cases cited, the facts in evidence were such as to bring them very close to those discussed in the next section. Indeed, if the existence or absence of a power of control had not been treated as the differentiating factor by the courts whose decisions are cited in the last section, it would seem not unreasonable to take the position that, in all cases of this type, the employer adopts, sub modo, the appliances as a part of his own plant.

Some of the decisions in the servant's favor relate to the condition of appliances belonging to another employer doing work upon the same premises.<sup>2</sup> In others, the injury was caused by the condition of

rant any such conclusion, as matter of Rap. Jud. Quebec, 13 C. S. 22, cited in law. The assurance was given at the next note. very time that the defendant told the 2 Where the remodeling of a bridge very time that the defendant told the plaintiff about the strong staging that is being carried out partly by its owner that been already erected and in use in and partly by an independent contract-the building, and at the very time when or, and, in the course of the work, the plaintiff was informed that Caulfield, tools or appliances both of the owner and not the defendant, was to 'see' to and the contractor are used by the service staging. What the defendant said ants of each of them as occasion results the staging of the service of the building of the staging of the service of the building of the service of the service of the building of the service of the service of the building of the service of the service of the building of the service of the service of the building of the service of

to the plaintiff, as detailed in the find-quires, the owner of the bridge is liable to the plaintiff, as detailed in the finding, falls far short of an agreement to be responsible for the staging already built, or to be built, by Caulfield or his servants. The most that can be said about the finding upon this point is to prove such an agreement, but such facts do not, as matter of law, constitute such an agreement."

1 See St. Arnaud v. Gibson (1898)

Vol. I. M. & S.—24. the track of a railway on which trains were operated by a licensee company.3 In others, the defendant was a railway company which had constructed a siding over the premises of another person, and the injury was caused by some object above or near it.4 In others, the plaintiff's employer was a railway company operating trains over a

Rawle (1901) 93 Ill. App. 212. An

sition was distinctly taken that where as regards a train hand who has occathe employee of a railway company is sion to stand on them in the course of directed to use the road of another his duties, a part of the company's incompany in the business of his employ-strumentalities, which it is bound to er, he has the right to treat such road keep in safe condition, irrespective of as the road of the company employing the question of ownership. Harding v. him; and every company whose em-Railway Transfer Co. (1900) 80 Minn, ployees use the road of another com-504, 83 N. W. 395,

appliances himself, or acquiesced in pany under its direction or for its bentheir use by his servants while engaged efit owes it as a duty to such employees in his work, he was as responsible for to see that such road is not in a condi-his servants' safety as if he had erected tion which will unnecessarily endanger In his work, he was as responsible for to see that such road is not in a condition is servants' safety as if he had erected the appliances himself, was proper, their lives or limbs. To the same effect without submitting to the jury that are Denver & R. G. R. Co. v. Sullivan such acquiescence must have been for (1895) 21 Colo. 302, 41 Pac. 501; Story such a period of time as would indicate v. Concord & M. R. Co. (1900) 70 N. an adoption by the master, since the word "acquiesced" was used by the S. R. Co. (1895) 93 Me. 80, 44 Atl. 361 court in the sense of "being satisfied (doctrine assumed); Smith v. Memphis with," and such acquiescence would & L. R. Co. (1883) 18 Fed. 304 (in amount to an adoption. Rinake v. Viccharge to jury). In the last-named to first appeal of this case the track was used by the plain-E. 700. On the first appeal of this case the track was used by the plain-falling from a wing to a gangway leading from the ground to the second story of one of its buildings, where there was evidence that, although the wing had been constructed by an independent contractor, it had been used by the company's employees, to the knowledge of its president. A contractor is liable to there was no warrant for such a theory, either in law or in any consideration. its president. A contractor is liable to there was no warrant for such a theory, his own employees for defects in a scafeither in law or in any consideration fold erected by another contractor enthat concerns the public welfare. Clark gaged on the same building, for the use v. Chicago, B. & Q. R. Co. (1879) 92 Ill. of the latter's employees. McBeath v. 43.

4 Where a switch track runs under employer who puts an employee to work the sheds of a brick kiln, the railroad upon a barge, exposed to jets of scald-company, though not owning the shed, ing water and steam, is liable for in- owes its employees the duty of seeing jury occurring thereby to the servant, that it is in a reasonably safe condition, where it could have been prevented by and is liable to a brakeman on whom the use of a shield or conducting pipe, the roof of the shed fell by its own as, although he had no control over the weight, while he was coupling cars steamer, if the persons in command re-thereunder. Doyle v. Toledo, S. & M. fused to put up such shield or pipe, the R. Co. (1901; Mich.) 54 L. R. A. 461, employer could have refused to do the 86 N. W. 524. Where a railway transwork. St. Arnaud v. Gibson (1898) fer company operates a spur track for Rap. Jud. Quebee, 13 C. S. 22. \*In Wisconsin C. R. Co. v. Ross from a mill, steps leading down from a (1892) 142 Ill. 9, 31 N. E. 412, the populatform at the mill to the track are, sition was distinctly taken that where as regards a train hand who has occaprivate siding which proved to be defective.<sup>5</sup> In others, the employer was a company licensed to use, for the support of its wires, the poles erected by another company for the same purpose.6

The defendant's liability is, in one of the cases cited, apparently based, in part at least, upon the servant's presumed ignorance of the fact that the instrumentality in question did not belong to his employer. But there seems to be no rational principle upon which it can be maintained in this instance, any more than under the theory which exempts the employer from liability (see last section), that the servant's knowledge or ignorance of the actual ownership can affect his rights either favorably or unfavorably.8

The present writer ventures to express the opinion that the decisions which declare the master to be liable in cases of this type are more consistent than the others with those general conceptions of pub-

railroad company and its employees, ticipate such a use of the pole, Here, the injury was received on a spur track on which the defendant delivered (1895) 14 C. C. A. 190, 21 U. S. App. the carrier.

a license from another company, strings them safely. McGuire v. Bell Teleph. care and protection of the company Co. (1901) 167 N. Y. 208, 52 L. R. A. while running over it.

437, 60 N. E. 433, Affirming (1900) 52

App. Div. 635, 66 N. Y. Supp. 1137.

See also San Antonio Edison Co. v. Dixhis right of action merely because he electric railway company which was to keep it in good repair. Story v. Conusing the poles of another company. cord & M. R. Co. (1900) 70 N. H. 364, The court remarked that the defendant 48 Atl. 288. was bound either to inspect the poles,

<sup>5</sup> That a railway company is not enti- or get the other company to do it. Dixtled to send its servants on private sid- on v. Western U. Teleg. Co. (1895) 68 ings for their usual work, without mak- Fed. 630 (see notes 7 and 9 to preceding ing proper efforts to provide for their section), was distinguished on the safety, was laid down in *Grand Trunk* ground that there the pole was not a R. Co. v. Tennant (1895) 14 C. C. A. structure on which the plaintiff's work 190, 21 U. S. App. 682, 66 Fed. 922. had to be done, and that, as he ascended (See note 7.) In Stetler v. Chicago it for the purpose of removing a wire & N. W. R. Co. (1879) 46 Wis. 497, 1 which obstructed the erection of a pole N. W. 112, the court considered that the which he was helping to set up, his asrule by which one railroad company us- cent was merely an incident of his work, ing the tracks of another for the pur- This ground of differentiation, however, poses of its business should be respon- seems inadequate, except in so far as sible to passengers and owners of prop- it bears on the questions whether the erty by reason of the defective condition servant acted on his own responsibility, of such tracks should apply between the or whether the master was bound to an-

goods to the owner. It was held to be 682, 66 Fed. 922, where it was laid immaterial that a state statute re-down that a railroad train hand emquired the delivery of goods at their ployed in a branch of the service where destination over tracks not belonging to no duty calls upon him to ascernain the limits of the company's road has a right A telephone company which, under to assume that any track upon which he is ordinarily sent in the performance of its wires on the poles of the latter is his duty, physically connected with the bound to see that they are in such a company's main line, is a part of its condition that its linemen can ascend system, and he is entitled to the usual

cn (1897) 17 Tex. Civ. App. 320, 42 S. knew that the track over which his em-W. 1009, where a similar doctrine was ployer's trains were running belonged enunciated in regard to the duty of an to another company, which was bound

lic policy which are the ultimate foundation of his obligations to his servants. In many, perhaps most, instances there is no real ground for contending that his want of control over an instrumentality constitutes a serious obstacle to his obtaining sufficient knowledge of its condition to enable him to see whether it will unduly endanger his servants or not, and there would, therefore, be no hardship or injustice in requiring him to make such investigations as may be necessary for that purpose. Even where an adequate examination by his own employees is practically impossible,—as, where the injury was caused by defects in the track of a railway not belonging to him,—it seems not an unreasonable application of the doctrine of non-delegable duties to treat the servants of the owner as his agents. If he desires to protect himself from the consequences of the negligence of persons not in his service, or under his supervision, it is easy for him to do so by making specific arrangements with their master for indemnification in the event of his being obliged to pay damages. To relegate the servant to his action against the party who owns the instrumentality must, in many cases, be productive of serious inconvenience, and will occasionally deprive him of all remedy.9

172. Instrumentalities not owned by the employer, but controlled by him, and used by him as a part of his plant.— Both on principle and authority it is clear that a master is answerable for defects in any instrumentalities which he has temporarily taken over from the owner and made a part of his own plant. In such cases the elements of possession and the exercise of control are decisive. Manifestly, no distinction can logically be based upon the bare circumstance that he has a merely qualified right of property in them. So far as regards his obligations to his servants, he must be considered as the owner pro tempore. This principle is applicable whether he has borrowed the appliance in question,1 or has hired it for a specific considera-

In the note in Cleveland, C. C. & St. N. E. 668 — it seems very questionable L. R. Co. v. Berry (1899; Ind.) 46 L. R. whether the servant could have red. pp.33 et seq., and an article published in the Law Quarterly Review for April, sponsible for the dangerous position of 1900, and in the Canada Law Journal for the same month, the present writer has collected a number of cases which show how very arbitrary in some respects are the limits of the right of action for the negligence of a party between whom and the plaintiff there is no privity of contract. In at least one of the cases cited in the preceding section (note 2),—Hall v. Wakefield & S. spect to such car as if it were owned by Street R. Co. (1901) 178 Mass. 98, 59 it; and the cases where cars of other

tion,2 or has taken possession of it for a definite or indefinite period, with a view to the performance of certain work in which he and the owner are both interested.3

173. Liability of railway companies for the condition of cars received from other roads; generally—A large number of the cases which turn upon the liability of an employer for injuries caused by instrumentalities not belonging to him relate to the duties of a railway company respecting what are commonly termed "foreign" cars,—a convenient expression, used to denote cars which are received from connecting roads, to be forwarded, with or without a load, to some point on the company's own system, or to be transferred again to another line. As between the owner of the cars and the receiving company the transaction involved is merely a contract of bailment for the purposes of transportation. But owing to the manner in which that contract is necessarily performed, the cars, when taken into a train, virtually become, for the time being, a part of the receiving company's plant. In view of this fact it has been uniformly held that, in regard to such cars while in its possession and under its control, the receiving company is subject to certain obligations determined by the nature of that possession and control. A railway company is not only under no obligation to receive and place in charge of its employees a car with defective and dangerous equipments,1 or of abnormally dangerous construction,2 but is under a positive duty to reject such a car, or, if it is forwarded, to repair it sufficiently to make it reasonably safe.<sup>3</sup>

176, 45 Pac. 1041.

<sup>3</sup> Subcontractors employed in the construction of a railroad, of which they are in control for the purpose of construction, are liable for the death of an (1896) 55 Ohio St. 342, 45 N. E. 559; employee, due to the misplacement of a Moon v. Northern P. R. Co. (1891) 46 switch not otherwise securely guarded, Minn. 106, 48 N. W. 679; Atchison, T. and for which no lock had been prodes. S. F. R. Co. v. Myers (1894) 11 C. vided. Rombough v. Balch (1900) 27 C. A. 439, 24 U. S. App. 295, 63 Fed. Ont. App. Rep. 32. A spur track made by a railroad company upon the land of a coal company, which graded the track Co. (1885) 100 N. Y. 462, 3 N. E. 344; and furnished the ties for it, but which Louisville & N. R. Co. v. Williams the railroad company keeps in repair, (1893) 95 Ky. 199, 24 S. W. 1. See, is a part of the railroad as between the however. is a part of the railroad, as between the however, § 175, post. company and its employees. Little Rock & F. S. R. Co. v. Cagle (1890) 55 (1891) 131 Ind. 319, 28 N. E. 989; Ark. 347, 14 S. W. 89. A railway company which permits a locomotive belonging to another company to be 295, 63 Fed. 793; Gottlieb v. New York, brought into its yard and used by its L. E. & W. R. Co. (1885) 100 N. Y.

companies are received merely for for- servants must exercise reasonable care warding were distinguished on this to see that it is in a reasonably safe conound. dition. Houston & T. C. R. Co. v. Mi-<sup>2</sup> Higgins v. Williams (1896) 114 Cal. lan (1900; Tex. Civ. App.) 58 S. W. 735; judgment reversed, but not on this point, in (1901; Tex. Civ. App.) 60 S. W. 591.

Pennsylvania R. Co. v. · Snyder struction, are liable for the death of an (1896) 55 Ohio St. 342, 45 N. E. 559;

several cases it has been declared that, where foreign cars are concerned, the responsibility of a railway company is to be measured with reference to the conception that the duty involved is merely that of inspection, and not that of furnishing safe and proper instrumentalities.4

The reason assigned in one case for this doctrine is that railway companies are compelled by statutory provisions to transport the cars of other roads, provided they appear to be in a reasonably safe condition (see § 176, post), while, as regards their own cars, they choose what they will use.<sup>5</sup> Where such provisions are not an element, a like conclusion is supposed to be indicated by the fact that the receiving company does not select the cars or the material from which they were made.6

Two inferences have been deduced from this conception,—first, that the receiving company may assume that all the parts of such cars which appear to be in good condition are so, in fact; and, second, that its obligations are performed by the employment of a sufficient number of competent inspectors acting under proper superintendence, rules, and instructions.8 But in any jurisdiction where the duty of inspecting cars while en route is deemed to belong to the non-delegable class, it is clear that the latter proposition ought rather to be put in the form that a company receiving a foreign car can be held responsible by an employee who sustains an injury from its defects, only for failure to furnish a competent inspector, or for failure of the inspector to exercise due care in making the inspection.9

Wangelin (1892) 43 Ill. App. 324; and those belonging to the defendence the cases cited below.

\*Mackin v. Boston & A. R. Co. (1883)

135 Mass. 201, 46 Am. Rep. 456; Keith

v. New Haven & N. Co. (1885) 140 strong (1895) 62 Ill. App. 228. 135 Mass. 201, 46 Am. Rep. 456; Keith v. New Haven & N. Co. (1885) 140 Mass. 175, 3 N. E. 28; Bowers v. Con-Mass. 175, 3 N. E. 28; Bowers v. Connecticut River R. Co. (1894) 162 Mass. (1880) 22 Hun, 284. This decision was 312, 38 N. E. 508; Cincinnati, H. & D. affirmed in (1883) 92 N. Y. 628, but no R. Co. v. McMullen (1888) 117 Ind. 439, opinion was filed, and it is impossible 20 N. E. 287. It has been held that an to say whether this doctrine was approved. It is not necessary for the supproved of the decision.

ances to its employees is improper in an action for injuries received by an (1882) 54 Wis. 257, 41 Am. Rep. 31, 11 employee while engaged in returning a N. W. 559.

\*Kellu v. Abbot (1885) 63 Wis. 310 employee while engaged in returning a car of another road, rejected as defective. Atchison, T. & S. F. R. Co. v. Meyers (1896) 22 C. C. A. 268, 46 U. S. App. 226, 76 Fed. 443. So, also, it has been laid down that an instruction is erroneous which does not indicate the difference between the degrees of dili-

462, 3 N. E. 344; Ohio & M. R. Co. v. gence required in the case of foreign

\*Jones v. New York C. & H. R. R. Co. (1880) 22 Hun, 284. This decision was affirmed in (1883) 92 N. Y. 628, but no

<sup>7</sup> Ballou v. Chicago, M. & St. P. R. Co. (1882) 54 Wis. 257, 41 Am. Rep. 31, 11 N. W. 559. <sup>8</sup> Kelly v. Abbot (1885) 63 Wis. 310, 53 Am. Rep. 292, 23 N. W. 890, and the

cases cited in note 4, supra.

<sup>o</sup> Atchison, T. & S. F. R. Co. v. Myers (1894) 11 C. C. A. 439, 24 U. S. App. 295, 63 Fed. 793.

The consequence seems to be that, assuming the distinction thus taken between the duties of inspecting and of furnishing appliances to be a sound one, it does not, in the last analysis, possess much practical importance, except in jurisdictions where the delegable quality of the former duty is affirmed.<sup>10</sup> Even if the company be regarded as subject to the more extended obligations of the latter duty, a breach of it cannot be predicated unless the evidence shows that the unsafe conditions were such as a reasonably careful inspection, of the character defined by the cases cited in the following section, would have disclosed. See §§ 126, 156, ante. Manifestly, the logical situation is essentially the same as this, if the rights of the servant are gauged with reference to the theory that the only question to be considered is whether there was a breach of the duty of inspection. But that theory has been categorically rejected in one case, 11 and is discredited in several others which embody, more or less distinctly, the notion that, after a foreign car has been introduced into a train, the responsibility for any abnormally dangerous conditions which were discoverable by a reasonably careful examination is the same in character and extent as if the car belonged to the receiving company itself.12

"As in Massachusetts. See cases cited in note 4, supra.

"A requested instruction in a suit versing, but not on this point (1897) against a railroad for injuries, that, if the jury found that the cars injuring plaintiff were foreign cars, "then it was ordinary inspection for any defects discernible by ordinary examination," has been held to be properly refused, for the reason that the law requires a master to furnish suitable appliances, whether they are his property or that of another. Youngblood v. South Carolina & G. R. Co. (1900) 60 S. C. 9, 38 S. E. 232.

"In Gottlieb v. New York, L. E. & W. R. Co. (1885) 100 N. Y. 462, 3 N. E. S. E. R. Co. v. Price (1895) 72.

"In Gottlieb v. New York, L. E. & W. R. Co. (1885) 100 N. Y. 462, 3 N. E. S. E. R. Co. v. Valirius (1877) 56 Ind. 344, the plaintiff was held entitled to recover on the ground that the defect complained of (deadwoods of an unsafe pattern) was obvious, easily discoverable by the most ordinary inspection, and could have been easily remedied by width to afford the protection needed and intended. The obligation to remedy the dangerous condition was also of the Cars, to give a charge to the effect width to afford the protection needed and intended. The obligation to remedy the dangerous condition was also of the Cars, to give a charge to the effect part of the dangerous condition was also of the cars, the condition of cars belonging to a recognized in Goodrich v. New York C. (But see § 175, post.) A railroad comdet H. R. R. Co. (1889) 116 N. Y. 398, 5 pany is responsible to its employees for L. R. A. 750, 22 N. E. 397. See also of As in Massachusetts. See cases Eaton v. New York C. & H. R. R. Co. (1900) 163 N. Y. 391, 57 N. E. 609, Re-

The basis of the liability thus imposed has been said to be the fact that the foreign car is handled and shifted by the orders of the employer.<sup>13</sup> But this circumstance is certainly not regarded by all courts as the essentially differentiating factor in this class of cases. See § 166, ante, where the master's orders are an element in all the decisions cited.

Injuries caused by defects in foreign cars present one of those cases in which the liability of the delivering company would not be conceded by all courts. See the writer's note in 46 L. R. A. pp. 108 et seg. (Cleveland, C. C. & St. L. R. Co. v. Berry). But in two jurisdictions it has been held that the servant may bring suit against that company as well as his own employer.14

174. Obligation of receiving company to inspect foreign cars.— As already stated in the preceding section, either of the theories which have been entertained as to the nature and extent of the receiving company's responsibility renders it liable for any injuries which its servants may receive as a result of the existence of abnormally dangerous conditions in a foreign car, provided those conditions were such as could have been discovered by the exercise of ordinary care. See chapter x., ante. The standard of duty thus fixed is deemed to impose upon it the obligation of subjecting such a car to an examination at least as thorough as is obligatory in the case of its own rolling stock while en route. See chapter x1., ante. As to this doctrine

down in Chicago & A. R. Co. v. Bragonties shift from one place to another on the tracks and in the yard of the latter company. Elleins v. Pennsylvania R. Co. (1895) 171 Pa. 121, 33 Atl. 74 (holding the rule as to foreign cars to be applicable). In the recent case of Caledonian R. Co. v. Mulholland [1898] A. C. 216, 67 L. J. C. P. N. S. 1, 77 L. The mere fact that a railroad company which was permitted, for its company which was permitted, for its car does not relieve it of the duty of inspection where the former company had agreed to deliver the load to a point where the former company had agreed to deliver the load to a consignee was liable for injuries caused by defects in the brakes, which a reasonably careful inspection would have disclosed. The controverted point was rolled to the company. See p. 114 of the author's note in 46 L. R. A., Cleveland, C. C. & St. L. R. Co. v. Berry (Ind.). That a railroad company is not an insurer of the safety of a foreign car was laid fining company, which it requires them down in Chicago & A. R. Co. v. Bragon-

all the authorities are unanimous.<sup>2</sup> The application of this criterion indicates that the inspection should be something more than a "mere-

foreign cars as may be discovered by common observation." reasonable inspection before such cars In Gottlieb v. New York, L. E. & W. quired to repair such defects relieve it from the want of an inspector of forare liable to be rendered unfit for use ald v. Fitchburg R. Co. [1897] 19 App.

2 "A railroad company is under a le- in the course of transportation, and this gal duty not to expose its employees to must be known to the receiving comdangers arising from such defects in pany. It is but the result of the most

reasonable inspection before such cars are admitted into its train." Baltimore R. Co. (1885) 100 N. Y. 462, 3 N. E. & P. R. Co. v. Mackey (1895) 157 U. S. 344, the court said, as to the defendant 72, 39 L. ed. 624, 15 Sup. Ct. Rep. 491, company: "It is bound to inspect for Affirming (1890) 8 Mackey, 282. "The eign cars just as it would inspect its cars used by a railroad company for the own cars. It owes the duty of inspecting the court of the purpose of transporting freight are ap- tion as master, and is, at least, responpliances, as to the condition of which sible for the consequences of such dethe company owes a duty to its em-fects as would be disclosed or discovployees working upon them, which canered by ordinary inspection. When cars not be fulfilled without proper inspectioned to it which have defects visible or tion." McMullen v. Carnegie Bros. & discoverable by ordinary inspection, it Co. (1893) 158 Pa. 518, 23 L. R. A. 448, must either remedy such defects or re-27 Atl. 1043. It is the duty of a rail-road company to inspect cars owned by least, is due from it to its employees. or received from another company, The employees can no more be said to which the employees of the former are assume the risks of such defects in forrequired to handle or use, where there eign cars than in cars belonging to the is time and opportunity to do so; and company. As to such defects the duty it will be liable to its employees for in- of the company is the same as to all juries resulting from defects in such cars drawn over its road. The rule imcars which an ordinary inspection would posing this responsibility is not an onerhave discovered. It will not be excused ous or inconvenient or impracticable for failure to perform that duty because one. It requires, before a train starts or carried a short distance; nor will the same inspection and care as to all the mere fact that the company is not recars in the train." The last sentence but one is quoted with approval in Jones v. New York, N. H. & H. R. Co. (1897) 20 R. I. 210, 37 Atl. 1033. In addition from the obligation to inspect. (Syllav. New York, N. H. & H. R. Co. (1897) bus by the court.) Atchison, T. & S. F. 20 R. I. 210, 37 Atl. 1033. In addition R. Co. v. Penfold (1896) 57 Kan. 148, to the phrases expressive of the obliga-45 Pac. 574. It is error for a trial tory character of the inspection which court to hold, as matter of law, that a are used in the above statements, the trainman assumes the risks arising following may also be quoted: "Ordinary inspection" (Louisville & N. R. Co. eign cars. Bennstt v. Greenwich & J. v. Reagan [1896] 96 Tenn. 128, 33 S. R. Co. (1895) 84 Hun, 216, 32 N. Y. W. 1050; Carruthers v. Chicago, R. I. & Supp. 457. For a total failure to make P. R. Co. [1895] 55 Kan. 600, 40 Pac. supp. 451. For a total failure to make P. R. Co. [1895] 55 Kan. 600, 40 Pac. an inspection the company is only expected by the defect which such an inspection would have disclosed is one of "proper inspection" (Atchison, T. & S. which the injured servant had actual F. R. Co. v. Myers [1894] 11 C. C. A. knowledge, or which he could easily 439, 24 U. S. App. 295, 63 Fed. 793; have discovered. Missouri P. R. Co. v. New Orleans & N. E. R. Co. v. Clements Barber (1890) 44 Kan. 612, 24 Pac. 969. [1900] 40 C. C. A. 465, 100 Fed. 415); In Gutridge v. Missouri P. R. Co. (1887) 94 Mo. 468, 7 S. W. 476, the court, in P. R. Co. [1891] 46 Minn. 106, 48 N. W. rejecting the contention of the defend- 679): "reasonably careful inspection" rejecting the contention of the defend- 679); "reasonably careful inspection" ant that it had a right to assume that (Moon v. Northern P. R. Co. [1891] 46 the car, being a foreign one, was rea- Minn. 106, 48 N. W. 679; Felton v. Bulsonably safe and fit for the uses for lard [1899] 37 C. C. A. 1, 94 Fed. 781). which it was being used, said: "Cars The receiving company is also said to be coming from one road to another must responsible for such defects as may be necessarily be subjected to wear, and discovered by "ordinary care" (McDonly formal one." The controlling conception is that the receiving company is merely bound to make such inspection as the nature of the transportation requires, 4 or, as it is also expressed, such an inspection as time, place, means, and opportunity and the requirements and exigencies of commerce will permit.<sup>5</sup> There is, accordingly, no ob-

Q. R. Co. v. Avery (1880) 8 III. App. (1881) 133. But this expression is stronger 690. than is warranted by most of the authorities. It is obvious that ordinary care demands a more careful examinanothing unusual. Louisville, N. A. & v. Bates (1896) 146 Ind. 564, 45 N. E. C. R. Co. v. Bates (1896) 146 Ind. 564, 108.

4 Dooner v. Delaware & H. Canal Co.

\*Dooner v. Delaware & H. Canal Co.

45 N. E. 108.

Beside the above cases the following also recognize the doctrine that, as regards inspection, there is no distinction between the extent of a company's liability for its own cars and for the cars of other companies. Reynolds v. Boston & M. R. Co. (1891) 64 Vt. 66, 24 In Alabama & S. R. Co. v. Carroll Atl. 134; Louisville & N. R. Co. v. (1898) 28 C. C. A. 207, 52 U. S. App. Reagan (1896) 96 Tenn. 128, 33 S. W. 442, 84 Fed. 772, the court said: 1050; Leak v. Carolina C. R. Co. (1899) "There is no question but that railroad corporations should require at their corporations should require at their corporations should require at their corporations. Bender v. St. Louis & S. F. R. Co. through transit from other roads as (1896) 137 Mo. 240, 37 S. W. 132; well as its own; but it does not follow Louisville & N. R. Co. v. Davis that what may be reasonable inspection

Div. 577, 46 N. Y. Supp. 600; Bender v. (1890) 91 Ala. 487, 8 So. 552; Sack v. St. Louis & S. F. R. Co. [1896] 137 Mo. Dolese (1890) 35 Ill. App. 636, Af-240, 37 S. W. 132; Louisville & N. R. firmed on other grounds in (1891) 137 Co. v. Williams [1893] 95 Ky. 199, 24 Ill. 129, 27 N. E. 62; Bomar v. Louis-S. W. 1; Louisville, N. A. & C. R. Co. iana North & South R. Co. (1890) 42 v. Bates [1896] 146 Ind. 564, 45 N. E. La. Ann. 983, 1206, 8 So. 478, 9 So. 244; 108); by "reasonable care" (Eddy v. Mateer v. Missouri P. R. Co. (1891; Prentice [1894] 8 Tex. Civ. App. 58, Mo.) 15 S. W. 970; Mason v. Richmond 27 S. W. 1063; Denver, T. & Ft. W. R. & D. R. Co. (1892) 111 N. C. 482, 18 L. Co. v. Smock [1897] 23 Colo. 456, 48 R. A. 845, 16 S. E. 698; Bennett v. Pac. 681); "by reasonable skill and dilligence" (Allen v. Union P. R. Co. 13 L. R. A. 465, 49 N. W. 408; Rail-[1891] 7 Utah, 239, 26 Pac. 297). The road Co. v. McClanahan, 3 Tex. Law exercise of "reasonable precaution" is Rev. 324, cited in Gulf, C. & S. F. R. Co. required. Denver, T. & Ft. W. R. Co. v. Dorsey (1886) 66 Tex. 148, 18 S. W. v. Smock (1897) 23 Colo. 456, 48 Pac. 444; St. Louis, A. & T. R. Co. v. Put-681. The limit of a railroad company's am (1892) 1 Tex. Civ. App. 142, 20 duty as to a car received from a refigerator company is "diligence to K. W. 1002; International & G. N. R. frigerator company is "diligence to K. W. 1002; International & G. N. R. frigerator company is "diligence to K. A. 703, 14 S. W. 668; Eddy v. Prenv. Illinois C. R. Co. (1891) 83 Iowa, tice (1894) 8 Tex. Civ. App. 58, 27 S. 105, 48 N. W. 1002. The phrase "high W. 1063; Union Stock-Yards Co. v. degree of care" is used in some cases. Goodwin (1898) 57 Neb. 138, 77 N. W. Indianapolis, B. & W. R. Co. v. Flanigan (1875) 77 Ill. 365; Chicago, B. & (1897) 72 Ill. App. 207; Jones v. Shaw Q. R. Co. v. Avery (1880) 8 Ill. App. (1897) 16 Tex. Civ. App. 290, 41 S. W. 133. But this expression is stronger 690. (1897) 72 Ill. App. 207; Jones v. Shaw (1897) 16 Tex. Civ. App. 290, 41 S. W.

<sup>8</sup> Atchison, T. & S. F. R. Co. v. Myers (1894) 11 C. C. A. 439, 24 U. S. App. 295, 63 Fed. 793; Chicago, St. L. & P. tion of an old or dilapidated car than of R. Co. v. Fry (1891) 131 Ind. 319, 28 one in the appearance of which there is N. E. 989; Louisville, N. A. & C. R. Co.

bility for its own cars and for the cars 131 Ind. 319, 28 N. E. 989; Wabash R. of other companies. Reynolds v. Bos-Co. v. Farrell (1898) 79 Ill. App. 508. ton & M. R. Co. (1891) 64 Vt. 66, 24 In Alabama G. S. R. Co. v. Carroll Atl. 134; Louisville & N. R. Co. v. (1898) 28 C. C. A. 207, 52 U. S. App. Reagan (1896) 96 Tenn. 128, 33 S. W. 442, 84 Fed. 772, the court said: 1050; Leak v. Carolina C. R. Co. (1899) "There is no question but that railroad 124 N. C. 455, 32 S. E. 884; Fay v. Min-corporations should require, at their neapolis & St. L. R. Co. (1883) 30 peril, cars, their couplings and appliminn. 231, 15 N. W. 241; Chicago, B. ances, to be reasonably inspected by & Q. R. Co. v. Avery (1884) 109 Ill. competent agents, and that the ordinary 314; Pennsylvania R. Co. v. Snyder employee may rely on such inspection; (1896) 55 Ohio St. 342, 45 N. E. 559; nor that this applies to cars received for Bender v. St. Louis & S. F. R. Co. through transit from other roads as

ligation to institute an examination sufficiently minute and searching to disclose secret or hidden defects, even though the defects may be of such a character that they could have been readily detected by the tests employed in the shops where rolling stock is periodically

for a home car shall be demanded as take reasonable care to ascertain that States shall speak to the contrary, we could not be remedied, and dangerous employment."

company to inspect foreign cars was ex- amination. Jessel, M. R., said: that the railway company are bound to reasonable limit to the amount of exam-

alone reasonable for a foreign car retrucks belonging to other companies and ceived for through transit. The time, persons so coming on their line are in place, and general opportunity for insuch a state as to travel safely. They spection, and the fact that the foreign must, therefore, use due diligence in the car comes to hand as one actually on examination of such trucks, and the car comes to hand as one actually on examination of such trucks, and the trial, showing its fitness, all should be question is whether, on the facts in this case, that obligation was discharged." now furnished by the railroad companies and demanded by the business publics. Every trainman of ordinary intelligence and experience knows that there is and must be a decided difference in from other lines. They are subject to the inspection possible between the inspection possible between the home cars and the foreign cars on of a very minute character, but such as through trains, and it is not unreasis usually given in such cases, and gensonable to hold that what necessary evally found sufficient. By these usual sonable to hold that what necessary erally found sufficient. By these usual risks attend the inspection of the latter precautions two defects were discovered, are risks of the service. We are aware one being that a spring had lost its that the adjudged cases are not wholly camber, and the other a crack in the with us on the matter of the inspection woodwork, which was not so material. required of foreign through cars, but, It being inconvenient to unload the until the Supreme Court of the United truck, without which the latter defect must hold with those cases which recog- did not interfere with the safety of the nize the actual situation,—the actual truck, it was left, but the spring was way the business is and must be carried repaired at the owner's shop near by, on if carried on at all,—rather than and, on its return to the defendants, with those cases which tend to make the their servant ascertained that the rerailroad companies absolute insurers pair had been done, and examined the against all the risks of a well-known truck in the usual way, to see that there was no other defect. It was then sent In Richardson v. Great Eastern R. on, and the accident occurred through a Co. (1875) L. R. 10 C. P. 480, 33 L. T. defect in no way connected with the two N. S. 248, Reversed in (1876) L. R. 1 defects previously mentioned, viz., a de-C. P. Div. 342, 35 L. T. N. S. 351, 24 fect in the axle, which might have been Week. Rep. 907, the duty of a railway discovered by a sufficiently minute exhaustively discussed. The plaintiff was must look to what is reasonable, in refa passenger, and, strictly speaking, the erence to the exigencies of the case. The case does not fall within the scope of company cannot stop all foreign trucks the present treatise, but the facts were and empty them for the purposes of a such as to make the decision quite apminute examination. If they were enplicable in the present connection. In titled to do so, it would practically dehis opinion, delivered in the court of stroy the right given by statute to other appeal (1876) L. R. 1 C. P. Div. 342, companies of having the through traffic 35 L. T. N. S. 351, 24 Week. Rep. 907, forwarded, and give a monopoly to the Jessel, M. R., said: "A coal truck be-company itself. The suggestion that longing to the Birmingham Wagon Com- they should do this is too absurd to bear pany, but which had been let to a col- discussion. It cannot be said that it is liery company, came on to the defend-obligatory on the company so to treat ants' line at Peterborough. The de-the foreign trucks as to destroy the very fendants are compelled by statute to object for which they were sent on to forward foreign traffic, i. e., through the line, viz., for the purposes of traffic, from other lines. It seems to me through traffic. There must be some

overhauled. Compare §§ 162, 163, ante. Still less is it incumbent upon the receiving company to repeat the tests which are proper to be

ination required, and the substantial prehension of the facts, as there was question was whether the mode of ex- really no question of repair at the juncamination adopted by the company was tion station, other than with respect to reasonably satisfactory." To the questine defects which the examination, as tion whether it was the duty of the de-fendants to examine the axle by scrap-ing off the dirt and minutely looking at Co. (1885) 100 N. Y. 462, 3 N. E. 344; it,—so minutely as to enable them to Gulridge v. Missouri P. R. Co. (1887) see the crack,—and so to prevent or 94 Mo. 468, 7 S. W. 476; Wabash R. Co. remedy the mischief, the jury answered v. Farrell (1898) 79 Ill. App. 508; "No." To the question whether it be Louisville & N. R. Co. v. Hinder (1895) came their duty so to do upon discover- 16 Ky. L. Rep. 841, 30 S. W. 399 (deing the other defects, the jury an-fect in handle of lever on hand car could swered: "It was their duty to require not have been discovered without refrom the Birmingham Wagon Com- moving the handle from the socket). pany some distinct assurance that it had been thoroughly examined and re-reversed where it rests upon a special paired." But Jessel, M. R., said: "If finding that, upon inspection made at ther; but if the defects discovered had been discovered without taking the no probable connection with any other brake staff off the car and striking it undiscovered defect, then I see no reason why any further or other examinason why any further or other examinaR. Co. v. Fry (1891) 131 Ind. 319, 28 tion should be made. Now, I read the N. E. 989. An instruction to the effect answer of the jury to the third question that the defendant was "not bound to as meaning. that the defendant was for a certain ants ought to have inquired. But there foreign car], but might have presumed was no evidence on which they were enthat it was in good condition if it restitled to find that such a duty existed. quire, it could only be because they were feet was latent, and not discoverable by bound to satisfy themselves of the fit- ordinary inspection. A request for such ness of the trucks, and, if so bound, an instruction is therefore rightly rethey could not exonerate themselves by fused where the defendant has taken the mere inquiry, I am not sure that might the outside as to indicate its defective rect to this finding of the plaintiff therefore fails. Louisville & N. Co. v. Reagan (1896) The judgment must, therefore, be re- 96 Tenn. 128, 33 S. W. 1050. versed." The court of common pleas had taken the position that, under the Co. (1882) 54 Wis. 257, 41 Am. Rep. circumstances, there had been a want of 31, 11 N. W. 559, it was held that the reasonable care on the defendants' part in not properly overhauling and recaused by the giving way of a round of pairing the car which had been found a ladder. In the majority opinion Casdefective, the assumption apparently being that the case was one in which provision should have been made for gen-bolts and looking beneath the slats or repairs. This theory, as was rounds. So, the sufficiency of the bolts, pointed out by Mellish, L. J., in the as to length as well as size, might have court of appeal, was based on a misap- been determined by the application of

fect in handle of lever on hand car could

A judgment for the plaintiff will be the defects discovered were such as different times and in different places, ought reasonably to induce a person of no defect was discovered in the brake experience to think that some other destaff of a foreign car, from which the feet existed, or was likely to exist, then plaintiff's injury resulted, and that there would be a duty to examine fur-such defects as existed could not have ther; but if the defects discovered had been discovered without taking the titled to find that such a duty existed, quired close inspection to determine that or that it had been neglected. . . . it was not in good condition," is apIf it was the defendants' duty to in- propriate only to a case in which the demere inquiry of the wagon company. If ground that the drawhead which init had been proved that they relied on jured the plaintiff was so battered on not, per se, be evidence of negligence. I condition, while the conductors of the do not think we ought to give any ef-fect to this finding of the jury, and the mit that they were aware of the defect.

used in the original construction of the car. It may assume that all parts of the car which appear, upon ordinary examination, to be in good condition are in such condition.7 The receiving company, however, is not protected if a reasonable inspection, as the phrase is ordinarily understood in such cases, would have disclosed conditions which would have indicated the probable existence of a concealed de-

As regards the respective provinces of the court and jury in determining the sufficiency of the inspection, the general rule is that a court cannot undertake to say, as a matter of law, when, where, and how often a foreign car shall be inspected by a railroad company, or that it should not have been inspected at some time while the car was under the company's control.9 But evidence that the car in question

a heavy weight, or by a strong man or Ledbetter (1885) 34 Kan. 326, 8 Pac. some machine wrenching the same. As- 411. suming that some such test should have been applied, the questions would remain, when, by whom, and how frequently? If properly tested by the manter of the benefit of the presumption that ment of railroad trains as to impute ercise ordinary care, without danger." negligence in not discovering what or Louisville & N. R. Co. v. Williams dinary care would fail to detect?" The (1893) 95 Ky. 199, 24 S. W. 1. jority of the court was, as Taylor, J., bers (1897) 17 Tex. Civ. App. 487, 43 pointed out in a lengthy dissenting opinion, that the essential question really was whether the trial index. dence stood, it could not be affirmed by Rep. 491. a court of review that this ruling was correct. The principles laid down in (1880) 53 Iowa, 595, 36 Am. Rep. 243, the opinion of the majority were ap-6 N. W. 5. As to how often inspection proved in Atchison, T. & S. F. R. Co. v. should be made, see, generally, § 156,

ufacturer, then is it to be repeated by such car had been properly constructed the purchaser and everyone who uses of suitable material, and had passed the same? And, if so, shall he go be-the inspection of someone of ordinary yond ordinary inspection while at rest skill in such matters, and was reasonor in use, to the extent of unmaking ably fit for the use to which it was dewhat has already been made? There is voted when so received. Baldwin v. much propriety in the law exacting Chicago, R. I. & P. R. Co. (1879) 50 rigid tests to the different parts in the low would require the company. first instance and while a car is in the not such as would require the company process of manufacture which would be receiving the car to test the strength of impracticable, if not impossible, to re- the metal or the material out of which peat every time a loaded car passed it was constructed, or to make that rigid from one railway company to another. examination into the car's condition as . . . May not the company so receiv- could only be arrived at by actual tests; ing such loaded car, and without being but the care must be at least an ordichargeable with negligence, assume that nary inspection by one competent to all parts of such car which appear to be know whether or not the car is in a safe in good condition are in such condition? condition for transportation, and can be Is the law so exacting as to the manage- handled by a subordinate who will ex-

opinion, that the essential question car being sealed was no excuse for fail-really was whether the trial judge was ing to examine it on the inside, there warranted in deciding, as a matter of being indications on the outside that law, that a reasonably careful inspec- a ladder was defective; citing Baltion would not have disclosed the de- timore & P. R. Co. v. Mackey (1894) feet. He considered that, as the evi- 157 U. S. 72, 39 L. ed. 624, 15 Sup. Ct.

<sup>§</sup> Brann v. Chicago, R. I. & P. R. Co.

was duly inspected at a regular inspecting station a short time before the accident is regarded as conclusively negativing the inference of culpability.<sup>10</sup> Nor can the plaintiff recover for injuries caused by a defective foreign car, unless he offers some evidence tending to show that the defect might have been discovered by the exercise of ordinary care.11

Some unsuccessful attempts have been made to exclude from the operation of the general principle which requires inspection, those cases in which the cars are handled for a very brief period at one particular point.12

such a short distance from the place of may, with complete legal impunity, subthe last inspection that a doubt arises mit its employees to the risk arising whether the inspection was made with from its neglect of duty. . . . The due care, that question should be left to argument wants foundation in reason the jury. Sheedy v. Chicago, M. & St. and is unsupported by any authority. P. R. Co. (1893) 55 Minn. 357, 57 N. In reason, because, as the duty of the W. 60.

14 Ill. App. 346.

<sup>11</sup> Carruthers v. Chicago, R. I. & P. R. Co. (1895) 55 Kan. 600, 40 Pac. 915. In his argument in this case, counsel bound to take notice.

railway, as to such local business, is dis- which are 'faulty in construction or

ante. If, at the time the eyebolt in a pensed from all duty of looking after brake staff gives way, the car has run the condition of the cars by it used, and company to use reasonable diligence to 10 Chicago & A. R. Co. v. Pratt (1883) furnish safe appliances is ever present, and applies to its entire business, it is beyond reason to attempt, by a purely arbitrary distinction, to take a particular part of the business of the company for the plaintiff cited Guthrie v. Maine out of the operation of the general rule, C. R. Co. (1889) 81 Me. 572, 18 Atl. and thereby to exempt it, as to the busi-295, as tending to establish the proposi-ness so separated, from any obligation tion that if a car with defective appli- to observe reasonable precautions to ances is taken into a train, and an infurnish appliances which are in good jury to an employee results from it, the condition. Indeed, the argument by company will be liable without proof of which the proposition is supported is notice of the defect, or its equivalent. self-destructive, since it admits the gen-But the court did not think that case eral duty of the employer just stated, would bear such a construction, for the and affords no reason whatever for the drawbar and bumpers of the car which distinction by which it is sought to take was the instrument of the injury had the case in hand out of its operation." been broken off before the casualty com-plained of, and this was a patent de- 171 Pa. 121, 33 Atl. 74, it was contended fect, of which the railroad company was that the rule which makes a railroad company responsible to its employees <sup>12</sup> In *Texas & P. R. Co.* v. *Archibald* for the condition of the cars it receives (1896) 21 C. C. A. 520, 41 U. S. App. for transportation over its own lines U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. which it requires them to shift from one Rep. 777, it was held that the amount place to another on the tracks and in of care required of a railroad company the yard of a shipper. This contention in inspecting cars switched from other did not prevail, the court saying: roads, to be merely loaded and returned, "They are as clearly in its service in the is not less than that as to cars to be latter case as in the former; their work sent out upon its own road. In ex- is of the same nature in one case as in pressing its approval of the trial the other, and the risks attending it are judge's refusal to give an instruction to the same. No sufficient reason appears the contrary effect, the Supreme Court for discriminating between the liability said: "The proposition is that, where a of a railroad company for injuries to car is received by a railroad only for the its employees in handling upon its own purpose of being locally handled, the line the cars of another corporation

The receiving company cannot relieve itself from its obligations to its employees by a contract with the company which owns the cars, under which each company is bound to keep its own cars in good repair, even though such contract is known to the servant.<sup>13</sup>

As to the inspection of loads on foreign cars, see chapters xv., and xxxII. D, post.

175. Manner in which foreign cars are constructed; how far a source of liability.— There is no difference of opinion with regard to the correctness of any of the abstract principles which have been relied upon by the courts in determining the extent of a receiving company's liability for injuries received by its servants in handling foreign cars of a different construction from its own. But, considered as decisions with regard to the specific facts involved, the cases on this subject are not altogether harmonious.

In far the larger number of those reported, the servant's right of recovery has been denied. The reason most commonly assigned for this conclusion is that the risk of handling such a car is one of those which are obviously incident to the work of a railway servant. From this standpoint the doctrine may be regarded as an application either of the principle that negligence cannot be predicated of the exposure of a servant to a risk which he appreciates (see chapter vii., ante), or of the principle that the servant is conclusively presumed to have agreed not to claim compensation for any injuries resulting from hazards which he appreciates (see chapter xvii., post). In their judgments the courts sometimes seem to waver between these two conceptions; but from the language used in nearly all of them it is quite manifest that the risk of handling foreign cars of the particular construction shown was regarded not merely as an obvious one, but also as an ordinary or normal one. In the ultimate analysis, therefore, these cases must be regarded as belonging to that class which is concerned with ordinary risks which a servant of mature years and

dangerously out of repair;" and its liasing them. But, having done the bility to them for injuries in handling work, it is responsible to its employees such cars, by its order, elsewhere. It for injuries caused by the unsafe consistency of the cars or of dition of the cars they were required to the line on which they are moved that imposes the liability upon the company, by the receiving company for a short but it is the handling or shifting of time, or carried a short distance, will not relieve it of its duty to its employees of inspecting such cars, was also the cars in the yard of the refining complaid down in Atchison, T. & S. F. R. pany without a previous inspection of the latter refused to allow an inspection the former could have properly declined to engage in the work of

average intelligence is bound to understand, and not to that class which is concerned with extraordinary risks, his knowledge of which must be established by positive evidence before his action is barred.1 The reason thus relied upon plainly ceases to be operative, however, where the servant does not understand the danger incident to handling the different patterns of cars. Under such circumstances, therefore, the receiving company is held liable either on the general ground explained in § 58, ante, or on the ground of a breach of the specific duty to give the servant proper instruction.<sup>2</sup> See chapter xvi., post.

Another reason which has been put forward in some of the decisions as being fatal to the servant's claim for damages is that negligence cannot be predicated of receiving and forwarding a foreign car, merely on the ground that it is not constructed with the safest possible appliances, or appliances of the latest and most improved

to detect it. The intervener was no boy, deadwoods). placed by the employer in a position of ligence can be imputed to the employ- cumstances, er." To the same effect, see Woodworth

¹In Kohn v. McNulta (1893) 147 U. v. St. Paul, M. & M. R. Co. (1883) 5 S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. McCrary, 574, 18 Fed. 282 (dissimilar 298, where a servant was held unable drawheads); Toledo, W. & W. R. Co. v. to recover for an injury caused by a Black (1878) 88 Ill. 112 (couplings; deadwood of unusual length, the court, bars of different heights, bumpers on dealing with the contention of the plainforeign cars, none on defendant's); tiff that none of his employer's cars had Thomas v. Missouri P. R. Co. (1891) these deadwoods, said: "Inasmuch as 109 Mo. 187, 18 S. W. 980 (peculiar he had in fact seen and coupled cars pattern of couplings); and the follow-like the ones that caused the accident, ing cases, in which the foreign cars and that more than once, and as the were equipped with double bumpers or and that more than once, and as the were equipped with double bumpers or deadwoods were obvious to anyone at- deadwoods, there being none on defendtempting to make the coupling, and the ant's own cars: Hatharay v. Michigan danger from them apparent, it must be C. R. Co. (1883) 51 Mich. 253, 47 Am. held that it was one of the risks which Rep. 569, 16 N. W. 634; Michigan C. R. he assumed in entering upon the service. Co. v. Smithson (1881) 45 Mich. 212, A railroad company is guilty of no neg- 7 N. W. 791; Northern P. R. Co. v. ligence in receiving into its yards, and Blake (1894) 11 C. C. A. 93, 27 U. S. passing over its line, cars—freight or App. 190, 63 Fed. 45; Louisville & N. R. passenger—different from those it, it- Co. v. Boland (1892) 96 Ala. 626, 18 L. self, owns and uses. It is not pretended R. A. 260, 11 So. 667; Baldwin v. Chithat these cars were out of repair or in cago, R. I. & P. R. Co. (1879) 50 Iowa, that these cars were out of repair or in cago, R. I. & P. R. Co. (1879) 50 Iowa, a defective condition, but simply that 680; Kelly v. Abbot (1885) 63 Wis. 307, they were constructed differently from 53 Am. Rep. 292, 23 N. W. 890 (coupthe Wabash cars, in that they had double deadwoods or bumpers of unsural length to protect the drawbars. form of a caboose and the end of the But all this was obvious to even a passforeign car); Chicago, B. & Q. R. Co. ing glance, and the risk which there v. Curtis (1897) 51 Neb. 442, 71 N. W. was in coupling such cars was apparent. It required no special skill or knowledge Flanigan (1875) 77 Ill. 365 (double to detect it. The intervener was no boy.

<sup>2</sup> The latter ground was relied on by undisclosed danger, but a mature man, the plaintiff in *Illinois C. R. Co.* v. doing the ordinary work which he had *Price* (1895) 72 Miss. 862, 18 So. 415, engaged to do, and whose risks in this and *Michigan C. R. Co.* v. *Smithson* respect were obvious to anyone. Under (1881) 45 Mich. 212, 7 N. W. 791. But those circumstances he assumed the risk in the second case the obligation to inof such an accident as this, and no neg- struct was denied to exist under the cir-

pattern.3 But it has already been pointed out (§ 36, ante) that the principle thus relied upon is based essentially upon the servant's presumed comprehension and acceptance of the hazards incident to the use of the inferior kind of appliance. It can hardly be said, therefore, that the rights of the parties are, in a logical point of view, affected by the introduction of this factor. In the last analysis it is nothing more than an application in a special form of the theory just noticed. Moreover, so far as this reason is concerned, it is clear that, as a matter of fact, very few cases of difference of construction are likely to present themselves, in which the difference goes beyond the limit which would be allowable if both cars had belonged to the receiving company. There is plainly no ground upon which culpability can be predicated where this limit is not exceeded, and so it has been held.4

The statements of the doctrine mentioned in the preceding paragraph are sometimes supplemented by a declaration that the receiving company is at liberty to operate cars with such coupling appliances as are in general use at the time, and such as are regarded by competent experts in railway management as ordinarily safe and fit to be handled.<sup>5</sup> But the conclusive effect thus ascribed to general usage is not conceded in all jurisdictions. See chapter vi., ante.

Still another reason for denying the servant's right of action has been found in the declared ability of the servant to protect himself, under the circumstances, by the exercise of due care.6

\*Northern P. R. Co. v. Blake (1894) that the cars provided by the company 11 C. C. A. 93, 27 U. S. App. 190, 63 whose employee he is should have all it was being coupled); Baldwin v. Chi- course of business." cago, R. I. & P. R. Co. (1879) 50 Iowa, Louisville & N. R. Co. v. Williams 680 (double deadwoods). In the last (1893) 95 Ky. 199, 24 S. W. 1; Pittsof these cases the court said: "The oc- burgh & L. E. R. Co. v. Henly (1891) casional or frequent use of such cars 48 Ohio St. 608, 15 L. R. A. 384, 29 N. on any road, in the ordinary course of E. 575. business, is one of the ordinary risks "Northern P. R. Co. v. Blake (1894) an employee assumes. He knows or is 11 C. C. A. 93, 27 U. S. App. 190, 63 bound to know that cars from other Fed. 45: Dooner v. Delaware & H. Canal roads are being constantly hauled over Co. (1895) 171 Pa. 581, 33 Atl. 415. the road whose employee he is. The most ordinary observation will teach (1892) 96 Ala. 626, 18 L. R. A. 260, 11 him this. He must know these cars So. 667, the court said: "In determinrule in relation thereto, and the eviquestion is not whether the couplings dence in this case discloses the fact that of the cars so received upon its road are none such exists. He may well require different from those on its own cars, or Vol. I. M. & S.—25.

Fed. 45 (double deadwoods); Simms v. the modern appliances, but it is not reasouth Carolina R. Co. (1886) 26 S. E. sonable that he, at the expense of the 490, 2 S. E. 486 (bumper of foreign car commerce of the country, should require was so constructed that it was unsafe this as to all other cars that may be to stand between it and the car to which transported in the usual and ordinary

may be differently constructed. To our ing the question of negligence on the knowledge, at least, there is no general part of the company in such cases, the

In a few cases presenting facts of the same description as those mentioned in the cases already cited, the servant was held entitled to maintain the action on the ground that it was for the jury to say whether the construction of the foreign car was such as to admit of the servant's doing his work with reasonable safety.7 Under this theory, it is manifest that the servant is presumed to be ignorant of the risk to which the difference of construction exposes him. In the absence of evidence overcoming that presumption, therefore, an independent ground of liability may be predicated as to the master's omission to inform him of that risk.8

176. Effect of statutory and constitutional provisions requiring railway companies to transport foreign cars.— The various statutory and constitutional provisions by which, in most, if not all, of the American states, railway companies are required to receive and forward cars from connecting lines, have abrogated that right of arbitrary rejection, which, in the absence of some contractual obligation, the companies are undoubtedly entitled to exercise, and have imposed upon them a peremptory duty to transport all such cars diligently and impartially. The result of predicating this duty is that a servant of a receiving company is sometimes placed in a less favorable position than that which he occupies with regard to cars which belong to his

144 Ind. 687, 43 N. E. 936 (double dead-

<sup>7</sup> Gottlieb v. New York, L. E. & W. R. Co. (1885) 100 N. Y. 462, 3 N. E. 344, (bumpers of insufficient length); Missouri P. R. Co. v. White (1890) 76 Tex. 102, 13 S. W. 65 (double deadwoods); Ohio & M. R. Co. v. Wangelin (1892) 43 Ill. App. 324 (drawbars of See O'Neil v. St. Louis, I. M. & S. R. (1892) 43 Ill. App. 324 (drawbars of different heights overlapped). It is Missouri P. R. Co. v. White (1890) 76 negligent to receive into a train a foreign car so high that a man could not pass under an overhead bridge while 258, 41 Am. Rep. 161, 9 N. W. 273. standing upright upon it. Southern R.

whether they are the best in use, or Co. v. Duvall (1900) 22 Ky. L. Rep. 56, whether they increase the hazard of 56 S. W. 988. It is negligence for a coupling cars, but whether they are rearrailroad company to accept from ansonably suited or adapted to the use to other company a freight car having an which they are applied. To say that a oval top not having a runway upon it, certain style or pattern of coupling inwhere the train is not equipped with creases the hazard, if it is reasonably air brakes, so that a brakeman will adapted to the purpose intended, or one have to move about over the top of the that a railway company in the exercise cars. Rogers v. Louisville & N. R. Co. of reasonable care and prudence would (1898) 88 Fed. 462. In O'Neil v. St. adopt, is simply to say that it requires Louis, I. M. & S. R. Co. (1881) 3 Mcgreater care and skill on the part of the Crary, 423, 9 Fed. 337, where the injury brakeman in using it than a coupling was caused by deadwoods which exof a different pattern." For another tended out too far, the court formulated reference to the same consideration, see the following rule: If the employer in-Pennsylvania R. Co. v. Ebaugh (1895) troduces, without notice to the employee, some new and unusual machinery involving an unexpected or unanticipated danger, through the introduction of which the employee, while using the care and diligence incident to his employment, meets with an accident, the employer must respond in damages.

\* See O'Neil v. St. Louis, I. M. & S. R.

employers. If the car offered satisfies the standard of safety fixed by common usage and the various other considerations which are applicable to all employers in this line of business, culpability cannot be predicated of its introduction into the trains of the receiving company, in compliance with the legislative mandate, although that company itself has adopted a kind of rolling stock which is safer to handle.2 Moreover, as these enactments, either by their express terms or upon a reasonable construction, require that no unnecessary delays or hindrances shall be interposed, and that all precautions against the use of improper cars shall be adopted with reference to reasonable despatch,3 it is evident that the result of complying with them may conceivably be that an inspection of a foreign car will be sufficient, although it is less thorough than that which the receiving company deems it proper to make in the case of its own rolling stock. In practice, however, this effect of the enactment is not likely to be exemplified, as the system of examining cars while they are en route is virtually the same in all parts of the Union.

On the other hand, these provisions do not take away from a servant of the receiving company any rights which the common law gives him. They cannot be construed as a direction to receive a foreign car irrespective of the question whether it is or is not of an abnormally dangerous construction or in bad repair. It has been uniformly held that the duty which they create is not enforceable unless the cars transferred are in good repair, and not of such a construction as to be unreasonably dangerous to persons who may be obliged to work on them or to handle them.<sup>4</sup> Plainly, no other conclusion was

that it is the right and duty of a rail-that method of construction." See also way company to receive and transport the reasoning of the court in Thomas double-deadwood cars, such as are, at v. Missouri P. R. Co. (1891) 109 Mo. the time, in use on other railroads, if 187, 18 S. W. 980; Baldwin v. Chicago, they are in good condition and free from defects, even though the use of such cars may enhance the risk to which a brakeman is exposed in the act of making couplings. It has been held, in effect, that the necessities of commerce ferring to the mandate of § 1, art. 17,

<sup>2</sup> As regards one particular appliance, and public policy alike demand that this point of view is thus discussed in such cars should be received and transthe somewhat recent decision of North-ported by a railroad company, even ern P. R. Co. v. Blake (1894) 11 C. C. though it does not make use of such A. 93, 27 U. S. App. 190, 63 Fed. 45. coupling appliances on cars of its own "The fact that railroad companies are construction, so long as such cars are now very generally required by statu-tory enactments to receive and trans-port cars which are tendered to them tent persons justify the use of such by connecting carriers has led several coupling appliances on the ground that courts to decide, after a very full and they are not unnecessarily dangerous careful consideration of the question, and that certain advantages result from that it is the right and duty of a rail- that method of construction." See also

possible in the absence of some explicit declaration of the legislative will. As was pointed out in one case, there is no reason why the rule should not be the same, whether the transportation of the foreign cars is carried out in obedience to a statute, or by virtue of a mutual agreement.5

of the Pennsylvania Constitution, to gent to its servants as to iurnish them "receive and transport". . cars, dangerous machinery and appliances, loaded or empty, without delay or discrimination," of another connecting ment relating to railways and their emproad, the court said: "By no reasonable construction can that be held to and enlarge the accountability of the rean cars of another road not in a containing the property of the real cars of another road not in a containing the sampliances which ordinates." Being the owners of nublic road to move defective cars from other To the same effect, see Smith v. Potter defective." In Illinois C. R. Co. v. 9 N. W. 273; Michigan C. R. Co. v. Price (1895) 72 Miss. 862, 18 So. 415, Smithson (1881) 45 Mich. 212, 7 N. W. the court said: "The constitutional 791; Thomas v. Missouri P. R. Co. provision which requires all railroads (1891) 109 Mo. 187, 18 S. W. 980; to receive and transport each other's Bender v. St. Louis & S. F. R. Co. cars, etc., without unnecessary delay or (1896) 137 Mo. 240, 37 S. W. 132; Loudiscrimination, is a simple corollary isville & N. R. Co. v. Williams (1893) from the previous declaration of the 95 Ky. 199, 24 S. W. 1; Chicago, B. & same section of the Constitution, that Q. R. Co. v. Curtis (1897) 51 Neb. 442, railroads are public highways. It is im. 71 N. W. 42 railroads are public highways. It is impossible to conceive that it was the intent of the Constitution framers to exempt from liability a railway so negli-

of the Pennsylvania Constitution, to gent to its servants as to furnish them vided with the appliances which ordi- doctrine. Being the owners of public nary care requires for the reasonable highways in this state, railroads are safety of train crews in properly hand-very properly required to receive from ling them. The obvious purpose of the each other cars to be transported withsection was to prohibit common car- out unnecessary delay; but it is imposriers from discrimination in transpor-sible to believe that they are thereby tation between their own cars and those required to receive and transport cars, of other roads. All were to be moved however obviously defective and dan-over the lines of each other, with the gerous, and thereby subject its servsame promptness and impartiality. But ants, and the traveling public on its the Constitution no more commands one trains, to certain peril and disaster." roads, than to move its own cars when (1881) 46 Mich. 258, 41 Am. Rep. 161, Q. R. Co. v. Curtis (1897) 51 Neb. 442, 71 N. W. 42.

<sup>5</sup> Pennsylvania R. Co. v. Snyder (1896) 55 Ohio St. 342, 45 N. E. 559.

## CHAPTER XIII.

## MASTER'S DUTY WITH RESPECT TO THE EMPLOYMENT OF SERVANTS.

- A. GENERAL PRINCIPLES.
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  - 179. Standard of care obligatory upon the master in regard to the selection of his servants.
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- B. CIRCUMSTANCES BEARING UPON THE QUESTION OF A SERVANT'S COMPETENCY.
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    - a. No act of previous negligence shown.
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  - 190. Derelictions of duty subsequent to the injury in suit.
  - 191. Disclaimer of fitness by delinquent servant himself.
  - 192. Reputation.
- 193. Certificates and licenses, evidential significance of.
- C. Master's knowledge, actual or constructive, of the incompetency, must be shown.
  - 193a. Generally.
    - 194. Duty to inquire into the fitness of a servant at the time he is hired.
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- D. CIRCUMSTANCES BEARING UPON THE QUESTION OF THE MASTER'S KNOWLEDGE OF THE SERVANT'S INCOMPETENCE.
  - 196. Incompetence of servant.
  - 197. Bodily and mental qualities of the servant.
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  - 200. Length of the period during which the unfitness has continued.
  - 201. Promise by the master to discharge the delinquent servant.
  - 202. Reputation.
  - 203. Specific statements as to unfitness made by individual coemployees of the delinquent servant.

E. DUTY TO EMPLOY AN ADEQUATE NUMBER OF SERVANTS.

205. Master's performance of duty primarily a question for the jury.

By whose knowledge of a servant's unfitness the master is bound, see chapter x. C, ante.

Servant's knowledge of the unfitness of a fellow servant, see chapters xvII.—xxI., post.

Duty of hiring deemed to be non-delegable, see chapter xxxx., post. That the master is not liable, even if the servant was incompetent, unless such incompetency was the efficient cause of the accident, see chapter XLII., post.

As to the duty in relation to statutes passed for the protection of the servant, see chapters xxxvII., xxx., post.

The usage of other employers as a test of the defendant's performance of his duty is discussed in § 45, ante.

## A. GENERAL PRINCIPLES.

177. Nature and extent of the duty; generally. — The obligations of a master to see that the servants hired by him possess the qualifications, mental, moral, and physical, which will enable them to perform their duties without exposing themselves and their coemployees to greater dangers than the work necessarily entails, are, in their broad features, similar to the obligations which are incumbent upon him with regard to the other agencies of his business. It is manifest, however, that, in their specific application to human beings, the general principles which define the nature and extent of those obligations must assume a shape somewhat different from that which they bear in their relation to the lower animals, or to inorganic instrumentalities. It is, in fact, apparent that the duty of a master to use care in hiring servants is very closely associated with, if not a special form of, his duty to adopt a safe system in the conduct of his business; that is to say, the duty of seeing that the unreasoning agencies used by him perform their functions.1 The essential distinc-

This conception emerges in statements like that which we find in a reit was held to be negligence to intrust
cent case that "the law will not allow the work of thawing dynamite to inexan employer, whose duty it is to provide perienced workmen who did not underreasonably safe appliances, to escape
stand the danger involved in applying
liability by employing incompetent or the heat in a certain manner. These
unsuitable persons to discharge it." facts manifestly suggest the conception
Donnelly v. Booth Bros. & H. I. Granof an unsafe method of work, the unite Co. (1897) 90 Me. 110, 37 Atl. 874. safety of which results from the inefCompare. also, such cases as Stewart ficiency of the person by whom it is Compare, also, such cases as Stewart ficiency of the person by whom it is v. New York, O. & W. R. Co. (1889) 28 done. See also subtitle D, infra.

tions suggested by this consideration render it proper to treat the cases dealing with the duty of hiring servants as a distinct division of the general subject, separate from the discussion of the duty to furnish a safe place of work and safe appliances. The cross-references at the head of the chapter indicate the instances in which the balance of advantage has seemed to the writer to be in favor of departing from this arrangement.

The rule established by the cases to be reviewed in this chapter may be stated in formal terms as follows: The hiring or retention of a servant whose unfitness for his duties, whether it arise from his want of skill, his physical and mental qualities, or his bad habits, is known, actually or constructively, to the master, is culpable negligence, for which the master must respond in damages to any other servants who may suffer injury through that unfitness.<sup>2</sup> The essential ground upon which the liability thus predicated is based is that "the master impliedly contracts that he will use due care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service." A master, therefore, is not liable for injuries caused by the negligent act of an incompe-

stance hired, or afterward continued in till is entitled to recover, unless it is the service, with notice or knowledge, overthrown by a successful defense. or the means of knowledge, of this Northern P. R. Co. v. Mares (1887) lack." Laning v. New York C. R. Co. 123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. (1872) 49 N. Y. 521, 10 Am. Rep. 417. Rep. 321; Loe v. Chicago, R. I. & P. R. "The same care requisite in hiring a Co. (1894) 57 Mo. App. 350.

servant in the first instance must still be exercised in continuing him in the S Allen, 441, 85 Am. Dec. 720. Comparison of horwises, otherwise, the appleador will prove the physical part the physical part the physical part of the ph service; otherwise, the employer will pare the phraseology used in *Stewart* v. become responsible for his want of care *Philadelphia*, W. & B. R. Co. (1889) 8 or skill. The employer will be equally Houst. (Del.) 450, 17 Atl. 639.

2"If, acting through appropriate of- liable for the acts of an incompetent or ficers, it [i. e., the defendant company] careless servant, whom he continues in knowingly or negligently employs in his employment after a knowledge of competent servants, it is liable for an such incompetency or carelessness, or competent servants, it is liable for an such incompetency or carelessness, or injury occasioned to a fellow servant by when, in the exercise of due care, he their incompetency. If it continues in should have known it, as if he had been its employment an incompetent servant after his incompetency is known to Shanny v. Androscoggin Mills (1876) its officers, or so manifest that its officers, using due care, would have known Michigan C. R. Co. v. Dolan (1875) 32 it, such continuance in employment is Mich. 510; Poirier v. Carroll (1883) 35 as much a breach of duty and a ground the continuance in the original employment of Co. v. Caustin (1888) 115 Ind. 450, 17 as much a breach of duty and a ground La. Ann. 699; Evansville & T. H. R. for liability as the original employment Co. v. Guyton (1888) 115 Ind. 450, 17 of an incompetent servant." Gilman N. E. 101; Hilts v. Chicago & G. T. R. v. Eastern R. Co. (1866) 13 Allen, 433, Co. (1885) 55 Mich. 437, 21 N. W. 878. 90 Am. Dec. 210. "A master is liable Where an employee was injured to his servant for an injury caused by through the negligence of a coemployee, the incompetency or want of skill of a evidence that the latter had frequently fellow servant, whether it existed when shown his recklessness and unfitthe fellow servant was hired, or has ness, and, notwithstanding complaints come upon him since the hiring, the fel- against him, was retained by the maslow servant having been in the first inter, makes a case on which the plainstance hired, or afterward continued in tiff is entitled to recover, unless it is

tent servant, where that act was not one of those which he was authorized to do.4

It should be observed that, in some states of the evidence, a servant may be entitled to recover either on the ground that the instrumentality furnished was defective, or on the ground that the employee to whom the duty of furnishing it was assigned was not competent for that duty. If the latter ground is relied upon, the essence of the servant's claim is that he was injured by the negligence of an employee who was charged with the performance of a non-delegable duty. The cases illustrative of this point of view are collected in chapters xxxi., xxxii., post.

178. Duty considered as creating an exception to the doctrine of common employment.— It is important to note that the rule stated in the last section was originally introduced into Anglo-American law, and is still frequently referred to by the courts, as an exception to the doctrine which declares a master to be exempt from responsibility for injuries caused to one servant by the negligence of another. From this point of view, it may be enunciated thus: "While a railroad company is not responsible to one employee for an injury resulting from the mere negligence or incompetence of a coemployee in the same general employment, it is liable in such a case where the company has been guilty of negligence in the employment of, or, after notice, continuing in the employment, the negligent or incompetent employee, thereby conducing to the injury." In other words, the wrongful hiring of incompetent servants is not one of the common and obvious

\*Southern Cotton-Oil Co. v. Devond while they are acting in one common (1894; Tex. Civ. App.) 25 S. W. 43; service, yet this must be taken with the Smith v. St. Louis & S. F. R. Co. qualification that the master shall have (1899) 151 Mo. 391, 48 L. R. A. 368, taken due care not to expose his service operate the engine; supervisors had not knowledge that he had ever before attempted to do so).

\*Soa for example Runnell v St. has a right to understand that the masattempted to do so).

See, for example, Bunnell v. St.

See, for example, Bunnell v. St.

has a right to understand that the master has taken reasonable care to protect the latter duty was relied on, but a only with persons of ordinary skill and breach of the former duty might also have been made the gravamen of the action, the cause of the injury having been a defective scaffold.

See, for example, Bunnell v. St. has a right to understand that the master has taken reasonable care to protect him from such risks by associating him only with persons of ordinary skill and care; and the object of the plea in this case is to show that the defendants had discharged this duty, the omission to discharge which might have made them responsible to the deceased. The plea. been a detective scaling.

1 Ohio & M. R. Co. v. Collarn (1881)

73 Ind. 261, 38 Am. Rep. 134. "Though therefore, appears to us not to be open we have said," remarked Alderson, B., to the objection insisted on." Hutchin a leading English case, "that a master is not, in general, responsible to one servant for an injury occasioned to him the realization of a follow servant for an injury occasioned to him the realization of a follow servant to externat to exter by the negligence of a fellow servant supererogation to attempt to cite all

hazards of an employment which is assumed by other servants.<sup>2</sup> It is error to take the case from the jury where there is evidence that

the cases in which this conception is adverted to. The following list will sufverted to. The following list will suffer the fol Ill. 545, 18 Am. Rep. 578; Toledo, W. position he occupied, and that necessary & W. R. Co. v. Durkin (1875) 76 Ill. appliances were furnished by the em-395; Chicago & A. R. Co. v. Rush ployer. Halcy v. Western Transit Co. (1877) 84 Ill. 570; Chicago & A. R. Co. (1890) 76 Wis. 344, 45 N. W. 16. A v. Keefe (1868) 47 Ill. 108; United railway company which is negligent in States Rolling Stock Co. v. Wilder (1886) 116 Ill. 100, 5 N. E. 92; Thayer v. St. Louis, A. & T. H. R. Co. (1864) employing an unskilful engineer, or allowing such engineer to turn over the v. St. Louis, A. & T. H. R. Co. (1864) engine to a fireman who is not qualified to manage it, damage resulting & G. E. R. Co. v. Harney (1867) 28 from the conduct of the engineer Ind. 28, 92 Am. Dec. 282; Lake Shore or fireman, is liable, although the index M. S. R. Co. v. Stupak (1886) 108 Ind. 1, 8 N. E. 630; Hubgh v. New Orleans & C. R. Co. (1851) 6 La. Ann. Co. (1875) 59 Mo. 285. In Chicago, 496, 54 Am. Dec. 565; Satterly v. Morgan (1883) 35 La. Ann. 1166; Poirier v. Carroll (1883) 35 La. Ann. 699; rehearing in 9 Ind. App. 511, 36 N. E. v. Carroll (1883) 35 La. Ann. 699; rehearing in 9 Ind. App. 511, 36 N. E. Braulicu v. Portland Co. (1860) 48 221, it was held error to give an in-Me. 291; Donnelly v. Booth Bros. & H. struction to the effect that, if it ever I. Granite Co. (1897) 90 Me. 110, 37 becomes necessary to take into the serv-Atl. 874; Cayzer v. Taylor (1857) 10 ice an inexperienced employee, the neg-

there was negligence in the selection or retention of the coservant whose act caused the injury.3

A complaint which alleges that the master was negligent in selecting the fellow servant whose act caused the injury is not demurrable.4 On the other hand, a complaint is insufficient which on its face shows that the injury in suit was caused by the act of a fellow servant, unless it avers negligence in respect to the selection or retention of that servant.5

The distinction between the negligence of a competent fellow servant and the unskilfulness of an incompetent fellow servant should be clearly pointed out to the jury by the trial judge, in any case where there is a possibility of their misapprehending the true rule.6

ligence of that employee is a risk as- Me. 463, 16 Am. Rep. 492; Collier v. sumed by his coservants. The majority Steinhart (1875) 51 Cal. 119; Boyce v. of the court said that, should such a ne- Fitzpatrick (1881) 80 Ind. 527; Bogard cessity arise, the other servants had a v. Louisville, E. & St. L. R. Co. (1884) right to assume that they would be in- 100 Ind. 491; Lake Shore & M. S. R. formed of that fact, or at least be given Co. v. Stupak (1886) 108 Ind. 1, 8 N.

formed of that fact, or at least be given a reasonable opportunity to learn it, before being placed in a perilous position. (1850) 6 Cush. 75; Dow v. Kansas P. Ross, J., dissented on the ground that the majority of the court confused the Gulf, C. & S. F. R. Co. (1888) 70 Tex. terms "inexperienced" and "incompetent," as a servant may be inexperienced, and yet not incompetent.

\*Brickner v. New York C. R. Co. (1871) 8 Kan. 642; Pilkinton v. Co. (1871) 8 Kan. 642; Pilkinton v. Method in the ground that the control of the court confused the Gulf, C. & S. F. R. Co. (1888) 70 Tex. (1876) 8 Colo. App. 63, 44 Pac. 781; McDermott v. Pacific R. Co. (1860) 30 Mo. Brickner v. New York C. R. Co. (1870) 2 Lans. 506.

\*Voss v. Delaware, L. & W. R. Co. (1898) 86 Va. 270, 9 S. E. (1898) 62 N. J. L. 59, 41 Atl. 224; C. B. R. Co. (1883) 79 Mo. 362.

\*Co. (1898) 61 N. J. L. 380, 39 Atl. 674; G. Br. Co. (1883) 79 Mo. 362.

\*Ingram v. Hilton & D. Lumber Co. (1898) 108 Ga. 194, 33 S. E. 961. In Hall v. Bedford Quarries Co. (1901) Cayzer v. Taylor (1857) 10 Gray, 274, 156 Ind. 460, 60 N. E. 149. A petition alleging that the employment of a felstruction was held correct: "It is conlow servant was careless and negligent, tended that the defendant was negligent

low servant was careless and negligent, tended that the defendant was negligent and that, in consequence thereof, an in- in the selection of an incompetent encompetent servant was taken into the gineer, and negligent in continuing him company's service, who caused the in- in his employment. There are two injury by his incompetency, is a sufficient quiries here: 1. Was the engineer com-allegation of negligence in his employ- petent or incompetent? 2. If he was ment. Galveston Rope & Twine Co. v. not, had the master reason to know it? Burkett (1893) 2 Tex. Civ. App. 308, 21 If he had reason, and if he knowingly, S. W. 958. A complaint is sufficient or having good reason to know, and which charges the death of the baggage without due care and prudence, emmaster through the act of the conployed or continued in his employment ductor, alleging that he was not a caresuch incompetent person, and the acciful, skilful and attentive conductor for dent happened or injury arose by reason a passenger train, which was known to of such incompetency, and the plaintiff defendant, and that the death of plain- has satisfied you of this, the burden bedetendant, and that the death of panels as satisfied you of this, the burden deficiency in the death of panels as satisfied you of this, the burden deficiency in the state was caused by such coning on him, he is entitled to recover. If ductor's negligence. Kerlin v. Chicago, he was not negligent in this respect, or had not reason to know of this incompetency, and the injury did not arise (1886) 110 Ind. 75, 10 N. E. 631; Law-from incompetency, he is not liable on let v. Androscoggin R. Co. (1873) 62 this ground. If it was the careless act

Any charge is erroneous which does not distinguish clearly between the liability of the defendant by reason of negligence in the furnishing of proper apparatus or in the employment of competent coservants, and his nonliability for a want of proper care on the part of the fellow servant at the time of the accident.7

The defendant is not entitled to an unqualified instruction that the plaintiff cannot recover if he was injured by his own carelessness or that of his fellow servants.8

179. Standard of care obligatory upon the master in regard to the selection of his servants.—As in the case of the other agencies of the master's business, the question whether he has performed his duty with respect to the employment of servants is sometimes considered with reference to the general standard furnished by the supposed conduct of a man of average prudence and intelligence under the circumstances, and sometimes with reference to the actual qualifications of the servant hired.

The former point of view is apparent in the doctrine that an employer is in no case held to an undertaking to select absolutely competent and careful servants. The rule requires of him no more than the exercise of reasonable care in either case,—such care only as men of reasonable and ordinary prudence exercise,—and, when he has complied with this requirement, he cannot be held responsible for injuries which result from the incompetency of the servants so selected.1

of an incompetent engineer, negligently and knowingly employed by the defendant, he would be liable; if it was the careless act of a competent engineer, he would not be liable."

'Houston & T. C. R. Co. v. Willie International & G. N. R. Co. v. Cook (1890) 91 Va. 193, 21 S. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 16 Tex. Civ. App. 386, 41 S. W. (1897) 17 Tex. A

The latter point of view is observable in the statements that the master is bound to provide servants that are "fit and competent,"2 "efficient," "of competent skill and prudence," but not "absolutely competent and careful servants."5

A blending of these two conceptions produces the more complete formula that a master is bound to exercise reasonable or ordinary care in the selection and retention of sufficient and competent servants.6 In instructing a jury, this extended form of statement should always be used; for otherwise the jury might be led to suppose that the master was an insurer of the servant's competency. Compare the similar doctrine in the case of other agencies, § 25, ante.

180. Unfitness injurious to the unfit servant himself.— In most instances the injured party is a coemployee of the servant whose unfitness is complained of. But such unfitness may conceivably create a cause of action in favor of the unfit servant himself. The reason why recovery on this ground is so rarely sought is doubtless that, in the nature of the case, the unfit servant is almost always aware of his unfitness. The effect of his knowledge is to bring the situation within the scope of the principle that, if a person of apparently full age and complete understanding undertakes certain duties, he is presumed to appreciate and accept the risks incident to those duties.<sup>1</sup> Or, from

was said that the master was bound to Supp. 151 (same facts); Laning v. New use "due or reasonable" care and dili-York C. R. Co. (1872) 49 N. Y. 521, 10 gence, the exercise of "ordinary" care Am. Rep. 417; Brown v. The D. S. Cage and diligence not being sufficient to about the form Vicinity of the control of the form Vicinity of the control of the c and diligence not being sufficient to absolve him from liability. But the ruling suggests a distinction which does not seem to be warranted by the authorities. In Sizer v. Syracuse, B. & N. Y. charge that "the law imposes upon R. Co. (1872) 7 Lans. 67, the expression "highest care" was used, but this was obiter, and is, in any case, too strong, as the above authorities show.

2 Ardesco Oil Co. v. Gibson (1869) 63

Pa 146.

<sup>8</sup> Norfolk & W. R. Co. v. Ampey (1896) 93 Va. 108, 25 S. E. 226 (not error to substitute this word for competent" in an instruction).

Wonder v. Baltimore & O. R. Co.

ment that a railway company is bound to "furnish competent and qualified men to handle its engines and trains").

<sup>1</sup> Accordingly, an employer who is hiring a man twenty years of age is not bound to examine him as to his experi-(1870) 32 Md. 411, 3 Am. Rep. 143. ence and capacity with a view to ascer<sup>6</sup> Holland v. Tennessee Coal. I. & R. taining whether he needs instruction as
Co. (1890) 91 Ala. 444, 12 L. R. A. 232, to the dangers of the work. O'Neal v. Co. (1890) 91 Ala. 444, 12 L. R. A. 232, to the dangers of the work. O'Neal v. 8 So. 524. Chicago & I. Coal R. Co. (1892) 132 & Matthews v. Bull (1897; Cal.) 47 Ind. 110, 31 N. E. 669. See also, to a Pac. 773. For similar language, see like effect, Pittsburgh, C. & St. L. R. Co. Rogers v. Ludlow Mfg. Co. (1887) 144 v. Adams (1886) 105 Ind. 151, 5 N. E. Mass. 198, 59 Am. Rep. 68, 11 N. E. 77; 187. A servant not hired for any spe-Tonnesen v. Ross (1890) 58 Hun, 415, cial duties, who is directed to couple 12 N. Y. Supp. 150; Thompson v. Ross two cars, and receives an injury because (1890) 35 N. Y. S. R. 271, 12 N. Y. he undertakes to do this on the inside another standpoint, he may be regarded as being guilty of contributory negligence in undertaking work for which he knows himself to be unfitted,<sup>2</sup> especially where his culpability takes the form of an omission to inform the master of his unfitness.3 But if this element of the incompetent servant's knowledge be abstracted, his right to recover for injuries received by himself is indisputable, the situation being essentially the same as where a servant, without being taken outside the scope of the duties defined by his contract (see chapter xxv., post), is assigned to work which is beyond his capacity, or which exposes him to unusual perils by reason of some physical or mental defect.4 Most of the cases under this head relate to the master's liability for the employment of minors. See §§ 18-20, ante.

## B. CIRCUMSTANCES BEARING UPON THE QUESTION OF A SERVANT'S COMPETENCY.

181. Generally.—The first step in the establishment of the plaintiff's case is to adduce sufficient evidence that the coservant whose

of a curve, cannot recover damages on the theory that he was unskilled in such work, where there is no evidence that held, that the instruction as given was his want of skill was known to the master or the master's representative. Whittaker v. Coombs (1884) 14 Ill. frouck (1895) 65 Ill. App. 174, it was App. 498. Crowley v. Appleton (1888) 148 Mass. 98, 18 N. E. 675, was an action to recover for personal injuries occasioned to the plaintiff, while in the defendant's employ, by being placed by him in a position of peculiar danger. Evidence was given that the plaintiff was subject to epileptic fits, and was ignorant of the fact. The judge, after instructing the jury that the plaintiff must show that he was subject to such fits, that he did not know this, that the must show that he was subject to such fits, that he did not know this, that the defendant did, and further, that the defendant "knew or had cause to know that plaintiff did not know anything about it," amplified the last clause, stating that, whether the defendant know that the plaintiff was ignorant of his own fault. Huber v. Jackson & S. knew that the plaintiff was ignorant of his malady might be proved by circumstantial, as well as by direct, evidence. The plaintiff excepted to this statement, and, without asking for any instruction as to the defendant's duty, if only he common laborer employed to break The plaintiff excepted to this statement, and, without asking for any instruction as to the defendant's duty, if only he "had cause to know" the plaintiff's ignorance, requested an instruction making the defendant responsible if the plaintiff was ignorant of, and the defendant was acquainted with, the malady, without regard to the inquiry as to 1105.

4 The act of a foreman in directing a common laborer employed to break stone and drill holes, to draw a charge from a blast, without ascertaining what his knowledge or experience is, constitutes negligence. Vitto v. Farley (1895) 15 Misc. 153, 36 N. Y. Supp. ady, without regard to the inquiry as to

negligence caused the injury was unfit for the duties assigned to him. In the absence of evidence tending to prove that the employee whose retention is alleged to be culpable had ever shown any lack of skill or efficiency in the performance of his duties before the accident occurred in which the plaintiff was hurt, a nonsuit is properly granted.1

Incompetency connotes the converse of reliability in "all that is essential to make up a reasonably safe person, considering the nature of the work and the general safety of those who are required to associate with such person in the general employment."2

The servant should be discharged for the same measure of negligence which would have unfitted him for the original employment.3

The question whether the delinquent servant was competent for the duties he was performing when the accident occurred must be determined with reference to that time, and not to the time when he first assumed the duties.4

careful and prudent, where, as a matter fore the accident, but not stating how of fact, he was unable to perform his long before the accident that knowledge duties properly owing to his ignorance was acquired, does not warrant the enand want of skill, and the injury retry of a judgment for the plaintiff. sulted from that incompetency, was Louisville, N. A. & C. R. Co. v. Breedlong ago settled in Wright v. New York love (1894) 10 Ind. App. 657, 38 N. E. C. R. Co. (1858) 28 Barb. 80, and does 357.

not seem to have been since disputed.

'The unfitness of the servant to act these recently been laid down that a say switchmen where for three mouths. tency of an engineer, although the latter exercises extreme care within the limitation of his knowledge. Nofsinger v. Goldman (1898) 122 Cal. 609, 55 Pac. 425.

<sup>3</sup> Harper v. Indianapolis & St. L. R. Co. (1869) 44 Mo. 488, holding erroneous an instruction that, if the servant employed by the defendant was competent at the time of the original employinefficiency has become known. Lake & A. R. Co. (1889) 35 Mo. App. 661.

¹Curran v. Merchants' Mfg. Co. Shore & M. S. R. Co. v. Stupak (1889) (1881) 130 Mass. 374, 39 Am. Rep. 457; 123 Ind. 210, 23 N. E. 246 (finding that Reese v. Biddle (1886) 112 Pa. 72, 3 defendant knew of servant's careless Atl. 813; Dysart v. Kansas City, Ft. S. habits the day before the accident does & M. R. Co. (1898) 145 Mo. 83, 46 S. not warrant entry of judgment that W. 751. See also chapter XLIII. B, post. master's retention of him was negli2 Maitland v. Gilbert Paper Co. gent). This ruling was made the basis (1897) 97 Wis. 476, 72 N. W. 1124. of a later decision, that a special verThat the master is not absolved by the dict. including a finding that the mas-That the master is not absolved by the dict, including a finding that the masmere fact that the servant hired was ter knew of the servant's unfitness becareful and prudent, where, as a matter fore the accident, but not stating how

It has recently been laid down that a as switchman where, for three months master may be liable to a servant by previous to the injury, he had had exreason of the unfitness and incompectusive control of the switches for tency of an engineer, although the latter exercises extreme care within the the evidence discloses, he had performed the discloses, he had performed the discloses, he had performed the evidence discloses, he had performed the discloses, he had performed the discloses and performed the evidence discloses, he had performed the evidence discloses. this duty to the satisfaction of the company, and without fault or neglect on his part, is denied in Harvey v. New York C. & H. R. R. Co. (1882) 88 N. Y. 481. Evidence that the delinquent servant was not competent to take charge of an engine five years before the tent at the time of the original employment, then defendant would not be liavely like for his negligent acts unless his subsequent negligence was known to his employer, and was also "gross" in its character. Under ordinary circumstantary contains the delinquent serves a mester is allowed at reasonable and the delinquent serves a mester is allowed at reasonable and the delinquent serves a mester is allowed at reasonable and the delinquent serves a mester is allowed at reasonable and the delinquent serves a mester is allowed at reasonable and the delinquent serves a mester is allowed at reasonable and the delinquent serves a mester is allowed at reasonable and the delinquent serves a mester is allowed at reasonable and the delinquent serves a mester is allowed at the delinquent serves and ces a master is allowed a reasonable referred to a period four years previous time to discharge the servant after his to the accident. Zumwalt v. Chicago

Whether a servant is competent for the duties assigned to him is primarily a question for the jury.<sup>5</sup>

182. Bodily qualities.— (See also § 197, post.)—A servant's unfitness may be inferred where he is of insufficient size and strength for the duties to be performed,1 or is maimed,2 or has defective sight,3 or is deaf,4 or is too old for the duty assigned to him,5 or is afflicted with some serious malady.6

That the appearance and manner of the servant while testifying do not constitute circumstances from which, apart from other evidence, a jury ought to be allowed to infer that he was unfit for his duties, is a rule no less conformable to principle than to authority.

But evidence, it has been held, tending several miles without a brakeman, and

he had only one arm. Louisville & N. R. Co. v. Davis (1890) 91 Ala. 487, 8

3 Whether a motorman on a street car is incompetent is a question for the jury, where, on the one hand, he himself testifies that his eyesight was defective, and that he often passed people 76 Me. 244, the court held that if the on the street without recognizing them; jury undertook to decide that a person and, on the other hand, the evidence gen- was unfit to be employed as a brakeman erally goes to show that he was not un- on account of what they saw, or supfit for his duties. Irwin v. Brooklyn posed they saw or could read, in his face Heights R. Co. (1901) 59 App. Div. 95, and manner while testifying before them 69 N. Y. Supp. 80. Where the incompact as a witness, they fell into a very grave petency relied upon is the old age and defective vision of an engineer, and his jury find a man guilty of murder beignorance of the road, it is error to adecause, their opinion, they could see mit evidence going to show that, after guilt in his face. The law does not recthe accident complained of had oc-ognize physiognomy as an art or science curred, he ran his train a distance of sufficiently reliable to found a verdict

But evidence, it has been held, tending several miles without a brakeman, and to show the servant's accustomed disobedience of orders and habitual drunkenness, and his reputation for unfitness, is competent, though it relates to a time to proof of the alleged defects. Is competent, though it relates to a time to proof of the alleged defects. It is not proof of the

which scarcely seems reconcilable with the decisions just cited.

\*\*Devine v. Tarrytown & I. Union Gaslight Co. (1880) 22 Hun, 26; Pagels v. Meyer (1899) 88 Ill. App. 169; Webster Mfg. Co. v. Schmidt (1898) 77 Ill. App. the purpose of testing a boiler for Mfg. Co. v. Schmidt (1898) 77 Ill. App. broken stay bolts, an inspector who is 49; Scott v. Utah Consol. Min. & Mill. Co. (1899) 18 Utah, 486, 56 Pac. 305.

\*\*H is not negligence to employ, for the purpose of testing a boiler for broken stay bolts, an inspector who is partly deaf in one ear, but whose hearing is good enough to determine whether a bolt struck with a hammer is sound or broken. Chicago & A. R. Co. v. Du Bois (1896) 65 Ill. App. 142.

\*\*Harrey v. New York C. & H. R. R. Co. (1882) 88 N. Y. 481, where the needing repairs run in upon repair court remarked upon the fact of a tracks, to discharge such duty in person, may be inferred from the fact that he had only one arm. Louisville & N.

master. See also note 3, supra.

<sup>6</sup> A brakeman who is subject to epileptic fits is not competent for his position. Baird v. New York C. & H. R. R. Co. (1901) 64 App. Div. 14, 71 N. Y. Supp. 734.

<sup>7</sup> In Corson v. Maine C. R. Co. (1884)

But it can scarcely be denied that a considerable risk of injustice may be the result of recognizing the competency of such evidence, even to the qualified extent of allowing it to be given to the jury when supported by corroborative testimony. Men who, as employees, may be perfectly efficient, often appear to great disadvantage as witnesses, when under the influence of the nervous embarrassment which is apt to be produced in a greater or less degree by the unfamiliar surroundings of a courtroom. At the very most, it is submitted, a jury should not be allowed to draw any conclusions from their view of a witness, except in the most extreme cases of glaring mental and physical defects which any reasonable person would concede to be incompatible with efficiency. But even in these cases, it would, upon general principles, be necessary to show by independent testimony that the defects existed at the time of the accident. It is difficult, therefore, to see why, if that testimony must ultimately be relied upon, the jury should be permitted at all to consider the demeanor and appearance of the delinquent servant on the witness stand. The present writer ventures to think that the obvious perils of the doctrine applied by the Massachusetts court do not seem to be counterbalanced by the consideration that the circumstances which it introduces into the case possess some probative force.

183. Mental qualities.—Unfitness may be predicated wherever the mental capacity of the delinquent servant was inferior to that which was requisite for the proper performance of the duties assigned to him.¹ Unfitness of this description is obviously aggravated by the

upon,—not even against a railroad corporation." In Keith v. New Haven & idence of incompetency in that case, N. Co. (1885) 140 Mass. 175, 3 N. E. while in the case at bar the only evidence and conduct of a car inspector in the presence of a jury, when considered together with other testicals and the spector in the presence of a jury, when considered together with other testicals and the spector in the presence of a jury, when considered together with other testicals and the spector in the presence of a jury, when considered together with other testicals and the spector in the presence of a jury, when considered together with other testicals and the spector in the ground that there was other even portation."

The second that there was other even portation.

considered together with other testimony tending to show his unfitness, might not be legally sufficient to satisfy where the delinquent servant was a them that he was an incompetent person. In Peaslee v. Fitchburgh R. Co. (1890) 152 Mass. 155, 25 N. E. 71, it was argued that the jury had a right to determine from the appearance of a witness that he was so manifestly incompetent that the defendant was negligent in employing him as engineer. The court said there was nothing in the exceptions to show that there was anything in his appearance that would justify such an inference, and that it could not understand English. B. Lantry Sons v. Lowrie (1900; Tex. Civ. App.) 58 S. W. 837. The question whether the delinquent servant was bright and intelligent is too general to be admissible in relation to the issue of ligent in employing him as engineer. The witnesses should be interceptions to show that there was anything in his appearance that would justify such an inference, and that it could not understand English. B. Lantry Sons v. Lowrie (1900; Tex. Civ. App.) 58 S. W. 837. The question whether the delinquent servant was bright and intelligent is too general to be admissible in relation to the issue of light and intelligent is too general to be admissible in relation to the issue of light and intelligent is too general to be admissible in relation to the issue of light and intelligent is too general to be admissible in relation to the issue of light and intelligent is too general to be admissible in relation to the issue of light and intelligent is too general to be admissible in relation to the issue of light and intelligent is too general to be admissible in relation to the issue of light and intelligent is too general to be admissible in relation to the issue of light and intelligent is too general to be admissible in relation to the issue of light and intelligent is too general to be admissible in relation to the issue of light and intelligent is too general to be admissible in relation to the issue of light and

fact that the servant has not received a sufficient general education to qualify him for his duties.2

The fact that a servant is extremely cautious in doing his work is not evidence of incompetency.3

In some cases a jury will be warranted in finding that a bad tempered man is unfit to be put in a position of control.4

Unfitness may arise from inability of the servant to control the nervous system in such a manner as to preserve his presence of mind at critical moments. But his incapacity under this head must, it would seem, be of an exceptional nature to justify the inference of negligence on the master's part.5

The fact that a workman had been an inmate of a lunatic asylum

656. Evidence that an employee in and switches. It was his duty to recharge of an elevator was forgetful, and port trains, receive and carry out tele-

a factory, neglected the usual precaupany for damages. The court held the tion of shifting a belt from a tight to a company not liable, saying: "Upon the loose pulley before the machine was occasion of the injuries, no duty rested stopped does not justify the submission upon Clark to open the switch. His of the question of her competency to act in raising the ball and breaking the of the question of her competency to act in raising the braking the the jury, in an action for injuries to a main track was voluntary, thoughtless, fellow servant from the starting of the and mistaken. Nothing appears in the machine, where it appears that she case showing that he had not physical knew how to shift the belt and was accustomed to do so. Gilmore v. Mittin-ties required of him at the station, or eague Paper Co. (1897) 169 Mass. 471, that he was not mentally fit for the position essigned to him by the defendant 48 N. E. 623. In Burke v. Syracuse, B. sition assigned to him by the defendant. & N. Y. R. Co. (1893) 69 Hun, 21, 23 Judged by the rule laid down in Cop. N. Y. Supp. 458, a railroad company pins v. New York C. & H. R. R. Co. employed in charge of a telegraph station at a single-track siding and higher evidence fails to show a want of compeway crossing a robust boy of seventeen, tency on the part of Clark to perform who was familiar with railroad tracks -e duties required at the station."

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had a habit of screaming without cause, graphic instructions, flag the crossing, is admissible in an action for the death and operate a "safety Wharton switch," is admissible in an action for the death of an employee killed through his negligence, to show his general unsuitability for the service in which he was employed. Ledwidge v. Hathaway (1898) 170 Mass. 348, 49 N. E. 656.

\*\*Mobile & O. R. Co. v. Thomas (1868) 42 Ala. 672 (switchman who cannot read the timetable of the train, incompetent); Taylor v. Western P. R. Co. (1873) 45 Cal. 323 (same point).

\*\*Bruce v. Penn. Bridge Co. (1900) 197 Pa. 439, 47 Atl. 354.

\*\*Lamb v. Littman (1901) 128 N. C. 361, 53 L. R. A. 852, 38 S. E. 911 (employer held liable for injuries received by a boy who was violently handled by by a boy who was violently handled by switch and raised the lever, sending the train upon the siding, where it collided <sup>5</sup> Evidence which is merely to the ef- with a waiting train, causing the death fect that an employee, in the excitement of the engineer of the moving train, caused by the breaking out of a fire in whose legal representative sued the comis not sufficient of itself to prove that he was wanting in the necessary skill to perform a simple form of manual labor.

184. Disposition with which the work is done.— (Compare § 188, c, post.)—Incompetence exists, not alone in physical or mental attributes, but in the disposition with which a servant performs his duties. Although he may be physically and mentally able to do all that is required of him, his disposition toward his work, and toward the general safety of the work of his employer and of his fellow servants, may make him an incompetent man.1

185. Bad habits.— Incompetency is inferable where a servant is addicted to vicious habits, which diminish his physical and mental efficiency and render him less trustworthy; the most common kind of incompetency under this head being that caused by intemperance in the use of intoxicating liquors.1

(habitual recklessness); Maitland v. the point is that he was slow and lazy, Gilbert Paper Co. (1897) 97 Wis. 476, 72 N. W. 1124 (carelessness in regard to compliance with rules). An engineer who has no idea of speed, and runs his train down hill "as fast as he can turn a wheel," is incompetent for his duties. Galveston, H. & S. A. R. Co. v. Davis (1898) 92 Tex. 372, 48 S. W. ciple. There are many kinds of work 570, Reversing (1898; Tex. Civ. App.) 45 S. W. 956. Where an employee was injured through the negligence of an engineer, evidence that the latter had frequently shown his recklessness and unfitness, and, notwithstanding complaints against him, was retained by 28 Atl. 901; Gilman v. Eastern R. Corp. (1865) 10 Allen, 233, 87 Am. Dec. 635; Plaintiff is entitled to recover, unless

\*\*Atkinson v. Clark (1901) 132 Cal. it is overthrown by a successful defense. 476, 64 Pac. 769 (tearing down a brick Northern P. R. Co. v. Mares (1887) 123 Wall).

\*\*Co. (1890) 122 N. Y. 557, 25 N. E. 915, P. R. Co. (1894) 57 Mo. App. 350. In Affirming (1888) 48 Hun, 292 (habitual neglect of duties); Cameron v. New brakeman to recover damages for in York C. & H. R. R. Co. (1895) 145 N. juries received while coupling cars, evi-Y. 400, 40 N. E. 1; Smith v. E. W. dence that the engineer, shortly before, Backus Lumber Co. (1896) 64 Minn. had declared to the plaintiff that he 447, 67 N. W. 358; Senior v. Ward "would as soon run over him as not," (1859) 1 El. & El. 385, 28 L. J. Q. B. is admissible as bearing upon the ques N. S. 139, 5 Jur. N. S. 172, 7 Week. tion whether the company selected an Rep. 261 (habitual disregard of a unsuitable man for engineer; but the Rep. 261 (habitual disregard of a unsuitable man for engineer; but the rule); Huntingdon & B. T. Mountain jury should be charged that, if the mal-R. & Coal Co. v. Decker (1876) 82 Pa. ice of the engineer toward the plaintiff 119 (habitual drunkenness and disobediwas the cause of the injury, there could 119 (habitual drunkenness and disobedience to orders); Hughes v. Baltimore & be no recovery. Houston & T. C. R. Co. O. R. Co. (1894) 164 Pa. 178, 30 Atl. v. Willie (1880) 53 Tex. 318, 37 Am. 383 (habitual carelessness); Malay v. Rep. 756. It has been held that negli-Mt. Morris Electric Light Co. (1899) gence of a railroad company in retain-41 App. Div. 574, 58 N. Y. Supp. 659; ing a brakeman in its employ is not to Walker v. Bolling (1853) 22 Ala. 294 be inferred where the only evidence on (habitual recklessness); Maitland v. the point is that he was slow and lazy,

186. Previous experience of the servant.— Whether the master is chargeable with negligence on the ground that he should have seen that the servant's previous experience was not such as to qualify him for the duties to which he was assigned is a question the answer to which is obtained by considering two variable factors, viz., the character of the duties, and the extent of the servant's experience in the same or similar duties. It is manifest that a question dependent upon factors which may assume such infinitely diverse forms as these is pre-eminently one for the jury.1

The essential question is the capacity of the servant to perform properly the work assigned to him. Hence, if the work may be well done by the unskilled and inexperienced, the master is not lacking in the measure of care he owes to other employees, if he employs unskilled and inexperienced men upon it.2

49 N. Y. 521, 10 Am. Rep. 417. Intemport of the proved under an was, however, approved by the court, allegation of injuries caused by the unskilful act of a coservant (Lyons v. St. L. R. Co. (1871) 47 Mo. 567, 4 Am. New York C. & H. R. R. Co. [1886] 39 Rep. 353. The incompetency of a serventun, 385); or under a general allegation of negligence (Huntingdon & B. T. not worked at the employment for sev-R. & Coal Co. v. Decker [1877] 84 Pa. eral years, as well as from unfamiliar-419; Hobson v. New Mexico & A. R. Co. ity with it. Curran v. A. H. Stange Co. [1886; Ariz.] 11 Pac. 545). The fact (1898) 98 Wis. 598, 74 N. W. 377. The that the servant was intoxicated at the fact that a locomotive engineer had been The contract of a railway engineer with lished where a witness called by the the company, not to go into saloons or drink whiskey while in the "employ" of the company, covers the time between "very competent" employee for the potrips, or the time from his arrival one day to his departure the next. Kansas corroborated by the testimony of that City, M. & B. R. Co. v. Phillips (1893) servant himself as to his previous traingle all clienties, of negligence evidence ing, and is not rebutted by any opposition of pregigence evidence in white N. Suder of the servant of the considered the plaintiff testified that he considered t al allegation of negligence, evidence ing evidence. White v. Sydney & L. that the servant was drunk when the Coal & R. Co. (1893) 25 N. S. 384. accident occurred is admissible as part

of the res gestæ. Hobson v. New Mexico. (1890) 91 Ala. 444, 12 L. R. A. 232, co & A. R. Co. (1886; Ariz.) 11 Pac. 8 So. 524. It is not negligence to emaccident occurred is admissible as part 545.

2 Lans. 515; Huntingdon & B. T. R. & Hence it is error to instruct a jury Coal Co. v. Decker (1877) 84 Pa. 419; that "proof of the employment of one Kean v. Detroit Copper & Brass Rolling who had always been a manual laborer Mills (1887) 66 Mich. 277, 33 N. W. or a mule driver to run a steam engine 395; Neilon v. Kansas City, St. J. & C. raises a presumption of negligence of B. R. Co. (1885) 85 Mo. 599; Maxwell the master, without showing that he B. K. Co. (1885) 85 Mo. 599; Maxwett the master, without showing that he v. Hannibal & St. J. R. Co. (1884) 85 had actual notice of the servant's ante-Mo. 95; Williams v. Missouri P. R. Co. cedents." Joch v. Dankwardt (1877) (1891) 109 Mo. 475, 18 S. W. 1098; 85 Ill. 331. This instruction, which Laning v. New York C. R. Co. (1872) follows the rule formulated in Shear-49 N. Y. 521, 10 Am. Rep. 417. Intemman & Redfield on Negligence, 8 193, reports habits may be proved under an way however approach by the second that the servant was intoxicated at the fact that a locomotive engineer had been time of the accident is competent evi-dence on the question whether the mas-prior to his employment by defendant is ter was in fault in employing him. prima facie evidence of his competency Probst v. Delamater (1885) 100 N. Y. when defendant employed him. Chi-266, 3 N. E. 184; Huntingdon & B. T. R. cago & E. I. R. Co. v. Myers (1898) 83 & Coal Co. v. Decker (1877) 84 Pa. 419. Ill. App. 469. Competency is estab-The contract of a railway engineer with lished where a witness called by the

ploy a man twenty-two years of age,

On the other hand, there are numerous cases in which the propriety of refusing to interfere with a finding of the jury based on the conception that the servant engaged for the duties in question should have had some practical experience, or been in a position in which he had an opportunity of observing others do the work, has been recognized. If the employment demands special knowledge or experience, only men of special knowledge and experience should be employed.<sup>3</sup>

physically and mentally qualified for the gear of a windlass is a function that the business, to assume the active dusiness, to assume the active dusiness of a brakeman, merely because he enced servant. Fraser v. Schroeder has not yet had experience. Gorman (1896) 163 III. 459, 45 N. E. 288, Afv. Minncapolis & St. L. R. Co. (1889) firming (1895) 60 III. App. 519. The 78 Iowa, 509, 43 N. W. 303. Complaint by a yard switchman, charging incompetency of the fireman, who failed to understand signals, and alleging his incompetence, is sufficient as to the allegation of his incompetency. Galveston H. & S. A. R. Co. v. Eckols (1894) 7 ant. Postal Teleg. Cable Co. v. Coote Tex. Civ. App. 429, 26 S. W. 1117. Negligence on the master's part is not established where the only testimony on hand car is sufficiently shown by evia statement.

in a schooner, were charged with the and water, and that decedent was killed duty of securing the platform, and allowed to select the gear, without inversing in of mud and water. Dingee struction, and there is no evidence that v. Unrue (1900) 98 Va. 247, 35 S. E. they possessed the requisite skill, intel-794. In cases where incompetency of ligence, or care. Donnelly v. Booth this description caused the accident, the Bros. & H. I. Granite Co. (1897) 90 Me. master may be held liable as for a 110, 37 Atl, 874. The management of breach of a specific duty to instruct the

tablished where the only testimony on hand car is sufficiently shown by evithe subject of incompetency is the serv-dence that a certain degree of training ant's own admission that he had never is necessary to properly operate a hand done any similar work, and where he car, and that such servants were inexalso testifies that he knew how it ought perienced. International & G. N. R. Co. to be done. O'Neil v. O'Leary (1895) v. Martinez (1900; Tex. Civ. App.) 57 164 Mass. 387, 41 N. E. 662 (deep drill- S. W. 689. An employer who knows ing, and blasting with electricity). In that a tall and heavy pole is merely one case it was said that the inexperimental control of the ground, ence of an employee can scarcely be held with nothing but guys to retain it in persuasive of incompetency as a gen- an upright position, and that his serv-eralization. National Fertilizer Co. v. ants are engaged in removing a pile of Travis (1899) 102 Tenn. 16, 49 S. W. coal from around its lower section, is 832. But this is evidently too sweeping bound to know that their safety requires the presence of a competent person to supervise the work of taking it down Co. (1890) 91 Ala. 444, 12 L. R. A. 232, while the removal of the coal is in progress. So. 524. It is negligence to intrust the handling of a dangerous material, Co. (1890) 137 Pa. 148, 20 Atl. 632. like dynamite, to inexperienced work. A verdict for the plaintiff was upheld men. Stewart v. New York, O. & W. R. where the evidence tended to show that Co. (1889) 54 Hun, 638, 8 N. Y. Supp. 19 (verdict for plaintiff warranted by evidence that the foreman in charge for the day was a stone mason with an a dangerous mining drift, under the dimensional drift, under the drift dri the presence of a competent person to imperfect knowledge of the properties rection of a young, incompetent, and in-of dynamite). The master may prop-experienced foreman, whom defendants erly be found negligent where common had directed to superintend the work of laborers, engaged in stowing stone posts clearing the same from a fall of mud in a schooner, were charged with the and water, and that decedent was killed

Between these two extreme predicaments lie those in which some experience is admitted to be necessary, and the question presented is whether that which the servant has had is sufficient to qualify him for his duties. The following cases cited below will indicate the views taken by the courts as to a variety of circumstances.4

negligent servant in his duties before tracks are so complicated that, without putting him to work. Sullivan v. Metropolitan Street R. Co. (1900) 53 App. Biv. 89, 65 N. Y. Supp. 842.

And the delinquent servant's duties as yard conductor only occasion-Co. (1882) 29 Minn. 305, 13 N. W. 129, there was held to be sufficient evidence to sustain a verdict for the plaintiff where the testimony showed that the man hired as a foreman of carpenters R. R. Co. (1895) 87 Hun, 538, 34 N. Y. had been in the defendant's employ only about four months before the accident caused by his negligence; that for three varies are so complicated that, without experience in the operation of the experience in the operation of the switches, mistakes would be likely to be made, and the delinquent servant's duties as yard conductor only occasionally required him to turn the switches, there was held to be sufficient evidence and before his appointment to that position he had been engaged in coupling cars. O'Loughlin v. New York C. & H. Supp. 297. The fact that a man is competent for the general duties of a caused by his negligence; that for three negligent servant in his duties before tracks are so complicated that, without caused by his negligence; that for three locomotive engineer will not excuse a years before that time he had been in the insurance business; that he had been in never learned the carpenter's trade, and had, in all, never worked more than accident occurred. Missouri P. R. Co. twelve weeks as a carpenter. A car inspector, who failed to discover and note a defect, was thirty-four or thirty-five Supers old, and had worked for three or four months in a railroad yard in Ireland, putting brasses into freight cars, but, with this exception, had been employed as a common laborer, and was not discussed. Where there is no positive evidence of incompetency, the land, putting brasses into freight cars, fact that a locomotive engineer has had but, with this exception, had been employed as a common laborer, and was not discussed. Where there is no twenty-three years of experience is conclusive in the master's favor. Chicago not a mechanic, and was without knowledge and experience as to the road at the place where the accident occurred. Missouri P. R. Co. (1894; Tex.) 26 S. W. 978, where, however, this point was not discussed. Where there is no positive evidence of incompetency, the land, but, with this exception, had been employed as a common laborer, and was not clusive in the master's favor. Chicago not a mechanic, and was without knowledge and experience as to the road at the place where the accident occurred. Missouri P. R. Co. (1894; Tex.) 26 S. W. 978, where, however, this point was not discussed. Where there is no positive evidence of incompetency, the land that a locomotive engineer has had the land that a locomotive engineer will not excuse a railway company for an accident caused as to the road at the place where the accident occurred. Missouri P. R. Co. (1894; Tex.) 26 S. W. 978, where, however, this point was not discussed. Where there is no four months in a railroad part in Ireland to the road at the place where the accident occurred. Missouri P. R. Co. (1894; Tex.) 26 S. W. 978, where, however, this point was no His evidence showed clearly that he unhad served as an engineer some four derstood the details of his business, and years, and had been in the employ of appeared to have been given intelligently. It was held that negligence in employing him as a car inspector was not that he had, however, as engineer, run charm. Charm to Neathern C. R. Converte head, however, as engineer, run shown. Gibson v. Northern C. R. Co. over the road a dozen times in the nine-(1880) 22 Hun. 289. Incompetency to teen months, and had ridden on the cars act as flagman for an approaching train at other times; and that he had run up at nighttime may be properly found, to the bridge with a freight train, the where the servant had had scarcely any night before; and several witnesses of experience as brakeman or flagman, had the defendant, engineers, also state facts not been instructed as to the rule re- tending strongly to show that such an quiring the use of torpedoes, and had acquaintance with a road was amply never flagged a train except once before, sufficient. The court of appeals held on which occasion he had been found that the man was certainly competent. fault with by defendant's conductor, (1862) 25 N. Y. 562. The competency and discharged for disobedience. Mann of a fireman to act as engineer on a run v. Delaware & H. Canal Co. (1883) 91 between stations is for the jury where N. Y. 495. Whether a railway company the evidence is that he had been in the is liable for an injury caused by the un- employment of the defendant several skilfulness of a yard conductor in turn- years, part of the time as a fireman, ing a switch is for the jury, where the and at two different periods of about six

Evidence which merely goes to show that a servant has been employed in an inferior capacity will not justify the inference that the master was negligent in employing him in a higher capacity in the same line of business.<sup>5</sup> Especially is it impossible to predicate negligence of such a promotion where the duties performed in the lower position were such as to enable him to acquire, by observation, a knowledge of the duties incident to the higher position.6

which the accident occurred an engine or the ability of those in charge of it to stop it; and that he had been examined when promoted to the position of engineer, but not upon that subject. O'Laughlin v. New York C. & H. R. R. Co. (1887) 27 N. Y. Week. Dig. 109, 9 N. Y. S. R. 384. The negligence of the railway company is for the jury where the evidence is that the accident occurred on the first occasion when the delinquent servant had charge when the delinquent servant had charge of a train in the nighttime; that, prior to the accident, he had had little or no experience as engineer, except such as he derived from making a few short trips by daylight; that he had also acted for a short time as fireman on day trips, and that the accident, a collision, might have been prevented if he had not neglected his duty to light the headlight. Newell v. Ryan (1886) 40 Hun, 286. A railroad engineer is presumshowed that such fellow servant was an man who was temporarily permitted to intelligent man; that the duties of a handle a locomotive. The rule applisignalman and a switchman, which he cable under such circumstances has was discharging when the accident oc-been formulated as follows:

months each had served as an extra en- curred, were so simple that, according gineer in charge of freight trains, but to the testimony of one witness, they never as a regular engineer; that he had could be learned in one or two days, or, been over the section of the road on according to the testimony of another about witness, in two or three weeks; and twenty-four times in all, in his service that, previous to the accident he had as an engineer, the last time about a been employed for three weeks in the month before the accident; that he had yard, and one week in the duties of never inspected the switches or side switchman and signalman. Deverill v. tracks at the point where the accident Grand Trunk R. Co. (1866) 25 U. C. Q. occurred, so as to learn their exact lo-B. 517. Where a miner whose duty it cation, and knew nothing on that sub- is to inspect the roof of a mine to deject except what he had noticed when he termine its safety, and to remove loose passed over them, and had been told by earth or rock therefrom, testifies that others; that he had had no experience he had worked in other mines, and in in running an engine disabled as was one other nineteen years, and another the one which caused the injury, and miner, charged with the same duties, had never observed the effect of such testifies that he had been in the defend-disability upon the holding power of ant company's employ fourteen months an engine or the ability of those in before the killing of plaintiff's husband, before the killing of plaintiff's husband, for which suit was brought, such evidence is sufficient to establish the competency of the miners to make such inspections, there being no substantial evidence of incompetency. Fisher v. Central Lead Co. (1900) 156 Mo. 479, 56 S. W. 1107. Evidence that a derrick which gave way had been erected by a servant who was a good carpenter, and had had experience in the operation of derricks and the lifting of material with them, but not with as large a derrick as the one in question, is not sufficient to show that he was incompetent. Gunn v. Willingham (1900) 111 Ga. 427, 36 S. E. 804. See also § 194, note 5, post. <sup>5</sup> Edwards v. London & B. R. Co. (1865) 4 Fost. & F. 531.

<sup>6</sup>Kellogg v. Stephens Lumber Co. (1900) 125 Mich. 222, 84 N. W. 136 (employee in sawmill had worked his ably a competent person to inspect an way up to the position of head saw-engine to see if it is in such repair as yer); Haskin v. New York C. & H. R. to prevent the escape of fire. Menom-inee River Sash & Door Co. v. Milvau-ler made conductor of yard). This kee & N. R. Co. (1895) 91 Wis. 447, 65 principle has frequently been applied N. W. 176. A verdict for the plaintiff in cases where the question to be de-has been set aside where the evidence termined was the competency of a fire-

187. Minority.— The fact that the delinquent servant was a minor is an important, though not decisive, element in determining his competency. Its evidential weight depends upon the character of the

in charge of their engines when switching or similar work is to be done, then
it is to be presumed that brakemen,
when they engage or continue in their
employment with the knowledge of the
custom, assume the additional hazard
switch engine is not proved where the
switch engine is not proved where the
switch engine is not proved where the custom, assume the additional hazard which the custom involves, and can be servant had had two years' experience entitled to compensation from the company for injury caused by a fireman's frequently been intrusted with switch-incompetent management of an engine ing. East Tennessee, V. & G. R. Co. only when his fitness was below what ought to be required of firemen." Louistonia Louis held objectionable because it assumes qualify the fireman for those duties; that such promotions of firemen to engineers were of uniform, or at least company had good reason to suppose, customary, occurrence "after a certain from the familiarity with his work period of service as firemen," without shown by the fireman in question, that regard to the capacity, habits, and he had considerable previous extemper of the particular individuals. perience under other employers. Texas The court said: "There was no proof & N. O. R. Co. v. Berry (1887) 67 Tex. of such custom; none such, of course, 238, 5 S. W. 817. Incompetency to act has ever prevailed." It cannot be deserged as a matter of law, that a conservant had been fireman for four years. ductor was negligent in ordering a com-petent fireman to operate a locomotive. taken charge of the engine while the Brazil v. Western North Carolina R. regular engineer was sick; and it also Co. (1885) 93 N. C. 313. One who has appears that from three to five years' served as a fireman for a long time, and service as fireman is all that is customon several occasions has run an engine arily required of a fireman before he in a switchyard, is not to be deemed in- is promoted. Roblin v. Kansas City, competent to act as engineer on a train St. J. & C. B. R. Co. (1893) 119 Mo. in such yard because he is not regular- 483, 24 S. W. 1011. In Chicago & E. I. ly engaged as an engineer. Ohio & M. R. Co. v. Beatty (1895) 13 Ind. App. R. Co. v. Dunn (1894) 138 Ind. 18, 36 604, 40 N. E. 753, 42 N. E. 284, a ver-N. E. 702, rehearing denied in (1894) dict for the plaintin was sustained 138 Ind. 28, 37 N. E. 546. Permitting where the evidence tended to prove that a fireman who has been employed as a the delinquent servant, an engine wiper, brakeman for six months and as a fire- had some experience as a brakeman, man for twenty months, and who has and had, in other places, as well as in handled an engine more or less, to op- the defendant's yard, acted as hostler erate a switch engine in coupling cars, in running engines on switches to and is not negligence which will render the from roundhouses, but had never had company liable for injuries to a switch- any other experience as a fireman or as man by starting the engine too sudden- an engineer; and the appellee introly. Thompson v. Lake Shore & M. S. R. duced testimony tending to prove that, Co. (1890) 84 Mich. 281, 47 N. W. 584. in order to qualify a man to handle en-A railroad company was held liable gines, in taking them to and from a where the engineer in charge allowed a roundhouse, he should have good judg-

"Railroad companies are certainly flying switch to be made by an inexperinot required to employ skilled engineers enced fireman, who had only been in as firemen; and, if it is the prevailing service three or four weeks and never custom of engineers to leave the firemen on a railroad before, and the conductor clared, as a matter of law, that a con- servant had been fireman for four years,

work to be done, the servant's previous experience, and his actual age.1

188. Conduct prior to the time of the accident.—a. No act of previous negligence shown.—Where a servant is shown to have possessed all the physical and mental qualities requisite for the proper discharge of his duties, and to have been free from any vicious habits, the only basis on which a charge of incompetency can be founded is habitual inattention to his duties. In the very nature of the case such a charge cannot be sustained where there is no proof that he was ever guilty of any carelessness before the injury was received. But the mere fact that no such carelessness is proved, clearly does not excuse the master, if the servant is liable, at any moment, to be incapacitated for his duties by the recurrence of some chronic malady, and

pervision of a competent engineer.

enteen years old, when it is also in evidence that he has discharged his duties passed the station. Wabash R. Co. v. efficiently for a year, and that young McDaniels (1882) 107 U. S. 454, 27 L. men are generally better operators than ed. 605, 2 Sup. Ct. Rep. 932. The burold ones. Sutherland v. Troy & B. R. den is on the master to show compeco. (1891) 125 N. Y. 737, 26 N. E. 609. tency, where a boy under fourteen years The fact that one employed at a mine in the responsible position of managing the brake whereby the cage in which being filled in the hold of a vessel were the workmen descended was lowered was but seventeen years of age does not ready to be hoisted, and an accident rewas but seventeen years of age does not sulted from his giving the signal preraise a presumption of negligence maturely. Molaske v. Ohio Coal Co. against the company as a matter of law, (1893) 86 Wis. 220, 56 N. W. 475. A when such employee was experienced in statute empowering mine owners to emmere fact that the servant is under fourteen years of age will not justify the
over four-teen years of age, with coninference that he is incompetent, where
the duties to be performed are of a
mine. Kansas & T. Coal Co. v. Brownsimple character, such as repeating to
the engineer of the hoisting machinery
above a quarry the signals received from
the men in the quarry. Rickert v.

Stephens (1890) 133 Pa. 538, 19 Atl. 197 Pa. 439, 47 Atl. 354.

ment, and also two years' experience as 410 (evidence was that such work was a fireman, under the direction and su-done customarily by boys). The question of the competency of an inexperi-<sup>1</sup> Incompetency for the duties of tele- enced youth of seventeen years of age graph operator cannot be inferred from for the position of telegraph operator the mere fact that the servant was sev- is for the jury where the accident was enteen years old, when it is also in evi- caused by his being asleep when a train when such employee was experienced in statute empowering mine owners to emthe work and for over seven months had ploy boys of a certain age does not creperformed it satisfactorily. Walkowski ate a presumption that any boy of that v. Penokee & G. Consol. Mines (1898) age is fit for his duties, but it is still 115 Mich. 629, 41 L. R. A. 33, 73 N. W. permissible for the jury to consider the 895. The mere fact of employing a boy boy's size, age, previous experience, twelve years old for the purpose of run-strength, and intelligence, and the fact ning an elevator is not evidence from that he was kept at his post thirteen which a want of care in selecting a serv-hours a day. Carlson v. Wilkeson Coal ant can be inferred. Smillie v. St. & Coke Co. (1898) 19 Wash. 473, 53 Bernard Dollar Store (1891) 47 Mo. Pac. 725. On the ground of compliApp. 402, Thompson, J., dissented. The ance with usage it has been held that a mere fact that the servant is under four- master was justified in employing a boy

this incapacity is apt to produce precisely those results which actually happened at the time of the accident in suit.2

b. Single act of negligence.—It has also been laid down broadly in several cases that a single prior act of negligence is incompetent as evidence to prove the unfitness of the servant.3 The receipt of information that the servant has been guilty of such an act is said merely to impose on the master the obligation of using ordinary care in investigating the cause of the accident and the competency of the servant, and acting with reference to his retention or discharge as rea-

he is careless and reckless and inattentive, the fact that he never has been careless or reckless or inattentive is a perthe charge is that he, although in his natural condition a careful and attentive man, is afflicted with a disease the effect of which may at any moment make him incompetent, it is for the the defendant to employ a man in such a condition, although up to that time there had been no failure to perform his leptic fits.)

<sup>3</sup> Gallagher v. Piper (1864) 16 C. B. N. S. 669, 13 L. J. C. P. N. S. 329; Chapman v. Erie R. Co. (1874) 55 N. Y. 579; Holland v. Southern P. Co. (1893) 100 Cal. 240, 34 Pac. 666; Ohio & M. R. Co. v. Dunn (1894) 138 Ind. 18, 36 N. E. 702, 37 N. E. 546; Dallas City R. Co. v. Beeman (1889) 74 Tex. 291, 11 S. W. 1102; Houston & T. C. R. Co. v. Myers (1881) 55 Tex. 110 (rule assumed arguendo); McKeever v. Homestake Min. Co. (1898) 10 S. D. 599, 74 N. W. 1053 (verdict rightly directed for defendant where the servant had made only one mistake during twelve years); apparently makes no distinction beapparently makes no distinction be-ploying those who have acquired a good tween one and several acts); Thomas character in respect to the qualificate. Cincinnati, N. O. & T. P. R. Co. tions called for by the particular serv-(1899) 97 Fed. 245. In Baulec v. New ice, and no one would say that a good York & H. R. Co. (1874) 59 N. Y. character acquired by long service was 356, 17 Am. Rep. 325, where the plaindestroyed or seriously impaired by a tiff was held to have been rightly nonsingle involuntary and unintentional suited, the court said: "An individual fault."

<sup>2</sup> In Baird v. New York C. & H. R. R. who by years of faithful service has Co.(1891)64 App. Div.19, 71 N.Y. Supp. shown himself trustworthy, vigilant, 734, the court said: "When the only and competent is not disqualified for claim of the incompetency is that the turther employment, and proved either man in question is incompetent because incompetent or careless, and not trustworthy, by a single mistake or act of forgetfulness and omission to exercise the highest degree of caution and presfect answer to such a charge. But where ence of mind. The fact would only show what must be true of every human being,—that the individual was capable of an act of negligence, forgetfulness, or error of judgment. This must be the case as to all employees of corporajury to say whether it was negligent of tions until a race of servants can be found free from the defects and infirmities of humanity. A single act may, under some circumstances, show an induties." (Servant was subject to epi- dividual to be an improper and unfit person for a position of trust, or any particular service, as when such act is intentional and done wantonly, regardless of consequences, or maliciously. So the manner in which a specific act is performed may conclusively show the utter incompetency of the actor, and his inability to perform a particular service. But a single act of casual neglect does not, per se, tend to prove the party to be careless and imprudent, and unfitted for a position requiring care and prudence. Character is formed qualities exhibited by a series of acts, and not by a single act. An engineer might, from inattention, omit to sound the whistle or ring the bell at a road Kennedy v. Spring (1893) 160 Mass. the whistle or ring the bell at a road 203, 35 N. E. 779; Galveston, H. & S. A. crossing, but such fact would not tend R. Co. v. Davis (1898) 92 Tex. 372, 48 to prove him a careless and negligent S. W. 570; first appeal (1893) 4 Tex. servant of the company. The company Civ. App. 468, 23 S. W. 305 (this case is only charged with the duty of employing those who have acquired a good

sonable prudence would dictate in view of the facts ascertained. If these facts prove to be such that a careful man would have considered himself justified in retaining the servant, no fault can be imputed to the master; though, undoubtedly, notice of the servant's lapse, if it is at all serious, will impose upon the master and his representatives the obligation of exercising increased vigilance in observing the servant's conduct afterward.<sup>5</sup> This doctrine clearly cannot be subject to any exception in courts which take the ground that even evidence of several specific acts of negligence is not competent unless they were so frequent as to be habitual.6 See note 18, infra. But any less restrictive position must, it would seem, be compatible with the conception that even a single careless act may sometimes be of such a serious nature as to indicate that the servant is unfit for his duties, and that the master will be culpably negligent if he does not discharge him immediately after the delinquency comes to his knowledge. Especially is it legitimate to draw the inference of unfitness

<sup>6</sup>Chapman v. Erie R. Co. (1874) 55 evidence to charge the master with N. Y. 579. That a single negligent act knowledge of the latter occurrences. is not proof of incompetency where the servant did not act wantonly, regardless Guyton (1888) 115 Ind. 450, 17 N. E. of consequences, or maliciously, and no 101, putting the case of carelessness so possible injury could be shown as the extreme as to allow two trains to meet result of his action, was declared in while running in opposite directions on Chicago & E. I. R. Co. v. Myers (1898) the same track. In another case it was 83 Ill. App. 469. The incompetency of said that, although a single act of a location of the competency cannot be predicated on the ground that miles in forty minutes, while the sched-

Olsen v. North Pacific Lumber Co. 100 Cal. 240, 34 Pac. 666. In Wabash

\*Baulec v. New York & H. R. Co. (1901) 106 Fed. 298. There it was (1872) 62 Barb. 623, Affirmed in held that unfitness could not be inferred (1874) 59 N. Y. 356, 17 Am. Rep. 325. from the fact that five years before the In the opinion delivered in the lower accident the servant's negligence had court it was denied that "intelligent injured one person, and that since then, men of good habits, who are engineers on three other occasions, persons work-or brakemen or switchmen on railroads, ing with him had been injured by acts must inevitably be discharged . . . which could not be held to impute negmust inevitably be discharged . . . which could not be held to impute negfor the first error or act of negligence." ligence on his part, where there was no

a fireman for the duties of an engineer comotive engineer in running a train 12 cannot be predicated on the ground that miles in forty minutes, while the schedhe failed, while the train was running between stations, to notice a signal to such distance at 40 or 45 miles an hour, stop, given from the rear of the train. in daylight and without accident or in Core v. Ohio River R. Co. (1893) 38 W. jury to anyone, did not necessarily va. 456, 18 S. E. 596. The mere fact show him to be unfit or reckless of that a yard master had sent an engine upon the track when a coming train was overdue does not conclusively show that the company was negligent in keeping him in its service, since he might run was due more to chance or good have had information showing that the train would not arrive for some time. Michigan C. R. Co. v. Gilbert (1881) 46 Mich. 176, 9 N. W. 243.

To satisfy this description it is not necessary that there should have been a warned of the approach of the train. necessary that there should have been a warned of the approach of the train. "constant repetition" of negligent acts. Holland v. Southern P. R. Co. (1893)

where the dereliction of duty was one which the physical qualities of the servant rendered extremely probable.8 Nor is there any difficulty in holding that, when proof of the commission of a negligent act is accompanied by proof that the delinquent servant had a reputation for recklessness (see § 202, post), and this reputation was known to the master, a verdict for the plaintiff is warranted.9

That notice of the prior act must, in any event, be brought home to the master before it can become a factor bearing upon the question of his negligence, follows from the general principles discussed in chapter x., ante, and it has been so decided.10

c. Several acts of negligence.—(Compare § 184, ante, and § 198, post.)—In regard to the question whether the plaintiff is entitled to introduce evidence that the delinquent servant had been guilty of several acts of negligence prior to the time of the accident in suit, the courts are not unanimous. The doctrine which seems to the present writer to be the most logical, and which is sustained by a considerable array of authorities, is that such evidence is competent to establish the unfitness of the delinquent servant. It is, of course, necessary

<sup>9</sup> Mexican Nat. R. Co. v. Mussette (1894) 86 Tex. 708, 24 L. R. A. 642, 26 S. W. 1075.

<sup>10</sup> Michigan C. R. Co. v. Gilbert (1881) 46 Mich. 176, 9 N. W. 243. See also Mulhern v. Lehigh Valley Coal Co. (1894) 161 Pa. 270, 28 Atl. 1087.

"Coppins v. New York C. & H. R. R. Co. (1890) 122 N. Y. 557, 25 N. E. 915

Co. (1890) 122 N. Y. 557, 25 N. E. 915 dence, and caution in the employment, (servant absent from his post several or in the retaining in service of careful, times a month); Sutton v. New York, prudent, and skilful persons to manage L. E. & W. R. Co. (1892) 50 N. Y. S. and operate such road, and for the pur-R. 514, 21 N. Y. Supp. 312; Wood v. pose of charging such corporation with New York C. & H. R. R. Co. (1898) 32 notice of the incompetency of its em-App. Div. 606, 53 N. Y. Supp. 163; ployees, it may be shown that such em-Gulf, C. & S. F. R. Co. v. Pierce (1894) ployees had been guilty of specific acts 87 Tex. 144, 27 S. W. 60 (brakeman had of carelessness, unskilfulness, and in-

Western R. Co. v. Brow (1895) 13 C. frequently gone to sleep while at a C. A. 222, 31 U. S. App. 192, 65 Fed. switch, and had failed to throw it); 941, the court assumed that the fact of Houston & T. C. R. Co. v. Patton a switchman having been drunk on one (1888; Tex.) 9 S. W. 175 (habitually previous occasion, and so caused an accareless handling of engine in making previous occasion, and so caused an accident of the same kind as that in suit (cars turned onto the wrong track), was sufficient to charge the company with notice of his incompetency.

The negligence of a railway company is for the jury, where it has retained in its employ as a night operator a boy eighteen years of age, who, a few months before the accident, had gone to sleep while on duty. Baltimore & O. R. Co. v. Camp (1895) 13 C. C. A. 233, Tex. Civ. App. 213, 65 Fed. 952. Compare note 1, supra.

Mexican Nat. R. Co. v. Mussette careless handling of engine in making carelists hardling of engine in making carelists hardli 79 Ill. App. 456. In Pittsburgh, Ft. W. & C. R. Co. v. Ruby (1871) 38 Ind. 294, 10 Am. Rep. 111, the court said: "We think that it is reall cattled as the court said: "We think that it is well settled, not only by the authorities, but in reason and on principle, that, for the purpose of showing that the officers of a railroad company had not exercised due care, prudence, and caution in the employment,

that the negligent quality of the prior acts should be beyond any reasonable dispute, before the further question whether they indicate unfitness can be considered. See also § 198, post.

Some courts, however, have declined to adopt the above doctrine. In Pennsylvania the position has been taken that such cases are governed by the general rule of evidence that character for care must be proved by evidence of general reputation, and not of special acts.<sup>13</sup> The reasoning by which this decision is supported proceeds upon an erroneous conception of the logical situation. It is evident that the general reputation which is here regarded as the only appropriate test of negligence must be regarded as a conclusion which has itself been deduced by various persons prior to the trial from a greater or less number of acts of the very same character as those which are thus declared to be unfit for the consideration of the jury. There seems to be a singular inconsistency in thus accepting a ready-made inference based upon testimony submitted in the most informal way to a nebulous tribunal of irresponsible parties outside the courtroom, and at the same time refusing to allow such testimony to be weighed inside the courtroom by a definite body of men, who have every facility afforded them for testing its reliability, and who are fully alive to the important issues which are immediately dependent upon their The difficulties involved in the theory of this court are still further emphasized by the fact that it has conceded the competency of evidence going to show the servant's accustomed disobe-

service after notice of such acts."

while running a locomotive had, on angreat improvement of character. Beother occasion, run an engine faster sides this, ordinary care implies occathan, in the judgment of another engisional acts of carelessness, for all men

out of special acts, but is not proved by

competency, and that such acts were them. Indeed, special acts do very known to such officers prior to the emoften indicate frailties or vices that are ployment of such agents, or that such altogether contrary to the character acemployees had been retained in such tually established. And sometimes the very frailties that may be proved against <sup>12</sup> Thus, evidence that a locomotive a man may have been regarded by him fireman who had caused an accident in so serious a light as to have produced neer, was proper, and at still another are fallible in this respect, and the law time, while running a locomotive, had demands only the ordinary." This case time, while running a locomotive, had demands only the ordinary." This case struck a car, in coupling to it, with force which the witness considered excessive,—is insufficient to raise a question of fact as to the competency of the earlier Texas decisions cited in note such fireman. Marrinan v. New York 11, supra, were not referred to, though C. & H. R. Co. (1897) 13 App. Div. 439, 43 N. Y. Supp. 606.

\*\*In Transier v. Pennsylvania R. Co.\*\* which is not apparent—the court intends to rely on a supposed distinction (1860) 38 Pa. 104, 80 Am. Dec. 467. between acts of negligence which are octated to special acts. but is not proved by service with a proval in Gale with approval in Gale veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. v. Davis veston, H. & S. A. R. Co. dience of orders and his habitual drunkenness, and that these facts were known to the master's representative. 14 In its essence, such evidence consists of testimony as to a certain number of specific acts, and the position thus taken is therefore inconsistent with that put forward in the Frazier Case (1860) 38 Pa. 104, 80 Am. Dec. 467, unless-which is not apparent-it is intended to grant the competency of such evidence only in cases where it is based on general reputation.15

In Massachusetts the conception relied upon is that the character or reputation of a servant as a careful or careless man, either generally or in any department of business, cannot be shown by introducing evidence of particular acts, and by trying the question whether those acts were severally careless, or done with due care. To do this. it is said, would introduce a multiplicity of issues of which the parties ordinarily could not have previous notice, and which it would be impracticable properly to try. 16 The point thus emphasized hardly seems sufficient to overcome the effect of the consideration that, according to the ordinary judgment of mankind, a servant who has been guilty of repeated acts of negligence is rather more likely than not to be unfit for his position. If a court would, perforce, have to determine the quality of each of several acts if they were put forward by the master as a justification for dismissing a servant for incompetence, there is no apparent reason why a similar investigation should be declined in an action sounding in negligence. It is not apparent that the difficulties of procedure adverted to in the cases last cited have caused any special embarrassment in the jurisdictions where evidence of this sort is deemed to be admissible. Nor is the reason assigned for this doctrine easy to reconcile with the decision in the cases cited in note 20, infra. The proposition that evidence of this sort must be rejected if directly offered on the issue of competency, but is proper for consideration if it happens to be before the jury for

mine what the doctrine should be if the master or his representative had knowledge of the specific acts. But this is a (1894) 160 Mass, 333, 35 N. E. 860,

14 Huntingdon & B. T. Mountain R. & plain misapprehension of the logical po-Huntingdon & B. T. Mountain R. & plain misapprehension of the logical pocoal Co. v. Decker (1876) 82 Pa. 119.

The For criticisms on the Pennsylvania the extent of holding that such evidence doctrine, see Baulec v. New York & H. can ultimately be a factor in the case R. Co. (1874) 59 N. Y. 356, 17 Am. unless the master is also shown to have Rep. 325, and Pittsburgh, Ft. W. & C. R. had knowledge, actual or constructive, Co. v. Ruby (1871) 38 Ind. 294, 10 Am. of the specific act or acts in question. Rep. 111. In Couch v. Watson Coal Such knowledge is declared, or assumed Co. (1877) 46 Iowa, 17, the court unto be, an existing element in all the dertakes to distinguish between the cases in which this sort of evidence has Pennsylvania rule and that adopted in been deemed admissible to establish un-Pennsylvania rule and that adopted in been deemed admissible to establish un-Indiana and New York, on the ground fitness. See, especially, notes 10 and 11, that the Frazier Case does not deter-

other purposes, seems to present a distinction for which no satisfactory logical basis can be suggested.

In some other states, also, the judges have exhibited a more or less pronounced tendency to adopt the theory of the courts of Pennsylvania and Massachusetts. But their precise position is not very clearly defined.17

A compromise between the theory that this kind of evidence is wholly incompetent, and the theory that it is admissible, is exhibited in the cases which take the position that it does not tend to show unfitness unless the derelictions of duty have been so frequent that they may fairly be termed habitual.18 This position plainly involves the necessity for a determination by the court of the question of fact whether the acts upon which the plaintiff relics come within one or other of the categories thus contrasted. Considered as an expression of a general principle, therefore, it can scarcely be correct.

That evidence of neither one, nor several, acts of negligence committed by a servant before that which caused the injury in suit is competent to show that the latter act was negligent, is perfectly plain upon general principles, and is not disputed. 19

In any jurisdiction it would probably be conceded, and by two courts it has been expressly decided, that, when conduct of a servant tending to show his qualifications, or his mental or physical fitness for

"In Kindel v. Hall (1896) 8 Colo. App. 63, 44 Pac. 781, it was held that a renders it imprudent to retain him in jury should not be told that if they find the delinquent fellow servant was frequently, and for an improper length of In Kellogg v. Stephens Lumber Co. time, absent from his post, and the practice was known, they might consider the fact as bearing on the question of his skill and competency. But, fitness. Baltimore v. War (1893) 77 perhaps, it is not intended to deny the admissibility of such evidence altogether. Logically, it certainly bears on the question of the servant's habitual carelessness, and this is one form of under the court held that a few occasional relationships in the court held that a few occasional relationships in the court held that a few occasional relationships in the court held that a few occasional relationships in the court held that a few occasional relationships in the court held that a few occasional relationships in the court held that a few occasional relationships in the court held that a few occasional relationships in the court held that a few occasional relationships in the court held that a few occasional relationships in the relation for the court held that a few occasional relationships in the relation for the court held that a few occasional relationships in the relation for the court held that a few occasional relationships in the relation for the court held that a few occasional relationships in the relation for the court held that a few occasional relationships in the relation for the court held that a few occasional relationships in the relation for the servant's habitual service." Baltimore v. War (1893) 77 perhaps, it is not intended to deny the court held that a few occasional relationships in the relation for the servant's habitual service." Baltimore v. War (1893) 77 perhaps, it is not intended to deny the court held that a few occasional relationships in the relation for the servant's habitual service." Baltimore v. War (1893) 77 perhaps in the relation carelessness, and this is one form of un- acts. fitness. The Missouri court of appeals

18 Hatt v. Nay (1887) 144 Mass. 186, has laid it down that simple acts of 10 N. E. 807; Connors v. Morton negligence do not tend to establish gen(1894) 160 Mass. 333, 35 N. E. 860;

eral incompetency. Cook v. St. Louis, Baltimore Elevator Co. v. Neal (1886) I. M. & S. R. Co. (1880) 8 Mo. App. 65 Md. 438, 5 Atl. 338. Testimony 573, Appx.; but the opinion is not reported at length, and it is impossible gineer and was injured in a railroad to say what the grounds of the judg-collision, would frequently go to sleep ment were. A decision of the supreme while on duty, is inadmissible where court of this state to the contrary effect there is no evidence that he was asleep is cited in note 11, supra.

18 "Negligence such as unfits a person K. & T. R. Co. v. Johnson (1898; Tex. for service, or such as renders it negligent in a master to retain him in the employ, must be habitual, rather than Compare § 192, note 2, post,

his work, is properly before a jury upon one of the issues of the case, they may consider it on the question of his competency.<sup>20</sup>

The cases in this section should be compared with those dealing with the satisfactory and unsatisfactory operation of inorganic agencies, chapter XLIII., post.

189. Act by which the injury was caused.— In several decisions it is laid down, quite broadly, that evidence which merely shows that the delinquent servant was negligent in respect to the particular act which caused the injury will not warrant a finding that he was incompetent.¹ So far as this doctrine depends on considerations analogous to those relied on in the cases which deny the justifiability of inferring incompetence from one act of negligence committed before the accident in suit, it must seemingly be subject to the same qualification as the general rule laid down in those cases, viz.: that the delinquency which caused the accident may be of such a flagrant character as to warrant the conclusion that only an unfit servant could have committed it.2 It has been objected that, "if a single act of negligence is to be regarded as tending by itself to show incompetency, and furnish any ground for conjecture that such incompetency is known to the company or its agents, then it must follow that all cases of damage by negligence of a fellow servant may be allowed to be traced to the negligent appointment of incompetent subordinates."3 But, plainly, this would not necessarily be the consequence of admitting in appropriate cases the competency of the evidence con-

engineer that the train might safely proceed, was assumed to be sufficient ev-R. Co. (1892) 62 Conn. 209, 25 Atl. idence of incompetency.

711, the court, taking the ground that negligence, as regards the retention of the servant, was not "necessarily" (1876) 62 Mo. 565,

<sup>20</sup> Olsen v. Andrews (1897) 168 Mass. shown," refused to set aside a verdict for 261, 47 N. E. 90; Couch v. Watson Coal the plaintiff for nominal damages, 261, 47 N. E. 90; Couch v. Watson Coat the plantin for nominal damages, Co. (1877) 46 Iowa, 17.

1 Curran v. Merchants' Mfg. Co. servant was negligent in respect to the (1881) 130 Mass. 374, 39 Am. Rep. particular incident which led to the 457; Salem Stone & Lime Co. v. Chasinjury. In Atlanta Cotton Factory Co. tain (1894) 9 Ind. App. 453, 36 N. E. v. Speer (1882) 69 Ga. 137, 47 Am. 910; Lindvall v. Woods (1891) 44 Fed. Rep. 750, the opinion of the majority 855; Texas & N. O. R. Co. v. Berry of the court proceeded partly upon the (1887) 67 Tex. 238, 5 S. W. 817; Bal-hypothesis that the fact of a foreman's time of N. War (1893) 77 Md. 593, 27 having wilfully violated a rule promultimore v. War (1893) 77 Md. 593, 27 having wilfully violated a rule promultimore v. War (1893) 77 Md. 593, 27 having wilfully violated a rule promul-Atl. 85; Peaslee v. Fitchburg R. Co. gated for the security of the children (1890) 152 Mass. 155, 25 N. E. 71; employed in the establishment was Spring Valley Coal Co. v. Patting proof of his incompetency. In Pleas-(1898) 30 C. C. A. 168, 58 U. S. App. ants v. Raleigh & A. Air Line R. Co. 575, 86 Fed. 433; Hathavay v. Illinois (1897) 121 N. C. 492, 28 S. E. 267, the C. R. Co. (1894) 92 Iowa, 337, 60 N. fact that when a switch was open, and W. 651; Buckley v. Gould & C. Silver cars were standing on the side track to Min. Co. (1882) 8 Sawy. 394, 14 Fed. which it led, a conductor signaled to his engineer that the train might safely proceed was assumed to be sufficient events.

demned. The questions whether a negligent act was merely a temporary lapse by a capable servant, or indicated an essential unfitness, are entirely distinct, and it seems impossible, from a purely logical standpoint, to maintain that such evidence, so far as it bears upon the latter question, should be rejected simply because the other one is also suggested by it. It may be readily conceded that the practical result of leaving juries untrammeled as regards the construction of this kind of testimony would inevitably be a serious inroad upon the doctrine of common employment. But this is hardly an adequate reason for excluding it altogether. The power of the court to direct the deliberations of the jury by differentiating clearly the two issues to which the evidence is applicable, and to make peremptory rulings upon its effect in extreme cases, is a sufficient guaranty against its being used to sap the foundations of the doctrine in question. It has also been said that to allow a jury to infer negligence or unskilfulness on the delinquent servant's part from the simple fact of the happening of the accident in suit would conflict with the principle that it is incumbent on the plaintiff to establish by affirmative proof that his injury was caused by the negligent and unskilful act of the fellow servant.4 Clearly, however, no logical reason can be suggested why the principle of res ipsa loquitur should not be as applicable under appropriate circumstances to cases where the injury arises from the negligence of a servant, as it is to cases where the injury is due to the defective quality of some inanimate agency of the master's business. The rule as to the burden of proof, therefore, is not necessarily infringed by admitting the competency of the evidence objected to. Whether it is sufficient, unsupported, to establish incompetency, depends upon the character of the servant's act.

190. Derelictions of duty subsequent to the injury in suit.—Subsequent derelictions of the servant have been held not to be competent evidence of fault on the master's part in having had the delinquent servant in his employment. That this is true, without qualification, of acts which do not tend to show unfitness of the kind complained of, is, of course, indisputable.<sup>2</sup> But if it indicates a want of fitness at the time when the act was committed, it is difficult to see why it

occurrence itself," said the same court to evidence sustained where there was in another case, "raises no presumption no evidence that the servant had been of negligence, and justifies no inference of incompetency." Baltimore v. War (1893) 77 Md. 593, 27 Atl. 85.

Co. (1884) 32 Minn. 331, 20 N. W. 332.

<sup>&</sup>lt;sup>1</sup> Couch v. Watson Coal Co. (1877)

<sup>\*</sup>Baltimore Elevator Co. v. Neal 46 Iowa, 17; Craig v. Chicago & A. R. (1886) 65 Md. 438, 5 Atl. 338. "The Co. (1893) 54 Mo. App. 523 (demurrer

should not at least be competent when the act was sufficiently close in point of time to the accident in suit to render it not unreasonable to infer that the servant's capacity for his duties was the same at the later as at the earlier date.

- 191. Disclaimer of fitness by delinquent servant himself.—Under ordinary circumstances, it would seem, the self-depreciatory statements of the delinquent servant himself are to be wholly disregarded where his previous experience and conduct are such as to justify the master in supposing that he is competent to do the work assigned to him.1
- 192. Reputation.— (Compare § 202, post.)—In some cases it has been argued that the servant's reputation for incompetency is evidence that he was actually incompetent, and not simply a circumstance which put the master upon inquiry as to whether he was or was not competent. But this contention has always been rejected. Still less is reputation competent evidence to establish that that particular form of incapacity which it ascribes to him existed at the time of the injury, and contributed to produce it.2

Where boys of the same age and size he had that reputation); Lee v. Michige commonly considered competent to gan C. R. Co. (1891) 87 Mich. 574, 49 to the work in which the servant whose N. W. 909 (reputation of incompetency are commonly considered competent to do the work in which the servant whose

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act caused the injury in suit was en- as yard master not sufficient when based gaged, and who for six months had done only on the fact that he had had no exgaged, and who for six months had done the work to the satisfaction of all his perience as switchman). So, also, in colaborers, the mere fact that, on the Gier v. Los Angeles Consol. Electric R. occasion in question, he had told the master's vice principal that he did not court said that it is the character of the feel strong enough to do the work will not render the master liable for the act more more principal in setting him to work notwithstanding this statement.

Jungnitsch v. Michigan Malleable Iron inability to furnish direct proof of the Co. (1895) 105 Mich. 270, 63 N. W. 296. In Wright v. New York C. R. Co. only after the establishment of the fact (1858) 28 Barb. 80, the supreme court that the employee is in truth an unfit remarked that the statement of an engineer to his superior officer, that he did ton is not proof of that fact. A man's remarked that the statement of an engineer to his superior officer, that he did not feel competent to take a train over a particular piece of road at night, was "very slight evidence" to prove incompetency for that duty; but did not express any definite opinion as to the precise evidential weight of the fact. The court of appeals ([1862] 25 N. Y. 562) held that the engineer was certainly competent, a ruling which necessarily implies that the evidence in question was inadequate to justify the inference of negligence on the master's part.

'Cosgrove v. Pitman (1894) 103 Cal.

'Cosgrove v. Pitman (1894) 103 Cal.

'Cosgrove v. Pitman (1894) 103 Cal.

'Baltimore & O. R. Co. v. Colvin (1888) 118 Pa. 230, 12 Atl. 337 (repu-Vol. I. M. & S.—27.

193. Certificates and licenses, evidential significance of.—Certificates of competency and licenses to pursue certain avocations merely limit the master's range of choice to the class of specialists to whom those documents are granted, and do not compel him to employ or retain any individual member of the class. They are, accordingly, no more than prima facie evidence of such individual's competency, and do not justify keeping him in the service after his actual unfitness has become known to the master.1

On the other hand, the mere fact that an employee has never been licensed by any official body to do the work in question is not of itself sufficient to show that he is incompetent or unskilful.2 The requisite special knowledge may be obtained by practical experience.3

C. MASTER'S KNOWLEDGE, ACTUAL OR CONSTRUCTIVE, OF THE INCOM-PETENCY, MUST BE SHOWN.

193a. Generally.—As was indicated in the general statement of principle in § 177, ante, the liability of the master for injuries caused by the unfitness of a servant is limited by a doctrine analogous to that which prevails with respect to other agencies,—the doctrine, namely, that actionable negligence is predicated only in cases in which the master either hired the delinquent servant with a knowledge of his

(1898) 59 Kan. 264, 52 Pac. 871. Com-St. Paul City R. Co. (1898) 71 Minn. 438, 74 N. W. 166, this rule was applied in an action by a third person. Nicknames are not so generally expressive of the characteristics of the persons to whom they are applied as to be competent evidence for the purpose of proving that the bearer of the name possessed the characteristics denoted by the nickname. Marrinan v. New York C. & H. R. Co. (1897) 13 App. Div. 439, 43 N. Y. Supp. 606 (fact that a servant is called by his fellow employees "Crazy Nolan" not, in the absence of other proof, competent evidence to show that he is actually crazy. In a subsequent case this ruling was cited with approval, and a new trial ordered, on the ground that the jury had not been left uninfluenced tent evidence for the purpose of proving

tation for carelessness not evidence of by the evidence of a nickname ("crazy") inefficient performance of duty at the which had been applied to the culpatime of the accident); Baltimore & O. ble servant. Baird v. New York C. & R. Co. v. Henthorne (1896) 19 C. C. A. H. R. R. Co. (1897) 16 App. Div. 490, 623, 43 U. S. App. 113, 73 Fed. 634 44 N. Y. Supp. 926. See also, to the (reputation for drunkenness not evisame effect, St. Louis, A. & T. H. R. dence that servant was drunk when the Co. v. Corgan (1891) 49 Ill. App. 229. accident occurred); Erb v. Popritz <sup>1</sup> Consolidated Coal Co. v. Seniger (1898) 59 Kan. 264, 52 Pac. 871. Com- (1899) 179 Ill. 370, 53 N. E. 733, Afpare § 188, note 19, ante. In Fonda v. firming (1898) 79 Ill. App. 456; Walker v. Bolling (1853) 22 Ala. 294.

<sup>2</sup> Illinois Steel Co. v. Richter (1898) 82 Ill. App. 45 (engineer in charge of a mill not licensed in accordance with the provisions of a municipal ordinance). In McMahon v. Davidson (1867) 12 Minn. 357, Gil. 232, the defendant was held liable for injuries caused by the incompetence of an unlicensed engineer.

unfitness, or retained him in the service after notice of such unfitness. The language used by the Supreme Court of the United States is that the plaintiff must show, not only the incompetency, but that the defendant failed to exercise proper care and diligence to ascertain his qualifications and competency prior to his appointment, or failed to remove him after his incompetency had come to the notice of some agent or officer of defendant having the power to remove the servant.1 On the one hand, therefore, a verdict for the plaintiff will always be upheld where there is adequate proof that the master knew of the delinquent servant's incompetency before the time when the accident happened, and still retained him in the employment.<sup>2</sup> On

accident happened, and still retained him in the employment.<sup>2</sup> On

1 Wabash R. Co. v. McDaniels (1882)
107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct.
Rep. 932.

2 Walker v. Bolling (1853)
108 22 Ala.

294; Senior v. Ward (1859)
118 El. & El.

294; Senior v. Ward (1859)
118 El.

28 L. J. Q. B. N. S. 139, 5 Jur. N.

23 N. E. 246; Ohio & M. R. Co. v. Col-S.

172, 7 Week. Rep. 261; Columbus, larn (1881)
173 Ind. 261, 38 Am. Rep.

C. & I. C. R. Co. v. Troesch (1873)
184; Indiana Mfg. Co. v. Millican
111. 545, 18 Am. Rep. 578; Laning v. (1882)
187 Ind. 87; Pennsylvania Co. v.

New York C. R. Co. (1872)
19 N. Y. Roney (1883)
189 Ind. 453, 46 Am. Rep.

521. 10 Am. Rep. 417; Michigan C. R.

173; Texas & P. R. Co. v. Johnson

Co. v. Dolan (1875)
18 Mich. 510; Ev
1888)
115 Ind. 450, 17 N. E. 101; Mills (1887)
188)
115 Ind. 450, 17 N. E. 101; Mills (1887)
188)
115 Ind. 450, 17 N. E. 101; Mills (1887)
188)
115 Ind. 450, 17 N. E. 101; Mills (1887)
189, 92 Am. Dec. 240; Chicago & G.

1872)
1894)
1895 Ind. 28; Nordyke & M. Co.

24 S. W. 520, affirmed in (1894)
85
1804 Ind. 462, 34 N. E. 227; Kansas P.

430, 44 Am. Rep. 724; Gulf, C. & S. F.

R. Co. v. Salmon (1875)
14 Kan. 512; R. Co. v. Pierce (1894)
87 Tex. 144,
1896 Poirier v. Carroll (1883)
85 Civ. App. 597, 25 S. W. 1052; Bonner

La. Ann. 699 (under Louisiana Code, v. Whitcomb (1891)
80 Tex. 178, 15
art. 2320, providing that a master is
180 S. W. 899. See also the cases with ref181 Independent of the property of the property and other bad habits, in the 1 Wabash R. Co. v. McDaniels (1882) 55 N. Y. 579; Frazier v. Pennsylvania 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. R. Co. (1800) 38 Pa. 104, 80 Am. Dec. Rep. 932.

2 Walker v. Bolling (1853) 22 Ala. (1872) 48 Ala. 459; Lake Shore & M. S. 294; Senior v. Ward (1859) 1 El. & El. R. Co. v. Stupak (1889) 123 Ind. 210, 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. 23 N. E. 246; Ohio & M. R. Co. v. Col. S. 172, 7 Week. Rep. 261; Columbus, larn (1881) 73 Ind. 261, 38 Am. Rep. C. & I. C. R. Co. v. Troesch (1873) 68 134; Indiana Mfg. Co. v. Millioan Ill. 545, 18 Am. Rep. 578; Laning v. (1882) 87 Ind. 87; Pennsylvania Co. v. New York C. R. Co. (1872) 49 N. Y. Roney (1883) 89 Ind. 453, 46 Am. Rep. 521. 10 Am. Rep. 417; Michigan C. R. 173; Texas & P. R. Co. v. Johnson Co. v. Dolan (1875) 32 Mich. 510; Ev. (1896) 89 Tex. 519, 35 S. W. 1042; ansville & T. H. R. Co. v. Guyton (1888) 115 Ind. 450, 17 N. E. 101; Mills (1887) 66 Mich. 277, 33 N. W. Illinois C. R. Co. v. Jewell (1867) 46 395; Chicago & A. R. Co. v. Sullivan Ill. 99, 92 Am. Dec. 240; Chicago & G. (1872) 63 Ill. 293; Mexican Nat. R. Co. E. R. Co. v. Harney (1867) 28 Ind. 28, v. Musette (1894) 7 Tex. Civ. App. 169, 92 Am. Dec. 282; Nordyke & M. Co. v. 24 S. W. 520, affirmed in (1894) 86 Van Sant (1884) 99 Ind. 188; Cincinnati, H. & I. R. Co. v. V. Madden (1892) 1075; Cruselle v. Pugh (1881) 67 Ga. 134 Ind. 462, 34 N. E. 227; Kansas P. 430, 44 Am. Rep. 724; Gulf, C. & S. F. Co. v. Salmon (1875) 14 Kan. 512; R. Co. v. Pierce (1894) 87 Tex. 144, Union P. R. Co. v. Voung (1878) 19 27 S. W. 60, Affirming (1894) 7 Tex. 144, Union P. R. Co. v. Voung (1878) 19 27 S. W. 60, Affirming (1894) 7 Tex. 144, Union P. R. Co. v. World (1881) 35 Civ. App. 597, 25 S. W. 1052; Bonner La. Ann. 699 (under Louisiana Code, v. Wikicomb (1891) 80 Tex. 178, 15 art. 2320, providing that a master is S. W. 899. See also the cases with refliable for damages by servants which he erroe in incompetency arising from inmight have prevented); Norfolk & W. temperate and other bad habits, in the P. C. O. v. Ho the other hand, in the absence of evidence that he possessed such knowledge, the master is, as a matter of law, deemed to be free from culpability.3

in the "selection" of the negligent em-Maxwell v. Hannibal & St. J. R. Co. ployee. Gier v. Los Angeles Consol. (1884) 85 Mo. 95; St. Louis, A. & T. H. Electric R. Co. (1895) 108 Cal. 129, 41 R. Co. v. Corgan (1891) 49 Ill. App. Pac. 22. A decision which is opposed 229; Dow v. Kansas P. R. Co. (1871) to those authorities is Texas & N. O. R. 8 Kan. 642; Lawler v. Androscoggin R. Co. v. Tatman (1895) 10 Tex. Civ. App. Co. (1873) 62 Me. 467, 16 Am. Rep. 434, 31 S. W. 333, where it was held, 492; Blake v. Maine C. R. Co. (1879) for reasons which are not explained in 70 Me. 60, 35 Am. Rep. 297; Reiser v. the opinion, that the mere fact that a Pennsylvania Co. (1892) 152 Pa. 38, 25 railroad company knows that its serv- Atl. 175; East Tennessee, V. & G. R. ants are negligent and careless will not Co. v. Gurley (1883) 12 Lea, 46. A render it liable to one for injuries in- complaint is demurrable which merely flicted on another by such negligence. alleges that it was the master's duty to This ruling is certainly wrong, unless employ careful and skilful servants, the court intended to make a distinct and that he failed to select those that tion between habitual and isolated acts were competent. A want of care and of negligence. See §§ 184, 188, ante. diligence in the selection should also of negligence. See §§ 184, 188, ante.

<sup>3</sup> Reiser v. Pennsylrania Co. (1892) be charged. Moss v. Pacific R. Co.
152 Pa. 38, 25 Atl. 175; Keystone (1872) 49 Mo. 167, 8 Am. Rep. 126. A
Bridge Co. v. Newberry (1880) 96 Pa.
246; Mulhern v. Lehigh Valley Coal facts, that the delinquent servant was
Co. (1894) 161 Pa. 270, 28 Atl. 1087 (a incompetent, and that the master knew
case under the mining law of Pennsylvania); Louisville & N. R. Co. v. Kelly judgment for the plaintiff. Evansville
(1894) 11 C. C. A. 260, 24 U. S. App.
(1894) 11 C. C. A. 260, 24 U. S. App.
(1894) 11 C. C. A. 260, 24 U. S. App.
(1895) 18 Kan. 647; Galveston, struction is erroneous by which the
H. & S. A. R. Co. v. Faber (1885) 63
Tex. 344 (1889) 77 Tex. 153, 8 S. W. a coservant is made to hinge upon his
64; Conrad v. Gray (1895) 109 Ala.
130, 19 So. 398; St. Louis Press Brick
tion is whether the master used ordiCo. v. Kenyon (1893) 57 Ill. App. 640; nary care to procure a competent per-Co. v. Kenyon (1893) 57 Ill. App. 640; nary care to procure a competent per-Huffman v. Chicago, R. I. & P. R. Co. son. Tarrant v. Webb (1856) 18 C. B. (1883) 78 Mo. 50; Wall v. Delaware, L. 797, 25 L. J. C. P. N. S. 261. A clause & W. R. Co. (1889) 54 Hun, 454, 7 N. in a charge, that the law imposes the Y. Supp. 709; Dysart v. Kansas City, duty "to employ reasonably skilful and Ft. S. & M. R. Co. (1898) 145 Mo. 83, competent employees," is a misdirec-4 N. P. R. Co. (1893) 100 Cal. 554, 35 part by the instruction that the incompact 165; Lee v. Detroit Bridge & Iron petency of a servant is not a ground of Works (1876) 62 Mo. 565; Matthews liability unless it is known, actually or v. Bull (1897; Cal.) 47 Pac. 773; constructively, to the master. Lewis Murphy v. Hughes (1898) 1 Penn. v. Emery (1896) 108 Mich. 641, 66 N. (Del.) 250, 40 Atl. 187; O'Boyle v. Let w. See in laying down the law of a high Valley Coal Co. (1894) 161 Pa. case with a view to a new trial, it is 275, 28 Atl. 1088; Kindel v. Hall (1896) 8 Colo. App. 63, 44 Pac. 781; esis that the plaintiff was employed Crew v. St. Louis, K. & N. W. R. Co. as an inexperienced man, unless there (1884) 20 Fed. 87; Bogard v. Louisis is some evidence that the employer ville, E. & St. L. R. Co. (1885) 100 Ind. 491; Lake Shore & M. S. R. Co. v. Stupak (1886) 108 Ind. 1, 8 N. E. 630; (1884) 63 Iowa, 562, 14 N. W. 340, 19 Cincinnati, H. & I. R. Co. v. Madden N. W. 680 (correcting, in this regard, (1893) 134 Ind. 462, 34 N. E. 227; the opinion in the first hearing of the United States Rolling Stock Co. v. case. The plaintiff was a minor, but Wilder (1886) 116 Ill. 100, 5 N. E. 92; only a little under twenty-one years of Smith v. E. W. Backus Lumber Co. age). (1896) 64 Minn, 447, 67 N. W. 358; (1896) 64 Minn. 447, 67 N. W. 358;

46 S. W. 751; Stevens v. San Francisco tion, unless it is qualified in another & N. P. R. Co. (1893) 100 Cal. 554, 35 part by the instruction that the incom-

In this instance, as in the case of the other instrumentalities of an employer's business, the knowledge or ignorance contemplated by the law connotes the situation in which he could or could not, by the exercise of due care, have ascertained the servant's unfitness.4 See chapter x., ante. The question whether the master knew or ought to have known of the servant's incompetency is primarily one for the jury.<sup>5</sup> It is obvious that the responsibilities which arise out of the employment of a rational living creature as an industrial agency must in some respects be essentially different from those which attend the use of an inorganic instrumentality, or of an animal which, for juridical purposes, is regarded as a mere chattel, devoid of reasoning capacity. This difference is reflected in the nature of the master's obligations with regard to ascertaining the qualifications of his servants, both at the time they are hired and while they are at work.

194. Duty to inquire into the fitness of a servant at the time he is hired.—(See also § 180, ante.)—Although an employer is, to a great extent, entitled to act upon the assumption that instrumentalities purchased from persons whose business it is to manufacture them are in a sound condition when they are first put in use (see § 153, ante), he clearly would not be justified in acting upon the assumption that a servant who seeks a position is qualified for it. It is therefore well established that, where the service in which the servant is to be employed is such as to endanger the lives and persons of coemployees,

\*Chicago, R. I. & P. R. Co. v. Doyle whether due care was used in the selection of that servant. Skerritt v. Scal-York C. & H. R. R. Co. (1894) 77 Hun, 519, 28 N. Y. Supp. 898; East Tennessee, V. & G. R. Co. v. Gurley (1885) 12 169; Calumet Electric Street R. Co. v. Lea, 46; Blake v. Maine C. R. Co. Peters (1900) 88 Ill. App. 112; Scott (1879) 70 Me. 60, 35 Am. Rep. 297; v. Utah Consol. Min. & Mill. Co. (1899) Hall v. Bedford Quarries Co. (1901) 156 18 Utah, 486, 56 Pac. 305; Huntsinger Ind. 460, 60 N. E. 149. An allegation v. Trexler (1897) 181 Pa. 497, 37 Atl. that the master knew of the delinquent 574; and the other cases cited in this servant's incompetency is sustained by section. servant's incompetency is sustained by proof that it ought to have been known.

Chicago, R. I. & P. R. Co. v. Doyle makes it the duty of all employees to (1877) 18 Kan. 58. It is not error to report omissions of duty, and the negsubmit a case to the jury on the theory ligent acts of the culpable servant took that the plaintiff is entitled to recover place on the train on which the plaintiff the negligent servant was incompetent and the defendant ought to have known of his incompetence. Hilts v. ence, or under his observation, than to Chicago & G. T. R. Co. (1885) 55 Mich.

437, 21 N. W. 878. It is error to direct company; and if he knew of and failed a verdict for the defendant upon a finding by the jury that the fellow servant was summe the additional risk. Cameron servant's incompetency is sustained by section. whose negligence caused the injury was assume the additional risk. Cameron incompetent, but that this incompetency v. New York C. & H. R. R. Co. (1895) was not known to the defendant. Such 145 N. Y. 400, 40 N. E. 1. a finding leaves open the question

the master, before engaging such servant, is required to make reasonable investigation into his character, skill, and habits of life.1 exception to this rule is admitted where the work is of a simple kind, which anyone of fair intelligence and requisite physical ability is competent to perform.<sup>2</sup> This investigation need not necessarily assume the form of questioning an applicant for work as to his competency. An omission to do this is negligence only when there is no better source of information at hand, and cannot be imputed as culpable where information is sought from the applicant's former employer.<sup>3</sup> On the other hand, the employer's duty is fully discharged if he makes careful inquiry into the habits and competency of the men employed, and upon such inquiry believes, and has good reason to believe, them sober and competent and careful.4

An employer is also bound to institute affirmative inquiries in order to ascertain the qualifications of a servant whom he transfers to a more responsible position, for which special qualifications are

1 Western Stone Co. v. Whalen (1894) 151 Ill. 472, 38 N. E. 241; S. R. Co. (1895) 108 Cal. 129, 41 Pac. 22. P. Mann v. Delaware & H. Canal Co. It is competent to show what the serv-(1883) 91 N. Y. 495; Norfolk & W. R. ant's previous record with other emco. v. Nuckols (1895) 91 Va. 193, 21 S. E. 342; Chicago & G. E. R. Co. v. Harnoy (1867) 28 Ind. 28, 92 Am. Dec. 282; Alabama & F. R. Co. v. Waller had made proper inquiry. Baltimore (1872) 48 Ala. 459; The Aneces (1899) & O. R. Co. v. Camp (1895) 13 C. C. A. 34 C. C. A. 558, 93 Fed. 240, Reversing (1898) 87 Fed. 565; Nutzmann v. Germania L. Ins. Co. (1900) 78 Minn. 504. 81 N. W. 518; Fraser v. Schroeder Mfg. Co. v. Millican (1882) 87 Ind. 87; (1896) 163 Ill. 459, 45 N. E. 288. The erection of telegraph poles is deemed to be work which requires special skill. and therefore falls within the scope of (1896) 19 C. C. A. 623, 43 U. S. App. this principle. Postal Teleg. Cable Co. 1813. A master exercised due care in v. Coote (1900; Tex. Civ. App.) 57 S. W. 912.

2 Timm v. Michigan C. R. Co. (1893) 98 Mich. 226, 57 N. W. 116 (loading for hirring, he made inquiries of one fore hirring.

to have inquired whether he was comant's officers as to his defective eyesight, (1891) 45 Ill. App. 127. and the evidence generally went to show his competency).

98 Mich. 226, 57 N. W. 116 (loading fore hiring, he made inquiries of one ties on a hand car).

Whether the master at the time of engaging the servant, or afterwards, ought againg the servant, or afterwards, ought had him instructed and watched by the engineer for a time after he commenced petent or not, or should have taken notice, under all the facts, of the probability that he was not nothing being said R. A. 33, 73 N. W. 895. It is not the on the subject by either party, is a questional duty of the master to ascertain the tion for the jury. May v. Smith qualifications of a servant "as a fact," (1893) 92 Ga. 95, 18 S. E. 360; Irwin for the imposition of such an obligation v. Brooklyn Heights R. Co. (1901) 59 would be tantamount to a requirement App. Div. 95, 69 N. Y. Supp. 80 (serv- that his qualifications should be warant had made no statement to defend- ranted. Illinois C. R. Co. v. Morrissey

demanded, unless the servant has given proof of his capacity in some similar position.5

195. Duty of the master to keep himself informed as to the fitness of a servant already in his employment.— The consequences of the essential difference between the situations in which the master is utilizing the work of human beings and of other appliances are still more conspicuous when we come to consider his duties with regard to keeping himself informed as to the fitness of servants after their employment. That he is bound to do this, so far as it can be accomplished by proper supervision and superintendence, is well settled. But the rule of conduct based upon the physical law that inorganic appliances are constantly tending to deterioriate with use finds no analogy in cases where it is a question whether the master should have known of a servant's unfitness. On the contrary, when suitable and competent persons have been employed, good character and proper qualifications may be presumed to continue, and the master may rely on that presumption until notice of a change.2

\*\*Evansville & T. H. R. Co. v. Guyton at the time of the collision, is not good, (1888) 115 Ind. 450, 17 N. E. 101. as "supposed" means no more than "be-There the court, in commenting upon the evidence, which was held to justify ler (1872) 48 Ala. 459. the jury in finding the defendant liable for the negligence of a conductor whom it had promoted without the usual examination, said: "It should be remembered that Stice [the conductor] had 46 Mich. 176, 9 N. W. 243; Lake Shore served the company as brakeman until & M. S. R. Co. v. Stungk (1889) 123

under the following sections. A plea such as would put a reasonable man that the company had exercised ordiupon inquiry. The charge rermitted nary care and diligence to secure a skiltent purphing without restriction or limit, ful engineer who was reputed to be careto determine what particular superviful and skilful, and supposed to be such sion or watchfulness was necessary to

the jury in finding the defendant liable for the negligence of a conductor whom it had promoted without the usual examination, said: "It should be remembered that Stice [the conductor] had served the company as brakeman until quite recently before the unfortunate accident, and while his service as brakeman is not to be disregarded in determining his competency to act in the more responsible position of conductor, it does not follow, without more, that because he was an efficient and competent brakeman, and fit for promotion, he was also competent to take charge of and run a wild train." Compare cases cited in § 186, note 4, ante.

\*\*Baltimore & O. R. Co. v. Henthorne (1896) 19 C. C. A. 623, 43 U. S. App. 113, 73 Fed. 634; Norfolk & W. R. Co. v. Nuckols (1895) 91 Va. 193, 21 S. E. "Good character and proper qualifications, once possessed, may be presumed (1881) 73 Ind. 261, 38 Am. Rep. 134; to continue, and I see no reason why a Wabash R. Co. v. McDaniels (1882) principal may not rely upon that presumed (1881) 74 Lol. 605, 2 Sup. Ct. Rep. 932; Holland v. Tennessee Coal, until he has notice of a change, or I. & R. Co. (1890) 91 Ala. 444, 12 L. knowledge of such facts as would be and the company had exercised ordi
\*\*unation (1881) 75 Co. (1890) 91 Ala. 444, 12 L. knowledge of such facts as would be and the company had exercised ordi
\*\*unation (1881) 75 Co. (1890) 91 Ala. 444, 12 L. knowledge of such facts as would be a cereminated in the company had exercised ordi
\*\*unation (1881) 75 Co. v. McDaniels (1882) principal may not rely upon that presumed (1881) 75 Co. (1890) 91 Ala. 444, 12 L. knowledge of such facts as would be and the company had exercised ordi
\*\*unation (1881) 78 Co. v. McDaniels (1882) principal may not rely upon that presumed (1881) 75 Co. (1890) 91 Ala. 444, 12 L. knowledge of such facts as would be deemed equivalent to notice, or at least under the following sections. A plea

Where the master receives specific information with regard to practices or habits which indicate that the servant ought no longer to be retained in the employment, there is ordinarily no obligation to discharge him without an investigation into the charges, unless the notification is accompanied by such evidence as leaves no doubt of the truth of such charge. A rule that would require the master to discharge a servant, careful and competent when employed, without investigation, upon a charge of carelessness, is very properly declared to be a harsh one, which would often result in great injustice to employees.3

## D. CIRCUMSTANCES BEARING UPON THE QUESTION OF THE MASTER'S KNOWLEDGE OF THE SERVANT'S INCOMPETENCE.

## 196. Incompetence of servant.— The principle explained in the pre-

of the employer to prevent it."

efficiency is to make careful and fre- well founded. quent investigation as to the fact, if he

exonerate the defendant from the charge retains him in his service. Whether he of negligence. They might require periodical investigations, or an efficient jury to pass upon. Michigan C. R. Co. detective system. They were at liberty v. Gilbert (1881) 46 Mich. 176, 9 N. W. to adopt any rule, and might adopt one 243. If a railroad brakeman has actuwhich would practically make the defendant a guarantor of the correctness ligence, the fact that he is not negligence of every act of its employees. We have gent in specific instances called to the correctness of the resistance o of every act of its employees. We have gent in specific instances called to the been referred to no authority for such attention of the officers of the railroad a doctrine, and it would be manifestly does not necessarily relieve the company unjust to adopt it." The court held from liability for an injury to a fellow that reasons for inspection of machinservant resulting from the servant's ery or implements are not applicable to negligence. Baird v. New York C. & H. the case of an employee, and said: "If R. R. Co. (1901) 64 App. Div. 14, 71 competent when employed, additional N. Y. Supp. 734, holding that it was the experience would naturally render him duty of the company's officers, upon between the company the company the company the company that the company the company the company the company that the company the company the company that the company the company the company that the company the company the company the company that the company the company the company that the company the company the company that the company the company the company the more so, and while his habits might ing notified, not merely to inquire into change for the worse, there is no such the truth of the complaint made, but depravity in human nature as in law also as to whether the delinquent was requires special vigilance on the part accustomed to perform his duties in the way he should. In another case it was Where the material charge against laid down in a charge to the jury that, the defendant was that, with notice of if the master continues the employee in the negligence and carelessness of an his service after receiving notice of the the negligence and carelessness of an his service after receiving notice of the engineer, it carelessly and negligently unfitness, he does so at his own risk, retained him in its service, the court said: "The jury found that the appelhave made inquiry and decided that lant had knowledge of the careless habsuch servant was not negligent or inits of Pool before the day on which the competent. He is bound by the fact, injury occurred, but this does not authorize us to say, as a matter of law, M. & St. P. R. Co. (1881) 2 McCrary, that it negligently retained him in its service after such knowledge." Lake too broad. Plainly, there can be no lishore & M. S. R. Co. v. Stupak (1889) ability under such circumstances if the 123 Ind. 210, 23 N. E. 246. All that inquiry was carefully conducted, and a the master is required to do when his notice after such to circumstances in drawing the conclusion that the indicating a diminution in the servant's charges against the servant were not efficiency is to make careful and fre-well founded. ceding subtitle involves the corollary that, as a general rule, the master's knowledge must be proved by independent evidence, and cannot be inferred from the mere fact of the servant's unfitness, supposing that to be proved or admitted. This rule, however, is subject to two qualifications. One is analogous to that which, in the case of injuries caused by inanimate agencies, is created by the doctrine of res ipsa loquitur.<sup>2</sup> See chapter XLIII. B, post. The other is that the testimony by which the incompetency of a servant is established may be such as to warrant the additional conclusion that the master had notice of his incompetency, or that he omitted to make such inquiries as common prudence would have dictated.3

prima facie proof of negligence in em- the mode and circumstances of the employing the servant); Thomas v. Her-ployment were matters peculiarly with-rall (1890) 18 Or. 546, 23 Pac. 497. in the knowledge of the master, evidence It is error to instruct a jury that, when showing that the delinquent fellow the incompetency of a servant is proved, servant had started an engine after the the incompetency of a servant is proved, servant had started an engine after the a presumption arises that the master plaintiff's decedent, who was killed by knew of it. Hicks v. Southern R. Co. its exploding, had suggested that there (1901; S. C.) 38 S. E. 725. It is error was something wrong with it, was sufto charge a jury that if a servant did ficient to be submitted to the jury on not possess some indispensable qualification for his duties, this of itself one Fitzgerald and Hughes intimated showed the master to have been neglian opinion to the contrary, but held that at all events it was not evidence. gent, for it may be that all reasonable that, at all events, it was not eviprecautions were taken to ascertain his dence of negligence in selecting the competency for the place, and that the servant. In Minnesota also it has been master was nevertheless deceived. Tay- held that proof that the servant was

to the jury the question whether the be reconciled with the general rule of master was negligent. Skerritt v. Scalevidence which casts upon the party allan (1877) Ir. Rep. 11 C. L. 389, where leging negligence the onus of proving the jury had specially found, in a case all the elements necessary for the estab-where a scaffold had been unskilfully lishment of the charge. constructed, that the delinquent coservopinion as to whether the onus of prov- to accident. ing negligence still lay on the servant after the incompetence of the delin- Co. (1879) 71 Mo. 202. In one case it quent servant was shown. Palles, C. was said that, in the absence of evidence

Roblin v. Kansas City, St. J. & C. B. dence to the master, adopting the theory R. Co. (1893) 119 Mo. 476, 24 S. W. of Deasy, B., in Murphy v. Pollock 1011 (incompetency said to be not even (1863) 15 Ir. C. L. Rep. 224, that, as lor v. Western P. R. Co. (1873) 45 Cal. incompetent at the time of his employment casts upon the master the burden There is, however, some authority for of disproving negligence. Crandall v. the doctrine that proof of the servant's McIlrath (1877) 24 Minn. 127. It is unfitness renders it necessary to submit difficult to see how these decisions can

<sup>2</sup> An instruction which declares, withant was incompetent, but that the de- out qualification, that negligence in hirfendant was not aware of it, and the ing a servant cannot be inferred merely trial judge directed a verdict for the from the fact of his incompetency, is erdefendant. A new trial was awarded roneous, as there may be a degree of inon the ground that the question competency which, of itself, might whether the master had used due justly be regarded by the jury as imcare in the selection of the servant parting notice. East Tennessee, V. & had not been submitted to the jury. G. R. Co. v. Gurley (1883) 12 Lea, 46. Dowse, B., did not express a decided Compare § 198, infra, as to acts prior

B., held that the onus of disproving negas to the exercise of any care in his seligence was transferred by such evilection, proof that a servant who had

197. Bodily and mental qualities of the servant.— As the ultimate and essential question in cases of this type is whether the servant, viewed as a combination of natural and acquired qualities, had the capacity to perform his work properly, discussions of the effect of natural qualities alone, in imparting notice of the unfitness of a person of full age, are not likely to be frequent.<sup>1</sup> The common sense of the matter, however, seems to warrant the proposition that, when such a person, having no obvious mental defect or bodily weakness, offers himself for employment, the master may proceed upon the assumption that he is what he appears to be in these respects, and that any inquiries which may be necessary, in view of the duties contemplated (§ 194, ante), may, without culpability, be restricted to ascertaining whether his character, disposition, education, skill, and experience, are such as to render him competent for the position sought. Compare the principle applicable to the situation dealt with in § 180, ante.

Minority, it is manifest, introduces into the problem a differentiating element which narrows the scope of the allowable presumptions to an extent which varies according to the age of the employee and the difficulty or danger of the duties to be performed. Or perhaps it would be more correct to say that, when a person who is plainly not of full age is being hired, the master is not entitled to the benefit of any presumptions whatever, and that the capacity of

been in the service but two or three Tex. 369. "Proof of facts which show weeks was incompetent when employed the nonexistence of such intelligence, need not be supplemented by proof of the ability, or disposition must be made by company's knowledge of his incompetency, the presumption that the employer had done his duty being overthe person whose qualities may be the come by proof that the servant was insubject of investigation may be of one competent; and the general rule was or another race or color; nor is a jury

souri P. R. Co. v. Christman (1886) 65

competent; and the general rule was or another race or color; nor is a jury laid down as follows: Where one com- at liberty to infer it from such fact. If, petent at the time of his employment however, this were not true, and the becomes incompetent, or indulges in a rule were that a jury might infer that habit which renders him incompetent a person was an unsuitable person for during its indulgence, notice of the in- brakeman from the fact that he was a competency or of the habit must be negro, then such inference would have brought home to the company, or the into be based on the fact that all negroes competency or habit must be so notori- are wanting in intelligence, ability, or ous as to charge the company with disposition to perform faithfully and knowledge; but when the incompetency safely the duties of brakemen. If this does not arise after the employment, were true, the appellee would stand but existed at the time, proof of notice charged with knowledge of their unfitis not necessary. Lee v. Michigan C. R. ness, and, knowing that the brakemen Co. (1891) 87 Mich. 574, 49 N. W. 909. on his train were negroes, would be held 1th has been held that notice of a to have voluntarily assumed such risks servant's want of competency for the as resulted from such incompetency. duties of a brakeman cannot be inferred. The invocation of such a rule would be from the fact that he is a negro. Missuicidal to the appellee's case." that person, so far as it depends on his natural qualities, is to be determined in each particular instance as an open question, with reference to the nature of the work to be done, and the cardinal fact that immature years are usually accompanied by bodily and mental powers lower than the average. Some such principle as this seems to be implied in all the cases cited in § 187, ante, in which the actual question decided was that the minor was or was not incompetent; but the writer has not found any direct authority on the point.

198. Conduct of the servant prior to the accident.— The question whether a single act of negligence can ever be regarded as being of itself sufficient evidence of constructive notice does not seem to have been directly considered. But, on principle, there does not seem to be any adequate reason for denying that, in extreme cases, such an act might bear this significance. Compare § 137, ante (near the end).

According to most of the authorities, evidence of the commission of several acts of negligence prior to that which caused the injury in suit is admissible to establish the master's negligence whenever those acts were so frequent that he would have learned of their commission if he had exercised proper vigilance in supervising the conduct of his servants.2 For the same reason, a jury is warranted in inferring constructive notice on the master's part when, several times before the accident occurred, the servant had been in a condition which showed that he was addicted to a habit which rendered him unfit for his duties.3 This principle is applied subject to the qualification that a

Supp. 914 (habitual violation of rules); purpose of thus proving knowledge of Wall v. Delaware, L. & W. R. Co. acts which are, ex hypothesi, of no evi(1889) 54 Hun, 454, 7 N. Y. Supp. 709 dential significance as regards the in(engine negligently handled in yard on competency of the servant.

numerous occasions); Daly v. Sang

B A verdict finding negligence of the (1895) 91 Wis. 336, 64 N. W. 997 (acts employer in failing to learn of an en-

¹ In Galveston, H. & S. A. R. Co. v. of negligence, extending over two Davis (1898) 92 Tex. 372, 48 S. W. 570, the court expressed an opinion, arguered, that, if there had been competent evidence aliunde that the delinquent servant was a careless man, testimony of negligence stated in the complaint, and evidence to support them. Hicks servant was a careless man, testimony v. Southern R. Co. (1901; S. C.) 38 S. of a certain specific act would have been admissible to show that the master was cater in this respect.

2 Michigan C. R. Co. v. Gilbert (1881)
46 Mich. 176, 9 N. W. 243; Internationated & G. N. R. Co. v. Branch (1900; Tex. Civ. App.) 56 S. W. 542. A verdict for plaintiff was held proper in Whittaker v. Delaware & H. Canal Co. (1891) 126 ton, H. & S. A. R. Co. v. Davis (1893) N. Y. 544, 27 N. E. 1042, affirming 4 Tex. Civ. App. 468, 23 S. W. 303. (1890) 34 N. Y. S. R. 822, 11 N. Y. But it is not apparent what can be the Supp. 914 (habitual violation of rules); purpose of thus proving knowledge of the stablishing that knowledge of the supplementary to the sup

master who has exercised due care in the employment of a servant may rely upon the presumption of competency until he has notice or knowledge to the contrary, and although the employee may frequently use appliances in a negligent manner, yet, if such use leaves no trace behind it, which it is the duty of the master on inspection to see, no presumption of knowledge on his part arises.4 Nor does the law go so far as to hold a railroad corporation to such an extreme of circumspection as to compel it to note, at its peril, every lapse of its employees, where no notice thereof is directly communicated, and where the circumstances are not such as to afford a reasonable presumption that the derelict conduct of the employee had become known to the employer.<sup>5</sup>

In some jurisdictions it is held that the master's knowledge must always be established by independent testimony.6 But this qualification of the rule is admitted,—that, if there is evidence aliunde that the servant was a careless person, even a single act of negligence is proper to consider in relation to the question whether the company had notice of his character. Compare § 188, note, 20, ante.

199. Act which caused the accident. - It has been laid down that the act of negligence which is the subject-matter of the action is not evidence from which a jury is warranted in finding that the master re-

gineer's habit of intoxication was sus- master, though the evidence was sometained in Hilts v. Chicago & G. T. R. Co. (1885) 55 Mich. 437, 21 N. W. 878, \*Walkowski v. Penokee & G. Consol. where there was a special finding that Mines (1898) 115 Mich. 629, 41 L. R. he had been intoxicated, or under the in- A. 33, 73 N. W. 895. fluence of liquor, three times when running his engine. In Tonnesen v. Ross Co. (1883) 78 Mo. 50 (where an en(1890) 58 Hun, 415, 12 N. Y. Supp. gineer had, several times, run his encated as often as two or three times a rural districts). week for a period of nearly two years before the accident, during which time he had been working for the defendant, and that the latter's superintendent was at the place of work every other day, was held to make a question for the jury intercourse with him and had seen him in drinking places, and on some occabions when he drank, and that one of first appeal (1893) 4 Tex. Civ. App. them had reprimanded him for drink-468, 23 S. W. 305. ing, to justify a verdict against the

what conflicting.

150, evidence that a servant was intoxi- gine at excessive speed, but in remote

<sup>6</sup> Olsen v. Andrews (1897) 168 Mass. 261, 47 N. E. 90; Keith v. New Haven & N. Co. (1885) 140 Mass. 175, 3 N. E. 28. A verdict for the plaintiff will not be set aside where one of the plaintiff's coservants gave evidence that the delinas to the master's knowledge, or means quent servant had been intoxicated in of knowledge, of the servant's habits. the master's presence, while engaged in In Chapman v. Erie R. Co. (1874) 55 his duties, and another that such serv-N. Y. 579, evidence that a negligent ant had been so drunk on one occasion servant had been in the habit of drink- as to be compelled to leave his work and ing daily many times, and had become go home, and the superintendent testi-somewhat dissipated, and that he was fied that he had seen the servant drunk intoxicated on the night of the acci- several times, and did not state that dent, was held sufficient, in connection these were not times when the servant with testimony that the master's repre- was at his work. McPhee v. Scully sentatives had been accustomed to daily (1895) 163 Mass. 216, 39 N. E. 1007.

tained him with knowledge of his incompetence. The reason which has been supposed to furnish an adequate basis for this doctrine has already been mentioned in discussing the effect of such evidence, considered as tending to establish the servant's incompetency. criticisms made upon that reason in the section referred to (189, ante), are also pertinent in this place. It seems impossible to deny that the delinquency which caused the injury may be of such a flagrant character that a jury might fairly infer that the master could not have failed to discover the servant's unfitness if proper inquiries had been instituted when he was hired, or his work had been properly supervised. Indeed, this aspect of the situation has been duly taken account of in one decision.2

200. Length of the period during which the unfitness has continued.— Both on principle and authority it is clear that, if the servant's incompetency had continued for such a length of time before the accident that a careful and diligent supervision of the master's business ought to have brought it to light, he is chargeable with notice of its existence. Whether the period in evidence is sufficient for this purpose is in each instance a question of fact.2

ficient to take the case to the jury on as to enable the master to discover and the question of the defendant's imputed remedy it by reasonable vigilance, inknowledge.

master's knowledge of his incompe-safe by use or otherwise. So, when the tency. Meyer's Sons v. Falk (1901) 99 negligence of a coservant in performing

Va. 385, 38 S. E. 178.

1, a verdict by which a railroad company was declared to be negligent in remarker might be chargeable after it had taining a brakeman who had habitually continued for such a length of time as violated a rule was set aside. The folton render it reasonable to assume that violated a rule was set aside. The following extracts from the opinion sufficiently explain the grounds upon which the conclusion was based: "There is no arbitrary rule of law that charges where the incompetency of the servant the master with constructive notice of the negligent omissions of duty on the part of a coservant, after the lapse of a certain time, under all circumstances. Had the power to discharge him. But The doctrine of constructive notice is how was the master in this case to know founded upon reasonable and just con-

<sup>1</sup> Conrad v. Gray (1895) 109 Ala. 130, siderations, and the mere lapse of time is not always the test of negligence on <sup>2</sup> Pleasants v. Raleigh & A. Air Line the part of the master. If a defect ex-R. Co. (1897) 121 N. C. 492, 28 S. E. ists in the appliances furnished the 267, the facts of which are noted in § servant for doing his work, of such a 189, ante. The evidence was held suf-character and for such a length of time spection, or examination, then the law <sup>1</sup>Whittaker v. Delaware & H. Canal will imply notice, since he ought to Co. (1891) 126 N. Y. 544, 27 N. E. know what can thus be ascertained. The 1042. Evidence that an elevator boy same rule will apply where the place had been continually incompetent for furnished to the servant to do his work six months is relevant, as bearing on the becomes defective, dangerous, or unhis work is of such a character as to <sup>2</sup>In Cameron v. New York C. & H. R. leave traces or evidence of it in the R. Co. (1895) 145 N. Y. 400, 40 N. E. work itself, which can be seen or dis-

201. Promise by the master to discharge the delinquent servant.— Such a promise is deemed to be tantamount to an admission that the servant was incompetent, and that the master was aware of his incompetency.1

202. Reputation.—(Compare § 192, ante.)—The doctrine which declares the notoriety of a certain fact in the community where the parties live to be competent evidence of a defendant's knowledge of the fact operates both to the advantage and disadvantage of a master in the type of case now under review.

On the one hand, testimony that the delinquent servant had a general reputation for competency at the time and place of employment is admissible as tending to disprove that the master was negligent in employing him.1

On the other hand, according to the doctrine adopted by most of the authorities, the fact that a servant was generally reputed to be unfit for the work for which he was hired is, in itself, an independ-

his coservants? His work was performed they were done in his presence, or unon freight trains running over a long der his observation, than to imply line of railroad, with little, if any, op- knowledge on the part of the defendant; tive of the company to watch or observe knew of these omissions of duty on the him at any one point. He had sufficient part of his fellow brakeman, and failed ability and intelligence to do his work, to report them, he might be regarded as and his omissions of duty were purely voluntarily assuming the risks and danwilful or thoughtless. It would be gers incident to his association in a manifestly unreasonable and unjust, common work with a careless or incomunder such circumstances, to impute petent coservant. There is a manifest negligence to this defendant for the sole inconsistency in assuming that the officers or representatives of the defendant failed to detect his delinquencies. The knew, or could have known, of Norton's defendant had given him, by its rules, violation of the rules, and at the same plain and simple instructions to govern his conduct with respect to the switches, and there was no reason to suspect that Ill. 472, 38 N. E. 241, held that neglithey would be disregarded, since it was gence in failing to learn of the servthey would be disregarded, since it was gence in failing to learn of the serv-quite as convenient for him to obey as ant's bad habits was properly inferred to violate them. Moreover, it had, in where he had been constantly drinking these same rules, invited and requested to excess for a period of nine months. all of his coservants to make prompt "Poirier v. Carroll (1883) 35 La. report to the company of any neglect or Ann. 699. disobedience of the rules on his part, 'Baltimore & O. R. Co. v. Camp and no complaint had been made. It (1897) 26 C. C. A. 626, 54 U. S. App. was reasonable to assume that his co- 110, 81 Fed. 807; Illinois C. R. Co. v. employees, whose lives might be endan-Morrissey (1891) 45 Ill. App. 127. It gered by his neglect, would observe and should be noted, however, that, as a report his omissions of duty, if any; and master is absolutely liable for the negfault in not discovering what his coserv-reputation of being a careful workman ants themselves had not discovered? The is incompetent, where the ground of the negligent acts of Norton took place action is the delinquency of such agent, while he was working on the same train Malcolm v. Fuller (1890) 152 Mass. and in a like capacity with the deceased. 160, 25 N. E. 83.

rules for his own protection and that of It is more reasonable to suppose that portunity for any officer or representa- and if it can be said that the deceased tive of the company to watch or observe knew of these omissions of duty on the

if they failed to observe any, how can it ligence of a vice principal, evidence on be said that the defendant itself was in the defendant's behalf that he had the ent evidential element, which may be considered by a jury as tending to show that the master, if he had exercised ordinary care, would have discovered that unfitness.2

This view is not approved by the New York court of appeals, which has taken the ground that the safer and better rule is to require that the incompetency of the servant should, in the first place, be proved by evidence of specific acts of negligence. After this founda-

<sup>2</sup> In Monahan v. Worcester (1890) 150 Mass. 439, 23 N. E. 228, the court "The master is bound to use reasonable care in selecting his servants, and if a person is incompetent for the work he is employed to do, the fact that he is generally reputed in the communecessary for the proper performance of the work certainly has some tendency to show that the master would have found out that the servant was incompetent, if proper means had been taken to ascertain the qualifications of the servant." In Davis v. Detroit & M. R. Co. (1870) 20 Mich. 105, 4 Am. Rep. 364, the court said: "If the defendants continue a man in their employ who is so notoriously unfit as to have argues, to suppose the officers of the dewe excuse their want of information on the ground of neglect of duty on their part to their employees and the public, so gross as to make it proper and just to hold them responsible to the same exall the facts. And if they fail to inquire into the cause of accidents, where manifestly this is an important part of their duty, and a high obligation rests upon them to accomplish it thoroughly their principal from responsibility for other accidents resulting from the same cause." For other cases on this point, Dec. 635 (1866) 13 Allen, 433, 90 Am. 253, 25 L. R. A. 710, 29 Atl. 994; Chicago & A. R. Co. v. Sullivan (1872) 63 the other. III. 293; St. Louis, I. M. & S. R. Co. v.

Hackett (1894) 58 Ark. 381, 24 S. W. 881; Lake Shore & M. S. R. Co. v. Stupak (1889) 123 Ind. 210, 23 N. E. 246; Grube v. Missouri P. R. Co. (1889) 98 Mo. 330, 4 L. R. A. 776, 11 S. W. 736; Mexican Nat. R. Co. v. Mussette (1894) 86 Tex. 708, 24 L. R. A. 642, 26 S. W. nity to want those qualities which are 1075; Snodgrass v. Carnegie Steel Co. (1896) 173 Pa. 228, 33 Atl. 1104; Texas & P. R. Co. v. Johnson (1896) 89 Tex. 519, 35 S. W. 1042; Erb v. Popritz (1898) 59 Kan. 264, 52 Pac. 871; Chicago, L. S. & E. R. Co. v. Hartmann (1897) 71 Ill. App. 427; Stoll v. Daly Min. Co. (1889) 19 Utah, 271, 57 Pac. 295. In an action for injuries caused by the negligence of a fellow servant, a special finding that no agent of the employer knew of the latter's unfitness and established a general reputation to that recklessness will not defeat a general effect, it is unreasonable, the plaintiff verdict in favor of the plaintiff, inasmuch as such a finding does not rebut fendants ignorant of that fact, unless the presumption that notice will be presumed, where the employee is so grossly and notoriously unfit that not to know of his unfitness is negligence. Chicago R. I. & P. R. Co. v. Doyle (1877) 18 Kan. 58. In Stevens v. San Francisco tent as if they were fully informed of & N. P. R. Co. (1893) 100 Cal. 554, 35 Pac. 165, the court approved of the re-fusal of the trial judge to permit the plaintiff to prove the general reputation of the delinquent servant for intemperance among his coemployees, but the and faithfully, they cannot afterwards reason assigned was merely that the ofjustly plead their ignorance, to excuse fer was general, and that, if offered for the purpose of affecting the master with notice, it should have been so specified. In Cook v. Parham (1853) 24 Ala. 21, see also Hatt v. Nay (1887) 144 Mass. the court held that the answer of a wit-186, 10 N. E. 807; Gilman v. Eastern ness, that the delinquent servant "had R. Corp. (1865) 10 Allen, 233, 87 Am. no reputation, for the reason that he had no experience, and he regarded him Dec. 210; Western Stone Co. v. Whalen as wholly incompetent" for his duties, (1894) 151 Ill. 472, 38 N. E. 241 (ap- was properly admitted. The statement proving the statement of principles in in the first clause was plainly compe-Shearm. & Redf. Neg. § 223); Norfolk tent, and, no specific objection having & W. R. Co. v. Hoover (1894) 79 Md. been made to the second clause, the court was not bound to separate it from

tion is laid, the second prerequisite to recovery, viz., notice to the master, may be established by showing that the incompetency was generally known in the community.3 In other words, evidence of reputation, not connected with any specific acts of negligence, is deemed not to be admissible to show that the master ought to have known of the servant's incompetency.4 The virtual effect of this doctrine is that the admissible evidence under this head is limited to the testimony showing that certain specific acts of carelessness were so generally known in the community or among the delinquent's fellow servants that they ought to have been known to the master.<sup>5</sup>

Under either of these doctrines, evidence of reputation is only admitted when the injury in suit was due to that particular kind of unfitness for which the servant was notorious,6 and when the unfitness is of such a kind that it may become the subject of a general reputation.7

It is important to remember, that the servant's general reputation

\*Lombrecht v. Pfizer (1900) 49 App. petency was not relevant, and could not Div. 82, 63 N. Y. Supp. 591. "Reputable considered, "unless such reputation tion, general in the community, . . . was brought home to the knowledge of based upon acts or reputed acts of ig-the defendant before the accident." The norance or carelessness, is one thing. court said that the condition thus ap-The mere gossip or speech of people, pended was inaccurate, because, on the that may have no foundation upon acts one hand, if the culpable servant did not even alleged, is another." *McCarty* v. cause the accident, the master's knowl-*Ritch* (1901) 59 App. Div. 145, 69 N. edge of his reputation had nothing to
Y. Supp. 129. In a much earlier case, do with the case; while, on the other
not cited in either of these, it was obhand, if the culpable servant did, by his
served: "Reputation is not competent intemperance, cause the accident, it was evidence to charge a master with negli-immaterial whether the master had act-gence in the employment of a servant, ual knowledge of his bad reputation, because, first, it may be false, and, secinasmuch as he was negligent in not
ondly, he may never have heard it." knowing it. In Walkowski v. Penokee
Haskin v. New York C. & H. R. R. Co. & G. Consol. Mines (1898) 115 Mich.
(1873) 65 Barb. 129. But this theory 629, 41 L. R. A. 33, 73 N. W. 895, it
is more sweeping than that of the rewas held that the incompetency of a

<sup>6</sup> Youngs v. New York, O. & W. R. Co. (1897) 154 N. Y. 764, 49 N. E. 1106. Summarized in Park v. New York C. & H. R. R. Co. (1898) 155 N. Y. 215, 49 N. E. 674.

<sup>6</sup> Hawk v. Pennsylvania R. Co. (1887; Pa.) 9 Cent. Rep. 786, 11 Atl. 459 the screw of the brake was turned in (recklessness); Norfolk & W. R. Co. v. the wrong direction.

Hoover (1894) 79 Md. 253, 25 L. R. A. In Monahan v. Worcester (1890) 710, 29 Atl. 994 (intemperance). In 150 Mass. 439, 23 N. E. 228, the court this case an instruction was held errorefused to say that it might not be a neous which told the jury that unless matter of common repute in a commutate culpable servant was drunk at the nity that a man is physically weak, and time of the accident, and his negligence is partially blind and deaf. by reason of such drunkenness produced

\*Park v. New York C. & H. R. R. Co. or contributed to the accident, evidence (1898) 155 N. Y. 215, 49 N. E. 674. of general reputation as to his incombrakeman, through whose negligence a cage fell to the bottom of a mining shaft, to the injury of an occupant, could not be shown by talk among the men that the employee lowered the cage too fast, when the accident was not due to the rate of speed, but to the fact that

is, of course, only one among many kinds of probative facts, and not the only kind from which the master's notice of the servant's incompetency may be inferred. The servant's general character may have been not only good, but very good, while the defendant had actual knowledge that he was, in point of fact, careless, negligent, reckless, unskilful, and incompetent; or his general reputation may have been that of a sober man, when, in point of fact, the defendant knew that he was in the habit of getting drunk, and that, when drunk, he was desperate and reckless.8

It has been held that negligence cannot be imputed to the master for not knowing the reputation acquired by a servant ten or fifteen years before the accident in suit, at a time when he was still attending school, and had not yet entered the master's employment.9 But the doctrine formulated above, in § 194, ante, as to the duty of the master to inquire into the qualifications of the servant when he is hired. indicates that this immunity must terminate at some point of time anterior to the hiring. Upon what principle that point should be fixed is a question which has apparently not been discussed. Of course, the reputation of the delinquent servant for unfitness at any time during his employment, prior to the accident in suit, is admissible in evidence. 10 Whether it will be allowed any probative force depends upon whether, taking into consideration the ordinary method of conducting the business, it can reasonably be supposed to have reached the master.11

What constitutes a general reputation, for the purpose of affecting a master with notice of a servant's defect, is not very clearly settled by the cases. There is no doubt that this description is answered by a reputation which pervades any considerable territorial section of the community in which he lives. 12 Several cases also proceed upon the

<sup>8</sup> Pittsburgh, Ft. W. & C. R. Co. v. not objectionable for the reason that it Ruby (1871) 38 Ind. 294, 10 Am. Rep. is not distinctly confined to a period 111. In Zunwalt v. Unicago & A. A. Co. (1889) 35 Mo. App. 661, it was said that notoriety as to the bad habits of a gence in regard to the employment of a servant where there is no evidence which a servant where there is no evidence clearly an inaccurate way of stating the rule, as there are other sources of constructive knowledge.

Baird v. New York C. & H. R. R. Co. (1897) 16 App. Div. 490, 44 N. Y. Supp.

Mexican Nat. R. Co. v. Musette (1893) 7 Tex. Civ. App. 169, 24 S. W. 520 (testimony as to such reputation (physical weakness); Park v. New York Vol. I. M. & S.-28,

servant was the only evidence which a servant where there is no evidence could supply the place of evidence of that he had not a good reputation at actual knowledge on the part of the the time of his hiring, or at any other master's representatives. But this is time than during two days during time than during two days during which he had been engaged in making a single trip on a certain train. Van Dusen v. Lake Shore & M. S. R. Co. (1887) 12 N. Y. S. R. 351.

 <sup>12</sup> Gilman v. Eastern R. Corp. (1865)
 10 Allen, 233, 87 Am. Dec. 635 (intemperance); Monahan v. Worcester (1890) 150 Mass. 439, 23 N. E. 228

theory that a general reputation among the coemployees of the delinquent servant is within the scope of the doctrine. 13 It has even been laid down that, where a man is engaged in an occupation which brings him into contact with only one class of a community, the material point is his reputation among that class, and inquiries as to it must be confined to that class.14 But, apparently, under no conception of what is general reputation could it be held that the remarks of a small section of the coemployees are evidence tending to charge a master with knowledge of the unfitness which is imputed by those remarks.<sup>15</sup>

The fact that a servant bore, among his fellow servants, some nickname derogatory of his mental or physical qualities, or his character,

V. Fleet (1900) 49 App. Div. 82, 63 N. cussing the evidence, said: "It is plain Y. Supp. 591; Galveston, H. & S. A. R. however, that Harris is not shown to Co. v. Henning (1897; Tex. Civ. App.) have a general reputation for careless-39 S. W. 302, Affirmed in 90 Tex. 656, ness or unfitness of any description. No 40 S. W. 392, but this point was not one ventures to express an opinion to discussed; International & G. N. R. Co. that effect. The evidence only tends to v. Jackson (1901; Tex. Civ. App.) 62 show that, when an accident occurred, S. W. 91; Warrington v. Atchison, T. remarks were made that he was cared S. F. R. Co. (1891) 46 Mo. App. 159 less, or that he went too fast. They incompetence of negligent servant a were such remarks we suppose as were matter of common talk among his fel- almost certain to be made, in any case, low servants). In one case, the mas- when an unfortunate accident occurs, ter's knowledge of intemperate habits while the consequences are exciting the was held to have been properly inferred, bystanders, and before inquiry and calm where they had been "notorious among consideration have determined whether

15 "The reputation of a foreman supra. amongst a few workmen employed un-

C. & H. R. R. Co. (1898) 155 N. Y. 215, der him is not a general reputation. It 49 N. E. 674. In St. Louis, I. M. & S. is merely the opinion of a small num-R. Co. v. Hackett (1894) 58 Ark. 381, ber of men, of which there is no sufficient reason to suppose the master may reputation was a matter of common be cognizant, or which he may be bound knowledge in the county was held suf-ficient.

163 Mass. 105, 39 N. E. 1003. In Davis <sup>18</sup> Texas & P. R. Co. v. Johnson (1896) v. Detroit & M. R. Co. (1870) 20 Mich. 89 Tex. 519, 35 S. W. 1042; Lambrecht 105, 4 Am. Rep. 364, the court, in disv. Pfizer (1900) 49 App. Div. 82, 63 N. cussing the evidence, said: "It is plain (incompetence of negligent servant a were such remarks, we suppose, as were where they had been "notorious among consideration have determined whether his fellow employees, and long continued." Chicago & A. R. Co. v. Sul- not. Such remarks are of very trifling livan (1872) 63 Ill. 293. And in two importance, and if they would tend to others, where several coemployees testified that he was a very reckless man. gineers of much experience, we appreside that he was a very reckless man. gineers of much experience, we appreside that he was a very reckless man. gineers of much experience, we appreside that he was a very reckless man. gineers of much experience, we appreside that he was a very reckless man. gineers of much experience, we appreside that he was a very reckless man. gineers of much experience, we appreside that he was a very reckless man. gineers of much experience, we appreside that he was a very reckless man. gineers of much experience, we appreside that he was a very reckless man. gineers of much experience, we appreside that he was a very reckless man. gineers of much experience, we appress that the was a very reckless man. gineers of much experience, we appress that the was a very reckless man. gineers of much experience, we appress that the was a very reckless man. gineers of much experience, we appress that the was a very reckless man. gineers of much experience, we appress that the was a very reckless man. gineers of much experience, we appress that the was a very reckless man. gineers of much experience, we appress that the was a very reckless man. gineers of much experience, we appress that the was a very reckless man. gineers of much experience, we appress that the was a very reckless man. gineers of much experience, we appress that the was a very reckless man. gineers of much experience, we appress that the was a very reckless man. gineers of much experience, we appress the very supplied to the very sup 

would seem to be fairly admissible as an element indicative of his general reputation.<sup>16</sup> At all events, it seems proper to say that where such epithets are shown to have been bestowed on a man by any large proportion of his fellow servants, and to have come to the master's ears, prudence demands that inquiries should be made with a view to ascertaining what were the man's real character and capacity.

203. Specific statements as to unfitness made by individual coemployees of the delinquent servant. - A few decisions dealing with the evidential weight of remarks made by the injured servant himself, or by coemployees other than the one whose negligence caused the injury, are to be found reported in the books. The conclusion, in each instance, was adverse to the plaintiff, as will be seen from the subjoined note. But it seems to be fairly open to question whether such statements as those mentioned ought not to be regarded as at least sufficient to put a master on inquiry, where it is shown that they were made in the presence of himself or his representative, or were communicated to them. There is, at all events, no room for doubting that

only evidence going to show the mas- v. Michigan C. R. Co. (1887) 66 Mich. ter's knowledge is the testimony of the plaintiff that he told the master's rep- Compare the cases cited in the preresentative that the delinquent servant ceding section, note 15.

In Park v. New York C. & H. R. R. was incompetent, but there is no eviCo. (1895) 85 Hun, 184, 32 N. Y. Supp.
482, evidence that the culpable servand the master's representative denies ant's general reputation prior to the accident was that he was "a little off," grass v. Carnegie Steel Co. (1896) 173 and that among railroad men he was Pa. 228, 33 Atl. 1104. The mere fact usually called "Crazy Brown," was held admissible to prove the master's knowledge of his unfitness. This decision was reversed by the court of appeals, hands," and told the employer that he as being inconsistent with the doctrine had better get rid of them, will not consumounced in the cases cited in notes 3. 4. and 5. supra. But it seems to be case to the jury. Sunders v. Eticum a reasonable deduction from the less restricted doctrine held in the other Evidence that the yard master of one
states, as explained above. In view of railroad company, who was short a man,
the fact that Illinois is one of the states employed a switchman on the statement in which the court of last resort has applied the latter doctrine (see note 2, that he "had one that he was done with supra), it is difficult to admit the cortectness of a ruling of the Court of Appeals, that evidence that the delinquent insufficient to show negligence on the servant was known by the nicknames of part of the company in hiring him. "Crazy Pete" and the "Wild Irishman," Ohio & M. R. Co. v. Dunn (1894) 138 is inadmissible either for the purpose of Ind. 18, 36 N. E. 702. Rehearing denied showing that the engineer was incom- in (1894) 138 Ind. 28, 37 N. E. 546. A petent or negligent, or for the purpose strong expression of opinion as to the of showing that the employer knew of unfitness of the delinquent servant, uthis incompetence or negligence. St. tered by a mere fellow servant on the Louis, A. & T. H. R. Co. v. Corgan day following the accident, is not competent evidence on that point, as an ad
1 Recovery cannot be had where the mission binding the defendant. Cattin

it is always a question for the jury whether the retention of the servant was negligent, when his superior has reported that he no longer regards him as competent.2

## E. Duty to employ an adequate number of servants.

204. Generally.—A duty of the master which, as a matter of logical arrangement, it seems equally appropriate to associate either with that discussed in the foregoing sections, or with that of conducting the business upon a safe system (see chapter xv., post), is the duty of employing a staff of servants sufficiently large to perform the work with reasonable safety to themselves.1 The fact that some slight inconvenience or expense will be caused by engaging the services of another employee will not excuse the master if the work could not safely be done without him.2

This duty being, like all others, continuous in its quality (see chapter ix., ante), the master is bound to see that the number of servants engaged upon the work in hand remains sufficient to insure the reasonable safety of each of them. This principle affects him with liability, not only where he allows the force of employees, considered as a whole, to fall below the proper aggregate, but also where he fails to assign an adequate number of men to each particular piece of work which may be undertaken from time to time.3 His obligation, in this point of view, is deemed to be violated if he conducts his business

2 Morrow v. St. Paul City R. Co. (1898) 71 Minn. 326, 73 N. W. 973.

1 Flike v. Boston & A. R. Co. (1873)

2 Trainor v. Philadelphia & R. R. Co. (1890) 137 Pa. 148, 20 Atl. 632 (mas-River & L. E. R. Co. v. Barber (1856) ter held liable where the plan adopted 5 Ohio St. 541, 67 Am. Dec. 312; Burke for taking down a pole required the suv. Syracuse, B. & N. Y. R. Co. (1893) perintendence of a competent person, 69 Hun, 21, 23 N. Y. Supp. 458; Mc. but the laborers were left to manage Mullen v. Missouri, K. & T. R. Co. (1893) for themselves).

(1895) 60 Mo. App. 231; Albertz v. Bache (1890) 32 N. Y. S. R. 1014, 10 sion, due to the fact that one of the N. Y. Supp. 639; Jones v. Old Domin-trains was sent out with two instead ion Cotton Mills (1886) 82 Va. 140; of three brakemen, it is not error to reJohnson v. Ashland Water Co. (1888) fuse to charge that, if the jury believed
71 Wis. 553, 37 N. W. 823; Texas & P.
R. Co. v. Rogers (1893) 6 C. C. A. 403, been at his post, the plaintiff could not
13 U. S. App. 547, 57 Fed. 378; Craig recover. It cannot be assumed that, if
v. Chicago & A. R. Co. (1891) 54 Mo.
App. 523. A complaint alleging that
the injury was caused by the inadequacy of the number of men employed
is not demurrable. Supple v. Agnew
Conrad Seipp Brewing Co. (1897) 72
(1901) 191 Ill. 439, 61 N. E. 392, Reversing 80 Ill. App. 437. A ship is
"seaworthy," as regards the sufficiency
of her crew, if the required number can

N. Y. Supp. 639; Jones v. Old Domin-trains was sent out with two instead ion Cotton Mills (1886) 82 Va. 140; of three brakemen, it is not error to re-

on a system which ignores the physical needs of his employees to such an extent that they cannot obtain the food necessary for the support of their bodily strength without absenting themselves from their posts.<sup>4</sup> In its application to cases of this type, the doctrine invades, to some extent, a domain of facts in which it is apt to conflict with that which declares the master to be free from liability for injuries caused by conditions arising out of the mere details of the work. See chapter xxxII., post. So far as the movements of servants may depend upon their own volition, and are not in any way affected by the control of a superior, it is clear that there can be no recovery on the theory that the number of servants was temporarily inadequate at the time and place where the injury was received, unless it is shown that such inadequacy was known, actually or constructively, to the master or his representative.5

In a purely logical point of view, it is possible to refer to the conception of an inadequacy of the force employed in the cases in which the negligence alleged is the failure to detail a servant to give warning of the approach of danger. But, for the purposes of classification, it seems preferable to treat these cases as exemplifying a breach of the duty to conduct the business on a safe system. They are therefore collected under §§ 209, 210, post.

A situation which, in its practical results upon the servant's safety. is identical with that produced by hiring an insufficient number of employees, arises when an employee is given an excessive amount of work to perform. To enable him to recover on this ground, it must be shown that some part of the other work which he had to perform interfered with or prevented his doing something which he might and ought to have done to prevent the accident in suit.6

205. Master's performance of duty primarily a question for the jury.— Whether the master has, in any particular instance, fulfilled his obligation to employ a sufficient number of servants is primarily

was unattended).

<sup>\*</sup>Pennsylvania Co. v. McCaffrey \*White v. Sydney & L. Coal & R. Co. (1894) 139 Ind. 430, 29 L. R. A. 104, (1893) 25 N. S. 384. Whether a rail-38 N. E. 67 (railway time table arway company is negligent in employing ranged so as to produce this result). no more than one watchman to look ranged so as to produce this result).

\*\*Parker v. New York & N. E. R. Co.\*\* after the live engines in a yard, and (1895) 18 R. I. 773, 30 Atl. 849 (mere prevent them from being tampered with, fact that a substitute did not remain is a question for the jury, where the at a switch continuously during the watchman has also to perform the dutemporary absence of the regular ties of a wiper. Southern P. Co. v. switchman cannot properly be construed by the jury as an implied notice to the company that said switch gines got out on main track in some unexplained manner). unexplained manner).

a question of fact, to be determined by the jury. But a finding of negligence in this regard is not warrantable where there is nothing to show that the accident was one which should have been anticipated.2

The fact that the number of servants was smaller than usual on the occasion when the accident occurred is one which tells with especial force against the master.<sup>8</sup> But evidence to that effect will not establish negligence, where it appears that the safety of the other servants is sufficiently secured by the methods actually adopted in the performance of the work.4

It has been held that an action cannot be maintained where there is no evidence of a general usage to engage a servant to perform the

Ill. App. 437. A railroad company is station where there is an unblocked sidnot, as a matter of law, free from negliing can be predicated, in the absence of gence in having only one brakeman to control ten loaded cars in descending a grade to a place where they are to be coupled to a stationary car. Georgia P. R. Co. v. Propst (1889) 90 Ala. 1, 7 So. 635. An instruction is too broad which declares that a railroad company is negligent, as a matter of law, towards the employees operating a freight train, in failing to furnish a conductor, where a passenger coach is attached. Means v. Carolina C. R. Co. (1898) 122 N. C. 990, 29 S. E. 939. On the second and third appeals of this case recovery was senger train, and not merely a freight train which picked up passengers now and then. (1899) 124 N. C. 574, 45 L. R. A. 164, 32 N. E. 960, and (1900) 126 N. C. 424, 35 S. E. 813.

Verdicts have been upheld which were based on the theory that a railway company is bound to see that a derrick provided for the use of shippers, the arm of which is liable, when not fastened, to swing out over the track, and so endanger trainmen, is placed under the charge of a competent servant, so that it may be kept properly fastened when not in use. (Gates v. Chicago, M. & St. P. R. Co. [1892] 2 S. D. 422, 50 N. W. 907); and that a railway company must keep enough trackmen, not only to supervise the line under ordinary circumstances, but also for extra-pany broke custom of sending out wordinary occasions, as after a rainstorm, trains equipped with a conductor). when it needs a more minute inspection. (Hardy v. Carolina C. R. Co. [1877] 76 N. C. 5).

\*Supple v. Agnew (1901) 191 III. \*No obligation on the part of a rail-439, 61 N. E. 392, Reversing (1898) 80 way company to keep an agent at a flag ing can be predicated, in the absence of evidence that the track is in such a condition that there is danger that cars may escape onto the main line. Hewitt v. Flint & P. M. R. Co. (1887) 67 Mich. 61, 34 N. W. 659. The owner of a steamer, tied up for the winter, is not bound to keep a night watchman on board, to lessen the risk of injury from fire to which members of the crew, who are sleeping on board, are exposed. Lang v. H. W. Williams Transp. Line (1898) 119 Mich. 80, 77 N. W. 633.

<sup>3</sup> South West Improv. Co. v. Smith (1888) 85 Va. 306, 7 S. E. 365 (verdict allowed on the ground that the train for plaintiff proper, where loaded coal in question was actually a regular pasing to there being only one brakeman on duty, instead of two, as was usual); Thorpe v. Missouri P. R. Co. (1886) 89 Mo. 650, 58 Am. Rep. 120, 2 S. W. 3 (verdict for plaintiff proper, where the switching crew, of which he was one, was smaller than usual, and he was injured while coupling cars, owing to the fact that his signals to the engineer were not transmitted); Stoddard v. St. Louis, K. C. & N. R. Co. (1877) 65 Mo. 515 (not error to refuse to direct a verdict for the defendant, where the master's representative had been notified that one of the regular hands was too sick to attend to his duties, and no

substitute was provided).

<sup>4</sup> Gulf, C. & S. F. R. Co. v. Compton (1890) 75 Tex. 667, 13 S. W. 667 (company broke custom of sending out water

functions in question;<sup>5</sup> and that the master cannot be held liable on the ground that, although the customary number of servants was engaged on the work to be done, use might have been made of an additional servant on the occasion when the accident occurred, with the possible result of preventing it.<sup>6</sup> But the controlling significance thus ascribed to usage is not conceded in all jurisdictions. See § 50, ante.

The absence of such evidence was one of the grounds of the decision in R. Co. (1892) 112 Mo. 86, 18 L. R. A. Lang v. Williams Transp. Line (1898) 817, 20 S. W. 480 (rear collision of two 119 Mich. 80, 77 N. W. 633, cited in freight trains equipped with the customary number of brakemen).

### CHAPTER XIV.

#### DUTY OF THE MASTER WITH REGARD TO ANIMALS.

As to animals, considered as a part of the master's "plant," as that word is used in the employer's liability acts, see chapter xxxvII., post.

206. Nature of duty explained.—It is well settled that a servant may recover for injuries caused by an animal which the master uses as a part of his industrial appliances, or keeps on the premises for other purposes, if it is vicious, or in some other way dangerous to persons doing work by its agency, or in its neighborhood, and the master was, or ought to have been, aware of its bad qualities.1

Wherever the animal is used as an industrial appliance, the necessity of proving the master's knowledge may be regarded as being simply an application of the general principle discussed in chapter x. But in other instances the requirement may be viewed either from this standpoint, or with reference to the old rule of the common law that the scienter of the owner of a vicious or mischievous animal is the gist of an action against him for any injuries which it may inflict upon persons or property.2

A specific and independent cause of action may be predicated of the

a vicious dog (Farley v. Picard [1894] bolting horses (Moffatt v. Bateman 78 Hun, 560, 29 N. Y. Supp. 802); a vi- [1869] L. R. 3 P. C. 115, 22 L. T. N. S. cious horse (Knickerbocker Ice Co. v. 140, 6 Moore P. C. C. N. S. 369); un-Finn [1897] 25 C. C. A. 579, 51 U. S. trained horses (Wilson v. Boyle [1889] 442, 28 So. 380; Leigh v. Omaha Street use a horse which he knew to be unfit R. Co. [1893] 36 Neb. 131, 54 N. W. 134; for the work is sufficient to take the R. Co. [1893] 36 Neb. 131, 54 N. W. 134; for the work is sufficient to take the George H. Hummond Co. v. Johnson case to the jury. Orichton v. Keir [1893] 38 Neb. 244, 56 N. W. 967; Green & C. Street Pass. R. Co. v. Bresmer [1881] 97 Pa. 103; Gray v. Germania & Redf. Neg. p. 633; Shearm. [1881] 97 Pa. 103; Gray v. Germania & Redf. Neg. § 628. This rule, and not Gas Coal Co. [1894] 164 Pa. 508, 30 Atl. the general principle mentioned in the 397; Cooper v. Portner Brewing Co. text, was the basis of the decision in [1901] 112 Ga. 894, 38 S. E. 91; Martin Clark v. Armstrong (1862) 24 Sc. Sess. v. Wrought Iron Range Co. [1893] 4 Cas. 2d series, 1315 (farmer not bound Tex. Civ. App. 185, 23 S. W. 387; Wiltokeep a bull confined and shut up, on son v. Sioux Consol. Min. Co. [1898] 16 the chance that it may injure one of Utah, 392, 52 Pac. 626; Fraser v. Hood

<sup>1</sup> This rule was applied in the case of [1887] 15 Sc. Sess. Cas. 4th series, 178); App. 256, 80 Fed. 483; Bessemer Land 17 Sc. Sess. Cas. 4th series, 62). An & Improv. Co. v. Dubose [1899] 125 Ala. averment that the master continued to failure of the master to warn the servant of the unsafe character of an animal.<sup>3</sup> See chapter xvi., post.

As in the case of other appliances, the servant's knowledge of the danger to which he is exposed by an animal is, in most jurisdictions, deemed to be conclusive proof that he assumed the resulting risk.<sup>4</sup> See chapter xvII., post.

As to the duty to adopt a safe system, in so far as it relates to the duty of inspection, see chapter xi., ante.

As to the employment of a sufficient number of servants, see chapter xIII., ante.

As to the evidential significance of the master's violation of or compliance with one of his own rules, see § 16, ante.

<sup>&</sup>lt;sup>8</sup> Bowman v. Texas Brewing Co. deer and elk are kept in the inclosure in (1897) 17 Tex. Civ. App. 446, 43 S. W. which he is to do his work. Bormann v. Milwaukee (1896) 93 Wis. 522, 33 As, where an employee knows that L. R. A. 652, 67 N. W. 924.

### CHAPTER XV.

# DUTY OF THE MASTER TO CONDUCT THE BUSINESS UPON A SAFE SYSTEM.

- A. DUTY CONSIDERED WITHOUT REFERENCE TO FORMAL RULES.
  - 207. Master bound to see that the instrumentalities are properly used.
  - 208. Application of this doctrine in specific cases.
  - 209. Duty to warn a servant in regard to transitory and sporadic dangers.
  - 209a. Limits of this duty.
- B. DUTY TO FORMULATE RULES DEFINING THE MANNER IN WHICH THE WORK IS TO BE DONE.
  - 210. Generally.
  - 211. Limits of the duty to promulgate rules.
  - 212. Relation of this duty to that of instruction.
  - 213. Common usage as a test of the performance of the duty.
  - 213a. Habitual practice; how far a legal substitute for a rule.
  - 213b. Duty to bring the rules to the notice of the servant.
  - 214. Duty to enforce the rules promulgated.
  - 215. Construction and meaning of rules.
  - 216. Rules prescribed must be definite and intelligible.
- C. PERFORMANCE OF THE DUTY IN SPECIFIC CASES.
  - 217. Operation of trains considered with reference to the safety of train crews.
    - a. Generally.
    - b. Rules as to the meeting of trains.
    - c. Rules as to notifying the crews of regular trains regarding the position of other trains of the same class.
    - d. Rules as to the operation of trains not provided for in the regular time tables.
  - 218. of employees engaged in track work.
  - 219. of car repairers.
  - 220. of employees working in yards.
  - 221. Automatic and unauthorized movements of cars.
  - 222. Track repairing as it affects the safe operation of trains.
  - 223. Loading of cars.
  - 224. Work in concerns other than railways.
- D. WHEN A RULE IS BINDING UPON A SERVANT.
  - 225. Introductory statement.
  - 226. No rule deemed to be binding unless it is brought to the knowledge of the servant.
  - 227. When a servant is deemed to have knowledge of a rule.
  - 228. Reasonableness.
  - 229. Rules making servants the insurers of their own safety.
  - 230. Rules requiring the servant to examine the appliances used by him.

stre language of an eminent English judge in a noted esponsible to his workmen for personal injuries occaective system of using machinery, than for injuries ect in the machinery itself," or, in other words, that ponsible, in point of law, not only for a defect on his g good and sufficient apparatus, but also for his failthe apparatus is properly used."

omplaint is not demurrable where the unsafety of the las the cause of the injury.<sup>2</sup> Nor should a verdict be

in Smith v. Baker case the injured servant was not in the

53, 60 L. J. Q. B. N. employ of the defendant. An employer S. 467, 40 Week. Rep. is bound "so to carry on his operations referring to the opinas not to subject those employed by 18 as not to subject those employed

a like principle in <sup>2</sup> Reagan v. St. Louis, K. & N. W. R. & Y. R. Co. (1858) Co. (1887) 93 Mo. 348, 6 S. W. 371; 3, 27 L. J. Exch. N. Snyder v. Cleveland, C. C. & St. L. R. S. 364. But in this Co. (1899) 60 Ohio St. 487, 54 N. E.

directed for the defendant on the ground that the injury was caused by a fellow servant's negligence, where such unsafety is one of the grounds of recovery relied upon, and the charge is supported by evidence.3

As already observed in § 9, ante, the scope of the duty now under review is very considerably restricted by the operation of the doctrine of common employment, a result which follows naturally and unavoidably from the fact that the persons who use the instrumentalities, or direct them to be used in certain ways, are themselves almost invariably employees. In fact, it may be laid down broadly that, except in those instances where the master himself supervises the work (see § 10, ante), or the method under discussion was put into operation with his direct sanction, the first stage in the investigation of a servant's right to recover on the ground of the imperfection of the system of work must always be the establishment of either of two conclusions, viz.: (1) That the performance of a non-delegable duty was involved; or (2) that the employee who made the arrangements alleged to be negligent was a vice principal by virtue of his official position.

If there is any evidence which tends to show that the system of work adopted by the defendant was an improper one, it is error to dismiss the action.4

Negligence cannot be predicated of the mere fact that a master has permitted his servants to put an appliance, more or less fre-

(1896) 23 Sc. Sess. Cas. 4th series, 504. while racing with another). In Reed v. Northeastern R. Co. (1891)

4 Fairweather v. Owen Sound Stone
37 S. C. 42, 16 S. E. 289, a complaint Quarry Co. (1895) 26 Ont. Rep. 604.
was held not to be demurrable which There it was held that there could be no ant had left open the switches leading injury through the negligence of the to a "Y" line and spur, and that a train company's manager; but it was deemed averments did not necessarily imply

475; Macdonald v. Udson Coal Co. train running with unusual rapidity

alleged that the plaintiff's decedent was recovery in so far as the plaintiff's claim killed owing to the fact that the defend- rested on the fact that he had suffered was consequently derailed. The basis necessary to send back the case for a of the decision apparently is that the new trial, for the reason that the jury had not been asked to consider certain that the condition of the switches was testimony which was to the effect that that the condition of the switches was testimony which was to the effect that due to the negligence of a fellow servent.

\*\*McKillop\* v. North British R. Co.\*\* failed to explode; that a dangerous tool, (1896) 23 Sc. Sess. Cas. 4th series, or one not sufficiently guarded, was in 768; Gibson v. Nimmo (1895) 22 Sc. use for this purpose; and that the plant Sess. Cas. 4th series, 491. A nonsuit is was furnished by the directors of the improper where, so far as appears, the company. The court considered that act of the fellow servant which caused the manner of working the cuerry cought. act of the fellow servant which caused the manner of working the quarry ought the injury may have been authorized by to be known to the defendant corporather rules of the defendant. Dick v. Intion, and that they should be answerdianapolis, C. & L. R. Co. (1882) 38 able if the system is dangerous or negOhio St. 389 (section hand struck by ligently conducted.

quently, to a use for which it was not intended. Such a situation is, however, viewed somewhat differently if the conduct of the servants amounted to an infraction of an express rule. See § 232, post.

208. Application of this doctrine in specific cases.— Negligence in respect to the system upon which the master's business is conducted is imputable where a servant is given more work than he can perform efficiently; where the space in which a servant is required to perform a duty is not sufficiently large for the work to be done; where an instrumentality is put to uses to which it is not adapted; where the methods adopted for getting heavy objects on to or off of railway cars and other vehicles are dangerous;4 where the methods of handling the cargoes of vessels expose the servants to undue perils;5 where no proper precautions are taken to protect car repairers; or where railway rolling stock is moved in such a way as to expose employees to unnecessary risk.7

they choose to do so for their own con-333.

<sup>1</sup> See § 204, note 5, ante.

railway. Welsh v. Moir (1885) 12 Sc. Sess. Cas. 4th series, 590. See also §§ 26-28, ante.

A foreman of a section gang enthe ties over the side of the car. Clay-raised as to its sufficiency. See also §§ baugh v. Kansas City, Ft. S. & M. R. 209, 219, post.

Co. (1894) 56 Mo. App. 630. In South-railway company which permits ern Kansas R. Co. v. Moore (1892) 49 its tracks to become unsafe should be

After laying down the rule that it On the other hand, it has been held that was no part of the defendant's obligance cannot be inferred where the tion to furnish an appliance which method adopted for loading rails on should be safe for any illegitimate use, flat cars was for the men to lift a rail, the court remarked: "We know of no walk with it to a car, and, when they principle which imputes negligence to reached the car, to line up, and at the an employer under such circumstances, word of command throw it, by a commercily because he permits his workmen bined effort, on the car. Coyne v. Unto relax his regulations or disregard his ion P. R. Co. (1889) 133 U. S. 370, 33 general instructions or advice, when L. ed. 651, 10 Sup. Ct. Rep. 382.

<sup>5</sup> A steamboat which attempts to devenience, and with knowledge of the liver freight without mooring, when risk." The Persian Monarch (1893) 5 certain danger to the crew is necessa-C. C. A. 117, 14 U. S. App. 158, 55 Fed. rily involved, is liable for the drowning of an employee by falling from the stage plank on its withdrawal from the <sup>2</sup> Cole Bros. v. Wood (1894) 11 Ind. shore, made necessary to save her App. 37, 36 N. E. 1074. smokestacks, while such employee is ac-<sup>8</sup>As, where a traveling crane is used tually crossing the plank. *Cheatham* to tear up the rails of an old line of v. *Red River Line* (1893) 56 Fed. 248. See also § 209, notes 3 and 4, post.

° In St. Louis, A. & T. R. Co. v. Triplett (1891) 54 Ark. 289, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 266, the gaged in loading ties upon cars is un- court, alluding to the fact that one of der the duty to adopt some extra pre- the precautions taken by some of the caution to guard against accident to a railroad companies is to place locks subordinate placed in a car in such a upon the switches, said that, if the deposition that at times he cannot see fendant had adopted that precaution, what is being done by those throwing no question could presumably have been

Kan. 616, 31 Pac. 138, a servant was al- held to an increased responsibility for lowed to recover on the theory that the manner in which its trains are run some special appliances ought to be fur- over such tracks. Wilson v. Louisiana nished, for the purpose of facilitating & N. W. R. Co. (1899) 51 La. Ann. the work of loading rails on flat cars. 1133, 25 So. 961. Negligence is infer-

Culpability is also inferable where there are no proper arrangements for guarding stationary locomotives, so as to prevent them from

S. W. 1090. A railroad company cannot be found guilty of negligence toward an employee killed on its track, night. Baltimore & O. S. W. R. Co. v.
for the reason that, in a yard where Alsop (1898) 176 Ill. 471, 52 N. E. 253,
trains are moving almost constantly, it
starts a train while a dense smoke has
settled down on the track from the locomotive of another train. Moore v.
weighed, while in motion, as they were
Great Northern R. Co. (1897) 67 Minn.
kicked one by one, while loaded, over
394, 69 N. W. 1103. It is not negliscales, was injured in consequence of
gence, as a matter of law, for a railway
failing to get out of the way of one
company to permit its cars to run unwhich he alleges was coming faster then
attended in its vard, though it would usual, the mere fact that it was moving attended in its yard, though it would usual, the mere fact that it was moving probably be otherwise if moving cars at more than the usual rate of speed, them, in places where the public were cept his assertion that the cars could allowed to be on the tracks. Kelley v. have been sent over the scales at a Chicago, M. & St. P. R. Co. (1881) 53 lower rate of speed, is not sufficient to Wis. 74, 9 N. W. 816. It is not neglishow negligence on the part of the comgence, as a matter of law, to shunt cars pany, where he testifies that twice begine, unattended by a brakeman or and he had refused to make the coup-& M. S. R. Co. (1893) 97 Mich. 318, 21 On the ground of compliance with comhad, in his charge, improperly ignored Hunt v. Hurd (1900) 39 C. C. A. 226,

able where, by the arrangements of a (1882) 11 Daly, 122 and Campbell v. railway company, train hands were rePennsylvania R. Co. (1887; Pa.) 2 Atl.
quired to run cars along a trestle until 489, where employees were denied rethey came very close to a place where it covery on the ground that they were ceased to be safe, there being nothing to aware of the manner in which the comindicate the point at which the defective pany was accustomed to do the shuntpart began. Paulmier v. Erie R. Co. ing of its cars in its yards. Whether (1870) 34 N. J. L. 151. An elevated a railroad company was guilty of negstreet railroad company is not liable for ligence toward an employee killed by beinjuries resulting in the death of a ing run over by a train is for the jury, workman employed on the track, mere- where he was crossing one of six parly because it allowed trains to closely allel tracks in the course of his employfollow one another. Bruen v. Uhlmann ment at the time of the accident, and (1899) 40 App. Div. 620, 60 N. Y. by reason of frequent passing of trains Supp. 222, denying rehearing (1898) 30 and the large number of men employed App. Div. 453, 51 N. Y. Supp. 958. the work was extremely hazardous, and Where men are at work in foggy weath- the foreman undertook to direct the er on a trestle over which trains are run time of crossing the tracks, and there is at intervals, the company is bound to evidence that the train approached take such precautions as are proper in noiselessly, and, owing to a storm and view of the atmospheric conditions. In- the darkness, was observable only a few ter-State Consol. Rapid Transit R. Co. car lengths, and even at that distance v. Fox (1889) 41 Kan. 715, 21 Pac. it could not be ascertained whether it 797. Whether the custom of pushing was moving or not. Illinois C. R. Co. flat cars ahead of the engine is negli- v. Gilbert (1895) 157 Ill. 354, 41 N. E. gent is a question for the jury. For- 724. It is a high degree of negligence dyce v. Lowman (1893) 57 Ark. 160, 20 toward an employee required to trav-S. W. 1090. A railroad company can- erse the track in the nighttime, to run were left without some one to control with no other proof of negligence exby kicking them backward by an en- fore they had come as fast as this one, lookout, in a yard where trains are beling. Woods v. St. Paul & D. R. Co. ing made up. Schaible v. Lake Shore (1888) 39 Minn. 435, 40 N. W. 510. L. R. A. 660, 56 N. W. 565. The ground mon usage it has been held that it is of the decision was that the trial judge not negligent to make flying switches. the element of the servant's knowledge 98 Fed. 683; Gorman v. Minneapolis & of the risk caused by this system of St. L. R. Co. (1889) 78 Iowa, 509. 43 shunting. The authorities followed were N. W. 303. For the same reason there Murphy v, New York C. & H. R. R. Co. is no negligence in starting a train

being put into motion by the careless or wilful act of strangers;8 where a siding is constructed on an inclined plane, without special precautions to prevent the escape of rolling stock on to the main line;9 where a switch which it is the company's duty to keep closed is left open;10 where workmen are not properly protected from dangers to be anticipated from the ordinary movements of vehicles in the public streets;11 where no proper measures are taken to prevent a dangerous current of electricity from being sent over a wire at a time of the day when lamps are customarily trimmed;12 where workmen are not protected from heavy fragments of metal which are apt to be caught up by a large cogwheel and thrown about the room in which they are engaged; 18 where the arrangement of the plant is such that servants handling explosives are exposed to unnecessary dangers;14 where proper supervision is not exercised, with a view to

without a snow plough and two engines to force a passage through a snow drift.

Bryant v. Burlington, C. R. & N. R. Co. (1885) 66 Iowa, 305, 55 Am. Rep. 275, 23 N. W. 678. It is not negligence to subject the couplings of cars to the additional strain caused by the use of two engines to draw the train. Hawk v. Pennsylvania R. Co. (Pa. 1887) 9 Cent. to run off a side track before reaching Rep. 786, 11 Atl. 459 (plaintiff's contention was that one of the engines should have been used as a "pusher"). Johnson (1900) 23 Tex. Civ. App. 160, Backing a gravel train when a road is under construction is not negligence. Carr v. North River Constr. Co. (1888) Backing a gravel train when a road is under construction is not negligence.

Carr v. North River Constr. Co. (1888) runs against a guy rope stretching from 48 Hun, 266. Compare § 29, ante.

Whether or not a company is negligent done at night, and thereby causes a in failing to designate, by a clearing servant engaged in that work to fall to post or otherwise, the distance at which cars on the repair track should be placed from the lead track, and so liaprotect his employees by setting danger ble to a car repairer injured by reason of the tender of a passing engine on the lead track striking a car on the result on the ground that, when the work pair track is for the jury, where there was begun, he furnished an adequate Texas & P. R. Co. (1895; Tex. Civ. (1900) 40 C. C. A. 69, 99 Fed. 679.

App.) 33 S. W. 737; former appeal "Harroun v. Brush Electric Light (1893) 4 Tex. Civ. App. 25, 23 S. W. Co. (1896) 12 App. Div. 126, 42 N. Y.

47. In McDonald v. Chicago, St. P. M. Supp. 716, Appeal dismissed in (1897) & O. R. Co. (1889) 41 Minn. 439, 43 N. 152 N. Y. 212, 38 L. R. A. 615, 46 N. W. 380, it was held to be negligence as E. 291. regards an experienced servant to adopt <sup>18</sup> Richlands Iron Co. v. Elkins the method of turning an engine upon a (1893) 90 Va. 249, 17 S. E. 890. Comthe method of turning an engine upon a (1893) 90 va. 249, 11 S. E. 690. Comturnable by means of another engine, pare note 5, supra.

14 The system of work at a quarry is tending between them. Other cases incogligent where a steam crane is placed volving situations similar to those presented in the above note will be found in such a position that the live cinders thrown out by the boiler furnace frequently fall at a place where workmen

pair track, is for the jury, where there was begun, he furnished an adequate is evidence that a point of safety could supply of lamps which they might have

protecting the servants against falling bodies; 15 where the arrangements made for giving signals for the movement of machinery are not such as are calculated to secure the safety of the servants whom that movement may endanger.16

If the servants employed are not competent for the work to be done unless they are under proper supervision, the master fails to perform his duty to have competent servants, where he has not arranged to have such supervision exercised at the time it is required.<sup>17</sup>

Whether the system of work is to be deemed negligent will sometimes depend upon the skill and experience of the servant who is seeking recovery. 18 See, generally, chapter vii., ante.

For other cases which might, as a mere matter of logical classification, be placed under the head of the master's duty to provide a safe system, see §§ 86, 98, 102, 103, 105, 107, ante.

As to common usage as a test of the quality of the methods of work, see § 46, ante.

209. Duty to warn a servant in regard to transitory and sporadic dangers.—One very common aspect of the duty to provide a safe system is presented in those cases in which the gravamen of the complaint is a breach of the obligation to warn a servant against perils arising from the manner in which the instrumentalities are affected by isolated events which occur at more or less frequent intervals during the performance of the servant's work, but which produce no permanent effect upon the intrinsic condition of the instrumentalities themselves. The distinctive feature which is common to actions to recover for injuries caused by such perils is that the environment of

are putting in blasts, and no arrange- Pa. 148, 20 Atl. 632; McCarthy v ments are made for intercepting those Thomas Davidson Mfg. Co. (1899) einders. Grant v. Drysdale (1883) 10 Rap. Jud. Quebec, 18 C. S. 272. See Sc. Sess. Cas. 4th series, 1159.

15 Di Vito v. Crage (1898) 35 App.

16 An employer is not, as a matter of Div. 155, 55 N. Y. Supp. 64 (rock which law, free from negligence in directing land heap through by a praying black on a princepting of the law.

had been thrown by a previous blast on an inexperienced employee to hold one to top of the bank underneath which a end of a plank the other end of which to top of the bank underneath which a end of a plank the other end of which servant was put to work fell on him). rests on a wagon for the purpose of un
16 As regards coal miners engaged in loading a heavy barrel by means thereplacing loaded hutches on the hoisting of. Beard v. American Car Co. (1895)
cages, it is negligence not to provide a 63 Mo. App. 382 (the barrel struck the bell for signaling the engineer of the inner end of the plank off of the wagon hoisting apparatus, and to appoint an on to the ground, and, falling upon it, caused such a shock as to break the the hutches and to regulate the ascent servant's wrist. The point was that and descent of the cages. Murdoch v. this method of unloading would not Mackinnon (1886) 12 Sc. Sess. Cas. 4th have been dangerous to an experienced workman who understood how far the series, 810.

\*\*McElligott v. Randolph (1891) 61 plan's should have extended inside the Conn. 157, 22 Atl. 1094; Trainor v. wagon to prevent its being pushed off).

\*Philadelphia & R. R. Co. (1890) 137 the servant undergoes some temporary change. A warning appropriate to such circumstances may be given in the shape of a general instruction. It must, then, be such as to put the servant upon his guard, either by notifying him of the time and place where he may expect the change to occur, or, at all events, by notifying him that, within certain limits, the change may occur, at any time, and any place. (See below.) Or the warning may take the form of some signal informing the servant that the change is imminent. In either case, the danger to be provided for will often be such that the servant's safety can be effectively secured only by directions in the nature of rules promulgated beforehand for the guidance of all the servants, both those who are to be protected against sporadic dangers and those whose acts may produce such dangers. The logical relation thus indicated is deemed to be a sufficient warrant for considering this obligation as one which arises out of the duty to conduct the business on a safe system. In a merely logical point of view, however, it might, with perfect propriety, be discussed in connection with the general obligation of keeping the servant informed as to dangers which he has no means of ascertaining himself. See next chapter.

One phase of the obligation is indicated by the principle that the master is bound to see that no order with respect to change of position of the subject of the work shall be executed without due warning to the employee. This principle is exemplified in a class of cases involving injuries of a type very common in the great industrial establishments of modern times,—injuries, that is to say, produced by the fact that some heavy object not under the control of some particular servant passes at intervals along certain lines through the space in which a servant is required to work. The special danger to be anticipated from such an event arises from the fact that the servant's coemployees, whose duty it is to regulate the movement of the heavy object, be they ever so vigilant, will often find it impossible to save him from injury by a warning given immediately before the entrance of the object into the space, where there is a danger of its impinging either upon his own person, or upon some object which will thereby be set in motion to his injury, and that the servant himself will often be unable, consistently with giving adequate attention to his duties. to keep a proper watch for the approach of the object. The situation, therefore, is one in which the highest degree of care on the part of the servants themselves cannot always avert a catastrophe, and in

<sup>&</sup>lt;sup>1</sup> Stewart v. Philadelphia, W. & B. R. Co. (1889) 8 Houst. (Del.) 450, 19 Atl. 639 (charge to jury). Vol. I. M. & S.—29.

which the adoption of suitable precautions by the master is calculated to diminish very greatly the risk of such a catastrophe. Under such circumstances it is reasonable to infer the existence of an absolute duty on the master's part to make arrangements for imparting a timely warning to any servant who may be imperiled by such a cause.

The most numerous illustrations of the duty to give warning are furnished by those cases in which the danger was produced by the movements of railway rolling stock, or other similar appliances.2

 $^2$  Negligence may be inferred where M. & S. R. Co. (1897) 49 La. Ann. no system of signals has been provided 1166, 22 So. 366. A complaint relying for warning track laborers in a tunnel on the theory that a railroad company as to the movements of trains. Felice owes a station agent who was engaged v. New York C. & H. R. R. Co. (1897) in unloading a car, requiring his pres-14 App. Div. 345, 43 N. Y. Supp. 922. ence on the main track, the duty of giv-Though there is no rule requiring the ing warning of the approach of a train dispatcher to notify an engineer freight train on the main track, is not of the whereabouts of a train with demurrable, as it may have been that which he is liable to collide, it is his strict attention to the work in which duty, when knowing that a train, which he was engaged was inconsistent with has orders to and is making 25 miles constant watchfulness for approaching an hour, is only ten minutes behind a trains. Snyder v. Cleveland, C. C. & train allowed to make but 16 miles an St. L. R. Co. (1899) 60 Chio St. 487, 54 hour, and which is three hours late, to N. E. 475. In the following case the Houston doctrine is laid down that, independent-de T. C. R. Co. v. Higgins (1900) 22 ly of the rules prescribed by the com-Tex. Civ. App. 430, 55 S. W. 744. It pany, it owed a duty to its yard switchis negligence to omit to notify the emment of give a signal of the movement of ployees who are dispatching an extra an engine, where such has been the cusfreight train by night, that the track is tom. Sobieski v. St. Paul & D. R. Co. obstructed at a yard which the train (1889) 41 Minn. 169, 42 N. W. 863. will reach within an hour after start- Irrespective of a statute, the starting or ing, and also negligence to omit to normal results of the yard that the yard filled with a network of tracks, train is coming. McGraw v. Texas & upon which cars and engines are conp. R. Co. (1898) 50 La. Ann. 466, 23 stantly moving, and in which yardmen

P. R. Co. (1898) 50 La. Ann. 466, 23 stantly moving, and in which yardmen So. 461 (fireman injured by a colliare constantly at work, without the sion). It is the duty of those operating of a bell or the blowing of a ing a freight train which is being whistle, is evidence of negligence. Unbacked onto a switch, to station a man ion P. R. Co. v. Elliott (1898) 54 Neb. on the rear car to warn employees 299, 74 N. W. 627. The failure of emrightfully on the track as to its apployees in charge of a work train runproach, and it is no excuse for the failure of the leading car to give notice to the one of the professor. ure to perform this duty that the rear the leading car to give notice to the encar was a box-car, which did not con- gineer of the approach of another train, car was a box-car, which did not congineer of the approach of another train, veniently admit of this precaution being is negligence. Rinard v. Omaha, K. C. taken. Illinois C. R. Co. v. Mahan & E. R. Co. (1901) 164 Mo. 270, 64 S. (1896) 17 Ky. L. Rep. 1200, 34 S. W. W. 124. A railroad engineer who 16. To drive one car, without warning, knows that a brakeman is standing on against another which is being repaired the pilot to make a coupling is neglisis negligence. Stucke v. Orleans R. Co. gent in suddenly and without warning (1898) 50 La. Ann. 188, 23 So. 342. A increasing the speed of the train when railroad is liable for the death of an about 6 feet from the car to which the employee while loading with heavy lumengine is to be coupled. Strong v. ber cars standing on a spur or side Ioua C. R. Co. (1895) 94 Iowa, 380, 62 track, through the fall of the lumber on N. W. 799. A conductor is guilty of him, caused by a jolt while coupling the negligence, if, knowing that a sudden car in which he was at work, without and unexpected starting of a train notice to him. Ragland v. St. Louis, I. without notice to a brakeman engaged

The omission to warn has also been declared to be a ground for holding the master liable, where the servant was exposed to the risk of injury from the operation of hoisting appliances,3 or from heavy bodies which are thrown from a higher level as a detail of the work,4 or from heavy substances which are likely to fall at irregular intervals

in coupling a car will probably endanger his safety, he orders it to be moved 627, 88 Fed. 23. A servant who, while without giving warning to him. Purhis attention is diverted by his work, is cell v. Southern R. Co. (1896) 119 N. C. 728, 26 S. E. 161. A laborer ordered along the ways on which is moved C. 728, 26 S. E. 161. A laborer ordered along the ways on which it travels to unload a car has a right to assume that the other cars will not be backed down on the car while he is at work, Mach. Works (1894) 90 Va. 492, 19 S. without notice to him. North Chicago E. 261. See also the cases cited in note Rolling Mill Co. v. Johnson (1885) 114 (6. infra. Additional cases in which 111. 57, 29 N. E. 186. The risk that an engine which is believed to be on its way to the repair shops will, in a few which a yard clerk has just alighted which a yard clerk has just alighted is assumed by such clerk. St. Louis & Negligence is inferable from the abwithout any lookout, is not one which is assumed by such clerk. St. Louis & T. H. R. Co. v. Egymann (1895) 60 Ill. sence of a man to superintend the placapp. 291. Where an employee of a railway construction company is at work on top of a tower wagon on the tracks of a street railway company, over which its cars were running, necessitating the frequent removal of the wagon from the tracks, by reason of which plaintiff was injured, it is the duty of the construction company to use ordinary care to prevent injury to shipwrights are at work in that part of its employee, while at work on the tower wagon, by so protecting the wagon that it would not have been necessary to remove it while he was at wagon that it would not have been necessary to remove it while he was at ing is going on, that means should be work, without notice or warning. North taken by those in charge of the loading American R. Constr. Co. v. Patry to ascertain when someone is coming up (1900) 10 Kan. App. 55, 61 Pac. 871. the ladder, or that someone should be Where a servant is engaged in repair-stationed at such a place near the hatch ing a cable which has been lowered so that those coming up may be properly far that there is danger of its being and seasonably warned. The Pioneer struck by an engine which is moving up (1897) 78 Fed. 600.

and down a railway track over which "Where it is essential to the safety the master is guilty of negling of laborers whose duties in the loading of safety." and down a railway track over which it hangs, the master is guilty of negligrence if he omits to furnish a watch of a ship require them to be in the hold, man, and see that he is stationed so as that a "hatch-tender" should be stato stop the engine. Burns v. Mertioned at the hatchway to warn them chants' & Planters' Oil Co. (1901; Tex. when bales of cotton are about to be Civ. App.) 63 S. W. 1061. The owner thrown into the hold, it is the duty of of steel works, who uses a locomotive to the company to supply a person to be shift the materials, is bound to give an stationed at the hatchway for that pur-inexperienced servant special instruc-tion as to the danger to which he ex (1893) 92 Ga. 726, 19 S. E. 33. An emposed by the passage of such locomotive ployer is not, as matter of law, free at a place where he cannot see it ap- from negligence in causing the bank of proaching until it has almost reached earth at the side of a ditch in which him. Weiss v. Bethlehem Iron Co. an employee is working to fall by prod-

through the action of gravitation alone, or from flying fragments of materials handled in the master's establishment,6 or from a sudden rush of steam into a boiler where the servant was set to work,7 or from the dangerously high pressure of steam in a wooden vessel, into which it has been admitted at a time when a vent which should have been open is plugged up,8 or from explosive substances.9 Negligence is predicable where no proper precautions are taken, after several blasts have been set off, to ascertain whether they have been all properly exploded, so that the servants might be warned before returning to their work,10 or from the presence of a current of electricity in places where the servant has no reason to expect it.11

Where the employer has adopted a system for the purpose of notifying servants of the approach of a certain kind of transitory or spo-

employee any adequate warning, merely ball of iron, the fall of which frequently

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of law, by continuing the work, assume Cas. 4th series, 540.

The owner of a mill is liable for an the risk attendant upon the temporary

The owner of a mill is liable for an absence of his superintendent, although injury to an employee from a piece of he knows of his absence and that he is flying steel cut by steam power, almo longer watching the bank, since he though the machine was a perfect one, has the right to assume that the superwhere the cutting of steel was much intendent will return in time to warn more dangerous than of iron, and no him of the danger of the bank's falling. one was employed to give warning when Lynch v. Allyn (1893) 160 Mass. 248, steel was being cut, although the forestorm of the station a man at the top of a bank v. Ontario Rolling Mill Co. (1900) 27 which is being everyated where there Out. Ann. Rep. 155. See also 8. 90 which is being excavated, where there is danger of its falling, so as to give the workmen a timely warning. Burlington & M. River R. Co. v. Crockett (1886) 19 Neb. 138, 26 N. W. 921. A complaint is not demurrable which alleges that, while plaintiff was employed in defendant's quarry, defendant's su-perintendent negligently directed an-other laborer to work at a point on the face of the quarry almost directly above the spot where plaintiff was at work, without warning plaintiff of the danger, and that such laborer, being ignorant of plaintiff's position, loosened a large rock, which rolled down and struck plaintiff. Augusta v. Owens (1900)111 Ga. 464, 36 S. E. 830.

form his duty to provide a safe system is engaged in making repairs. Colo-

ding it from above, without giving the up old iron by dropping on it a heavy telling him to "look out" at the instant scatters to a considerable distance large the earth falls. Raynor v. Trolan pieces of the metal, and the man in (1897) 22 App. Div. 107, 47 N. Y. charge of the weight merely gives a warning shout, without taking any pre-An inexperienced employee set at work cautions to see that the space over with a pick to undermine a high em-which the metal might fly is clear. bankment of earth does not, as matter M'Guire v. Cairns (1890) 5 Sc. Sess.

one was employed to give warning when steel was being cut, although the foreman had usually given warning. Choate v. Ontario Rolling Mill Co. (1900) 27 Ont. App. Rep. 155. See also § 99,

<sup>7</sup> Kewanee Boiler Co. v. Erickson (1899) 181 Ill. 549, 54 N. E. 1044, Affirming (1898) 78 Ill. App. 35.

<sup>8</sup> Crowell v. Thomas (1895) 90 Hun, 193, 35 N. Y. Supp. 936.

<sup>o</sup> Grimaldi v. Lane (1901) 177 Mass. 565, 59 N. E. 451, where defendant's superintendent did not warn plaintiff to go away to a safe distance, while an unexploded charge of dynamite was being unloaded by another employee with an iron spoon.

10 Kelley v. Cable Co. (1887) 7 Mont.

70, 14 Pac. 633.

in It is negligence to turn on a current of electricity at an unusually early 6 The owner of a foundry fails to per- hour, without notifying a servant who for the protection of his employees rado Electric Co. v. Lubbers (1888) 11 where he makes a practice of breaking Colo. 505, 19 Pac. 479.

radic danger, it is plain that the fact of the servant's having relied on the receipt of the customary warning, and being thus induced not to keep as careful a watch as he would otherwise have kept, constitutes a specific and additional reason for holding the master liable for injuries which may result from the omission to give the warning on some particular occasion.12

12 Where employees are working in warning when danger was imminent

such a position that the sudden tighten- from such cause, and he would not be ing of a cable is likely to injure them if expected to keep so constant a watch they are not on their guard, the fail- to detect danger, or so high a degree of they are not on their guard, the fail-to detect danger, or so high a degree of ure of the master's vice principal to care to avoid it as he otherwise would be warn them in accordance with a cusrequired to do at this time." In Cincintom established by himself, that the nati, N. O. & T. P. R. Co. v. Barber cable is about to be tightened, is negli-(1895) 17 Ky. L. Rep. 424, 31 S. W. gence for the consequence of which the 482, the court, in commenting on the evmaster must answer. Richmond Gran-idence, which was held to justify the ite Co. v. Bailey (1896) 92 Va. 554, 24 conclusion that the plaintiff's intestate, S. E. 232. Where the work of one emparts height grant of a train's approach S. E. 232. Where the work of one emnot being warned of a train's approach, ployed in a saw-mill to remove and pile and being near the track, if not upon it, in the yard lumber as fast as it is attempted, in order to prevent a sawed is such as to bring him upon a wreck, to remove certain obstructions, part of a platform frequently made and in this way was killed, owing part of a platform frequently made dangerous by the descent of heavy timtor to the fact that the men on the train bers from the saws above, with great failed to see him until it was too late velocity and at irregular intervals, it to check up, said: "Warning signing in negligence for the mill owner, who had adopted a custom of warning the men of the coming of these timbers by means of a signal, to omit the custom-ary and cautionary signal. Anderson v. Northern Mill Co. (1890) 42 Minn. of giving notice of its approach, for the 424, 44 N. W. 315. Where the usual safety of the train and those on board, signal to men employed in a train yard that a train is coming is a shout by one of the men that "the cars are coming," their duty, and the deceased had the right to believe it would be performed, have been adopted as a safer signal than the blowing of a whistle or the ringing the attempt to prevent what might have the blowing of a whistle or the ringing the attempt to prevent what might have of a bell, a laborer who has been emresulted in a wreck of the train, as well ployed at the yard for several weeks as loss of life, lost his own life; and we and knows what signal was agreed think the evidence authorized a recovupon cannot, if struck by a train, reery, based on the alleged wilful negcover for his injuries on the theory lect." It is a breach of duty on the cover for his injuries on the theory lect." It is a breach of duty on the that the failure to sound a bell or whistle was negligence. Speed v. Atlantic fore starting his engine, and give the P of P of P of P of the purpose of warn-Anderson v. Ogden Union R. & Depot ing any employee who may be working P on the following charge was held correct: P on the track. Britton v. Northern P. the following charge was held correct: P on the track. Britton v. Northern P. the following charge was held correct: P on the track. Britton v. Northern P. wiff you find it was the custom and 231 (decision rendered in regard to an practice of the defendant, within and accident in Wisconsin where, under Wisconsin where, under Wisconsin warnings to the employees at company was liable for the negligence timely warnings to the employees at company was liable for the negligence such times only as earth was pushed of an engineer). The same rule is apdown the bank, or when there was dan-plicable where the servant injured was ger, and not at other times, and the in the employ of a person other than plaintiff knew of this custom, and re- the defendant. Thus, the employees of lied upon it, then the plaintiff would a contractor engaged, to the knowledge have a right to have expected such of a railroad company, in the grading

An employer does not discharge his full duty of keeping a place reasonably safe, by giving warnings of threatened or impending danger, when the employee charged with the duty of giving the warnings is so engrossed and busy with his other duties that he cannot properly and efficiently give the necessary warnings. 13

Where means for warning the servant have been provided, or a warning was actually given by some employee for whose acts and omissions the master was responsible, the servant is entitled to recover if the warning thus conveyed was inadequate to secure his safety.<sup>14</sup>

of a new track alongside the main pany, and depends upon the general track, in such close proximity as to be principles of law requiring the exercise liable to be struck by passing trains, of ordinary care not to injure another." are not bound to keep a constant look
13 The Pioneer (1897) 78 Fed. 600. out for approaching trains, where it is

14 A railroad company in whose yards the uniform practice of those operating it is the rule to give warning of the apthe trains to give warning of their approach of an engine by ringing its bell proach. Erickson v. St. Paul & D. R. does not perform its duty toward em-Co. (1889) 41 Minn. 500, 5 L. R. A. ployees, where the bell is cracked or 786, 43 N. W. 332. The court said: otherwise defective so that it does not "Although in the employment of a con-sound loudly enough to warn persons tractor, and not of defendant, the plain- of the approach of the engine under ortiff was lawfully at work along defend-dinary circumstances. Northern P. R. ant's railroad, with its knowledge and Co. v. Krohne (1898) 29 C. C. A. 674, by its authority. The character of his 56 U.S. App. 593, 86 Fed. 230. An emwork was such that, under the facts, it player who undertakes to give his emowed him the duty of active vigilance ployee warning of the approach of an to the extent of giving him signals, by engine and cars into a shed where the way of warning of approaching trains, latter is at work is bound to give such and he had a right to rely on its doing warning as may be heard by a person this, instead of keeping a constant look of ordinary hearing, considering the out for himself, at least in view of the distance between the person giving the out for himself, at least in view of the distance between the person giving the fact that the company had adopted and practised the custom of giving such warning and the employee. Mississippi practised the custom of giving such warnings, and which he had every reason to suppose would be continued. Had plaintiff been employed by the defendant itself to work on its track, there ant itself to work on its track, there quiring them to cross its tracks, and probably would have been no question that there is a blinding snow storm at raised that defendant would have owed him this duty of active vigilance, and that trains pass such point at frequent that he would have had the right to become engrossed in his work to such an something more than the usual warning extent as not to notice the approach of given by an approaching engine. Illextent as not to notice the approach of given by an approaching engine. Ill-trains, and to rely upon the performinois C. R. Co. v. Gilbert (1894) 51 Ill. ance by the defendant of its duty to App. 404. The blowing of a whistle by give him signals to warn him of the the engineer of a railroad train 50 fact. But it can make no difference in yards or more before reaching the place principle whether a person be at work where the track is obscured by dense immediately upon the track or so near smoke for 250 or 300 yards is not, as it as to be struck by passing trains. matter of law, a sufficient exercise of Neither does this duty depend, as appellant seems to claim, upon the fact be coming on the track from the opposite of the track provent of the coming on the track from the opposite of the track provent of the coming on the track from the opposite of the track provent of the coming on the track from the opposite of the track provent of the coming on the track from the opposite of the coming on the track from the opposite of the coming on the track from the opposite of the coming on the track from the opposite of the coming on the track from the opposite of the coming on the track from the opposite of the coming on the track from the opposite of the coming on the track from the opposite of t that the person is a servant of the com- site direction. Woodward Iron Co. v. pany, and the employees running the *Herndon* (1896) 114 Ala. 191, 21 So. trains his fellow servants. It is a duty 430. The owner of an iron mill, who growing out of the fact that he is law- uses locomotives to shift the iron from fully working there under the author- place to place in the mill and around ity and with the knowledge of the com- the yard, cannot be said to have done

But a master is not in fault because he fails to communicate a fact which is immaterial to the servant's safety, and which, if he had known it, would not have affected his action. 15

209a. Limits of this duty. - Both upon principle and authority it is clear that a master cannot be deemed culpable on the ground of an omission to give warning, where the servant already possesses sufficient knowledge of the conditions to enable him to take appropriate precautions for safeguarding himself. Accordingly, a master "is

As track repairing or track cleaning approach; particularly where the cars after a snow storm in the vicinity of are moving so slowly that ordinary atmoving trains is intrinsically a danger-ous occupation, the fair presumption is, to avoid them. Aerkfetz v. Humphnot only that men who engage in it take reys (1892) 145 U. S. 418, 36 L. ed. the risks of the employment, but that 758, 12 Sup. Ct. Rep. 835. A railroad

his whole duty to employees in sounding they are competent to keep themselves a whistle when the locomotive emerges out of manifest and unnecessary danfrom the building, if the locomotive ger. Hence, representatives of a rail-cannot be seen from the outside and road company have the right to assume other whistles are constantly sounded that one of a gang of men employed to within the building. Weiss v. Bethle release a snow-bound train on one track hem Iron Co. (1898) 31 C. C. A. 363, 59 will not place himself in danger of be-U. S. App. 627, 88 Fed. 23.

15 A verdict for the servant, based on 7 feet from the former. Nye v. Pennthe theory that the defendant's supersintendent was negligent in not information that an unexploded charge relied on the consideration that it which he was ordered to drill out had would, under the circumstances, have a wet fuse, cannot be sustained where been impracticable for the division suthere is no evidence going to show either perintendent to have communicated any that it was more dangerous to extract warning in regard to the movements of a charge which had failed to ignite on the passing train, as the men to be noti-account of the wetness of the fuse than fied "might have moved 100 feet or a one which had failed to ignite owing to mile in ten minutes." A rule of a railone of the several causes from which road company requiring signals to be such an occurrence may result, or that given by the foreman of workmen upon the method of extracting the charge its track when any work is to be done would have been at all different if the which will render its track unsafe, or nonexplosion had been due to some impassable, or unsafe for trains at their fuse. Henderson v. Williams (1890) signals to given where the work be66 N. H. 405, 23 Atl. 365. ¹ In Greenwald v. Marquette, H. & O. passable or dangerous, so as to render R. Co. (1882) 49 Mich. 197, 13 N. W. the company liable for injuries to a 513, the liability of the defendant was workman who fails to clear the track denied on grounds thus stated: "The for a passing train, and who is acdefendants can fully prove that decedent quainted with the usage not to signal knew that the locomotive was moving approaching trains or slacken their or about moving back, and it also speed, but that the workmen should shows that there was room enough for clear the track. Aurandt v. Chicago, him to perform his duties without being M. & St. P. R. Co. (1894) 90 Iowa, hurt. But this is not all. The order 617, 57 N. W. 442. The person in to back up was a proper one beyond charge of a switch engine in a railquestion; and as decedent was partici-road yard, used for the purpose of pating in the operations connected with moving cars, has a right to act on the backing up of the locomotive and the belief that the various employees in knew what was going on and what to the yard, familiar with the continuousexpect, he does not seem to have stood ly recurring movement of the cars, will in need of warning by bell or whistle." take reasonable precaution against their

not required to keep special watch over his employee and warn him of common dangers to which he may be subjected in the performance

H. R. Co. (1897) 25 C. C. A. 223, 51 on the lookout for special trains, and, U. S. App. 157, 79 Fed. 903 (station as a matter of precaution, to flag master injured by train). Railroad around curves and through cuts. In men to place signals at snow banks Mass. 296, 41 N. E. 289, where the along their tracks, or to give them noplaintiff was injured by the "blowing tice by whistle or bell of the approach down" of a locomotive underneath which istence of such banks just as they as- do the job, he should have given notice sume the risk of the existence of per- to the engineer or fireman that he had sume the risk of the existence of perto the engineer or fireman that he had
manent structures which they know to
been sent. But the court said: "Both
be near the track. Brown v. Chicago, the engineer and fireman knew that
R. I. & P. R. Co. (1886) 69 Iowa, 161, someone would be sent by the foreman
28 N. W. 487. The failure to blow the
to do the repair; and it hardly would
whistle of the engine attached to a construction train so that the hands thereon could prepare to protect themselves
or could prepare to protect themselves or things, they had
against the sudden jerk of the train
every reason to expect he would do.
in stopping is not imputable as wilful
formed by the boss that the train would
formed by the boss that the train would or manner or place of doing it. The
stop at that place, and knew where the place was dangerous, but the plaintiff stop at that place, and knew where the place was dangerous, but the plaintiff train was before and at the time it knew that. He also knew that the entrain was before and at the time it knew that. He also knew that the enstepped. Simmons v. Louisville & N. gine would have to be blown down if R. Co. (1892) 13 Ky. L. Rep. 941, 18 a check was ground in, and that that S. W. 1024. A company was declared was done over the ashpit as commonly not guilty of any breach of duty in reas anywhere. There was no negligence incessant, owing to the constant move-that anything was omitted in this case ments of the engine about the yard on which the men habitually relied or throughout the day, and would there-had a right to rely. There was testithroughout the day, and would therefore signify very little at any particular moment. Chesapeake & O. R. Co. themselves, as they needs must in many v. Lee (1888) 84 Va. 642, 5 S. E. 579. things. Some details a foreman may The starting of a freight train unexpectedly to a brakeman on the top of whom he has charge. We discover no a car at the rear end of a train, but not evidence of negligence on the part of suddenly, violently, or negligently, gives Noyes [the foreman]." In Leonard v.

company is not guilty of negligence him no cause of action for injuries towards section hands who have occa- caused by his being thrown from the sion to travel by a hand car when it train thereby. Johnston v. Canadian runs a train around a curve at the rate P. R. Co. (1892) 50 Fed. 886 (decided of from 25 to 32 miles an hour. Inter- on demurrer). In Turner v. Norfolk national & G. N. R. Co. v. Arias (1895) & W. R. Co. (1895) 40 W. Va. 675, 22 10 Tex. Civ. App. 190, 30 S. W. 446. S. E. 83, the court implies in its argu-No action can be maintained where the ment (p. 689) that a railroad comusual signal has been given by which pany has discharged its whole duty in the approach of a train is indicated, regard to the protection of a section and the servant is familiar with that foreman traveling on a hand car, when signal. Henion v. New York, N. H. & it has expressly instructed him to be companies do not owe any duty to train- Perry v. Old Colony R. Co. (1895) 164 of their train to such banks. They he was working, it was contended that, assume the risks arising from the ex- when the foreman sent the plaintiff to gard to notifying an employee of the on the part of the foreman in failing approach of a train, when it was in evi- to notify the plaintiff of what he well dence that the engine which was push- understood himself. There was nothing the train in question up an incline ing to show that it was customary, in a yard had a very loud exhaust when men were sent to grind in checks, which could be heard at a great dis- to notify the engineer or fireman, or tance, and which, by reason of its sin- anybody else, of the fact, and that they gularity, was a better signal than a must be careful about blowing down, or bell, the ringing of which was almost that it had ever been done before, or of his ordinary duties." The reluctance of the courts to allow a servant to recover for an injury due to such a danger is especially strong

form a miner ordered to go to blasting in a place where there are unexploded blasts, as to the exact number of such blasts, was not negligence, where he had good reason to believe that all the unexploded blasts had wires protruding therefrom, which would be a sufficient warning to the miner. Compare also Houston & T. C. R. Co. v. Strycharski (1894) 6 Tex. Civ. App. 555, 26 S. W. 253, 642 (for facts see § 220, post).

<sup>2</sup> An engineer on a locomotive is not guilty of negligence in failing to stop the train, or warn of danger a section hand who stands in a safe position, several feet from the track, until after the engine passes; and the foreman of a gang of section hands is under no duty to warn each of them of the danger from each passing train, where they are so familiar with the work as to be are so familiar with the work as to be presumably capable of looking out for themselves, and there is no unusual danger, and no rule exists imposing upon him such duty. Ring v. Missouri P. R. Co. (1892) 112 Mo. 220, 20 S. W. 436. A railroad company is not negligent in failing to place danger signals to warm members of a bridge graph. tion men at work on the track. Brunell v. Southern P. Co. (1899) 34 Or. 256, 56 Pac. 129. In a case holding that the mere fact that in a railroad company's private yard, where cars are loaded and unloaded and trains made

Collins (1877) 70 N. Y. 90, it was held be justified in declaring, as a matter of that where a servant injured by the fall law, that it was negligence in a rail-of a bank of earth sought to recover road company to permit its cars, or on the theory that the master failed to even a single car, to move along its keep his promise to warm him when track in a public place, such as a street contain work representation and the subsidence are single or parkens at its passenger. certain work rendering the subsidence crossing, or, perhaps, at its passenger of the bank probable was about to be depots, where the public are permitted commenced, it was error to refuse a re- to be upon and travel across its tracks, quest to the effect that the failure of without having someone on the same to the defendant to keep his promise would control its movements; but the quesnot be a ground of recovery if the servtion presented by this case is an enant actually looked up and saw the tirely different question. The cars work in progress. In McMahon v. Ida which were permitted to go along its Min. Co. (1898) 101 Wis. 102, 76 N. tracks unattended were in the private W. 1098, first appeal (1897) 95 Wis. yards of the defendant, where no per-308, 70 N. W. 478, it was held that the sons were expected to be present except failure of a shift boss of a mine to inits servants and agents, many of whom its servants and agents, many of whom were present solely for the purpose of moving the cars on the tracks, without being upon the same as brakemen. If it was negligence to permit the cars to run unattended in the defendant's yard, where cars are loaded and unloaded and moved about for the purpose of making up trains, such negligence is not so apparent that a court may pronounce upon it as a matter of law. At most, upon it as a matter of law. At most, it might be a fact to go to the jury upon the question of negligence." Kelley v. Chicago, M. & St. P. R. Co. (1881) 53 Wis. 74, 9 N. W. 816. A railway company does not owe yard employees the duty of notifying them when are constituted. duty of notifying them when an opening, such as is usual and necessary from time to time in shifting cars in theyard, will be closed up, inasmuch as these openings are not left for the purpose of enabling the employees to cross the track. Plunkett v. Central R. Co. (1898) 105 Ga. 203, 30 S. E. 728. Whether a fore-man was negligent in not notifying a switchman that a switch had already been turned, and that it was, therefore, unnecessary for him to cross the track to tend it, depends upon what the forenals to warn members of a bridge gang man should have foreseen the switch-running hand cars to look out for sec-man would undertake to do if he was not informed that the switch had been changed to the required position. Grant v. Union P. R. Co. (1891) 45 Fed. 673. The failure to have a servant on the rear of a backing train to give warning of its approach to a street crossing up, such cars are permitted to move was not negligence as to a flagman at along the tracks unattended by a brake-man, cannot be held negligence, as mat-train if he had been performing his ter of law, as against the company's duty to keep a watch for approaching servants employed in such yard, the trains. Coleman v. Pittsburg, C. C. & court said: "A court would probably St. L. R. Co. (1901) 23 Ky. L. Rep. 401,

in cases where the isolated event which caused the injury occurred during the work of constructing or repairing a part of the master's plant.3

It is sufficiently manifest that some of the applications of the doctrine exemplified in the cases just cited, when considered with relation to the facts involved, go very far towards reducing the obligations of warning to a mere nullity. The process of nullification may be said to be complete in those decisions which proceed upon the broad ground that employers cannot be required to warn their men as to every transitory risk, where the only thing the men do not know is the

give a servant who knows of the existing that it is open at any particular

<sup>3</sup> In Porter v. Silver Creek & M. Coal Co. (1893) 84 Wis. 418, 54 N. W. 1019,

63 S. W. 39. There is no necessity of been one of the incidents of such opa signal being given to an off-bearer in eration, regularly or occasionally recura sawmill of the starting of the saw ring, the argument would be strong carriage, where it is uniformly started that negligence could be predicated upon as soon as the hooks are removed from the failure to warn a new and inexthe cants, and the carriage has been so perienced employee of such fact. Such, operated hundreds of times during the however, was not the situation. The few days he has worked at it. Olsen docks, structures, and machinery were v. North Pacific Lumber Co. (1901) 106 not in use. They were undergoing re-Fed. 298. A master is not bound to pairs and rebuilding made necessary by notify a servant working near a trap- a recent storm. The situation was subdoor on every occasion on which it is stantially the same as if they were in opened for purposes connected with the process of erection. Now, in the origordinary routine of the business. inal erection of buildings or structures, Kupp v. Rummel (1901) 199 Pa. 90, 48 the rule that the master must furnish Atl. 679. Compare Young v. Miller a safe place to work can have manifest (1897) 167 Mass. 224, 45 N. E. 628, ly very limited application. In the holding that a master owes no duty to handling of building materials, the adjusting of machinery, and the many ence of a trap door, and that it is liable operations that are continually going to be open at any time, notice or warn- on in the process of building or rebuilding, dangers constantly must arise time. In North Chicago Rolling Mill against which no foresight can provide Co. v. Johnson (1885) 114 Ill. 57, 29 or warning be given. A place which is N. E. 186, the servant's nonanticipa- perfectly safe at one moment may betion of the event which injured him is come full of danger the next moment. adverted to as one of the elements in- Were the employer held to the duty of dicating the existence of a duty to give providing at all times a safe place for the builder to work, or of warning him of a possible future danger, we apprehend few would undertake to build or the majority of the court thus stated repair any structure. Such a rule of their reasons for refusing to allow the diligence would be too grievous to be servant to recover for injuries caused borne." Cassoday and Orton, JJ., disby the sudden tautening of a cable in a sented on the ground that the plaintiff chute, the jury having found that there was directed to work in a place of imwas no negligence on the part of the minent, but unforeseen, danger, of which employee in control of the machinery: he had no knowledge or warning, and "The only ground upon which such negthat the defendant, as master, was ligence can be claimed is that the debound to know that the engineer was fendant furnished the plaintiff an unliable to start the machinery at any safe place to work, and did not warn time without warning, and thus imperil him of the fact that the cable was in the safety and life of the plaintiff. The the chute and would be lifted. Had conclusion of the majority that the dethe machinery of the dock been in regular operation handling coal, and had bound to anticipate such an accident as this lifting of the cable from the chute that which occurred seems to the presprecise time when the danger will supervene; on where the actual danger which caused the injury was due to a transitory occurrence, of such a nature that the plaintiff must have known that it would probably happen from time to time.<sup>5</sup> The conclusion thus based upon the transitory and obvious character of the risk is regarded as especially appropriate where that risk is essentially incident to the very work which the servant has undertaken to do.6

The somewhat inconsistent position which is the result of a theory which attributes this effect to the servant's knowledge of the conditions is avoided by denying, as some courts have done, that the mas-

ent writer an unjustifiable invasion of wheel has exploded to clear away rubthe province of the jury. The stand- bish, that no one has as yet examined and of duty is doubtless not so high the room to see that nothing is likely

plaintiff, after four and a half years of ger, and of necessity much has to be experience in the work of wheeling coal left to his care in this regard. Burns from a coal-shed to a fire room, was was not set at work upon a dangerous struck in the foot by a load of coal machine about which he had no knowlhatchway in the roof, after being dis- a trench for a sewer. He had done such charged from a lighter, the position of work before, and so far as appears was which could easily have been ascer- a man of reasonable intelligence, and tained, and whether it was ready to un- must have known something of the danload or not.

ployee sent into a room in which a fly- and he might have commenced where it

ard of duty is doubtless not so high the room to see that nothing is likely when repairs are going on (see § 29, to fall upon him. Under such circumante), but surely it is going too far to stances the servant has no right to assay that a jury could not warrantably find a master negligent in having failed to make suitable arrangements for obviating such an accident as the one which occurred.

168 Mass. 217, 46 N. E. 620. In Burns v. Matthews (1895) 146 N. Y. 386, 40 N. E. 731, the court, in denying the right of a laborer to recover for injuries Mass. 23, 44 N. E. 1055, the plaintiff was at work upon a house in which the trench, said: "Had the foreman known defendant was making some changes. That the walls of the trench were likely He went up a ladder, stepped through to give way, it doubtless would have a window, and then, in order to avoid a man who was working behind it, but masters are not insurers against acstepped to the left upon a joist which cidents, and they ought not to have exhad been sawed nearly through for a had been sawed nearly through for a traordinary and unexpected burdens well-hole, and fell. The plaintiff knew imposed upon them. They are required that the customary way to make well- to be careful and prudent, and to exerholes was to lay the joists and then cut cise the care and caution over the men them out, and, so far as appears, knew in their employ that careful and pruwhere this well-hole would be. It dent men ordinarily exercise. A forewould be seen from the plaintiff's tes-timony that the joist had been cut very not be expected to keep his eye con-recently. Another witness stated, with-stantly upon every man and see that he out contradiction, that he had cut it does not step into a place of danger, a moment before the accident, and had nor can he, having the care of so many, gone to get an ax to knock the joist out. be expected momentarily to think of It was held that the employer was not every danger that may befall them. liable.

Each man is expected to have some <sup>6</sup> Flynn v. Campbell (1893) 160 judgment and care with reference to Mass. 128, 35 N. E. 453, where the the preservation of himself from danwhich had been dumped through a edge, but instead he was directed to dig gers of working in deep trenches with-Oldence, an employer is not required out curbing. He was at liberty to sein formal language to notify an emplect his own place to work in the trench,

ter's duty is fulfilled, where the only warning received was a general notification to the servant to be on his guard, especially where the plaintiff had gone to work after the notification was issued;8 or where there has been a change in the methods, of which he was ignorant, and which entailed the approach of danger from an unexpected quarter.9 Another way of reaching a similar conclusion is also indicated by a decision in which it was held that a usage which is itself an evidence of a want of due care cannot be utilized as a defense. 10

It has already been shown that, as a general rule, a master is under no obligation to take steps to preserve his employees from the consequences of casualties which are not due to his negligence. See § 13, ante. One exception to this rule is that a court would probably decline to interfere with a verdict based on the theory that it is culpable to omit to warn an employee when some sudden catastrophe has created an extra-hazardous situation, and it is apparent that a timely notification would have enabled him to escape. But it is obviously a condition precedent to recovery under such circumstances, that the master should be proved to have been aware, actually or constructively, that the servant was in such a position as to be exposed to danger by the catastrophe in question (see chapter x., ante), and that it would have been possible to convey the warning to him with sufficient rapidity to enable him to protect himself.11

was but a foot deep. He knew that started, and is subsequently injured by

ployee who cannot reasonably protect himself by watching out for the return of a switch engine with cars attached to be coupled to a car at which he is eming upon it, is entitled to some warning other than a mere general instruction that he must look out for himself water, leaving the fireman to get down over the coal without signal to him, will when the cars are switched against it. Houston & T. C. R. Co. v. Strycharski liability to a fireman for personal in- (1896; Tex. Civ. App.) 35 S. W. 851. juries while getting down, occasioned When a minor thirteen years of age, by such movement, where the character, employed to pick out the slate from coal cars after they have been run down an incline from the place of loading, has perilous, or where the engine moved been told to be on his guard when cars are being run down, and also to Dubaque & S. C. R. Co. (1892) 84 Iowa, be on his guard against the jerking of the cars when the train was being ing upon it, is entitled to some warn-

curbing had been put in up to the man-being thrown off a car by the sudden hole, and that it must have been the impact of another car which has thus intention of the foreman to curb north been run down against the one on which therefrom." Other decisions bearing he is working, it is for the jury to say upon this limitation of the servant's whether the master's duty of instruction of action will be found in § 218, tion has been sufficiently discharged. Note 2, post.

The Pioneer (1897) 78 Fed. 600. (1893) 153 Pa. 379, 26 Atl. 18.

See § 109, note 3, ante. A railroad em-

Houston & T. C. R. Co. v. Strychar-ski (1896; Tex. Civ. App.) 35 S. W.

10 Thus, a custom of moving an enployed, while standing on a ladder rest-gine immediately upon the covers being placed over the man-hole after taking

## B. Duty to formulate rules defining the manner in which THE WORK IS TO BE DONE.

210. Generally.—It has been judicially recognized that rules for the conduct of a business are prescribed both for the purpose of increasing the economic efficiency of the various instrumentalities which are brought into use, and for the purpose of lessening the risks which the servants will have to incur.1 The law, however, takes no account of the financial aspects of an employer's arrangements. From a juridical standpoint those arrangements are material only in so far as they may affect the safety of others, and the persons who are most directly and vitally interested in the manner in which an industrial concern is carried on by its proprietor are necessarily those who assist him in his enterprise. The rationale of the obligations which arise out of this situation is not far to seek.

However experienced and careful servants may be, a master is clearly not justified in conducting a complicated business on a system which assumes them to be capable of selecting, upon each and every occasion, that particular course of action which is the safest both for themselves and for their fellow employees. In the very nature of the case, many of the elements of the problems involved in the process of making a choice between alternative methods of work at any given time and place must be unknown to persons whose range of view is necessarily limited to their own immediate environment. Some of the perils produced by unavoidable ignorance may doubtless be obviated by properly instructing the servants. But even after the very fullest information of which the circumstances admit has been imparted to them, there will, in many lines of business, remain a residuum of situations which can be rendered safe for them only by the issuance of peremptory directions which leave nothing to their own discretion, and require them to do certain work in a specified manner. Wherever, therefore, the master should, as a reasonably prudent man, see that there is a probability of injury to some individual servant or to some class of servants, if they and their fellow employees are left

the evidence is that he was injured in perior of the injured servant was the jumping, when a fire broke out, from a only person who was aware that he window on the third floor of a building in which he had, at the request of have been notified of the fire if his presauperior employee, remained during the dinner hour, at which time he and the dinner hour. Troy & B. R. Co. 1891 and the dinner hour has a ware that he was in the building, but that he could have been notified of the fire if his presence had been known. Hernischel v. 1802 and 1802 and

jury on the issue that the servant was ployees on the first floor had only just not warned of a discovered peril, where time to escape; that the immediate suthe evidence is that he was injured in perior of the injured servant was the

to regulate their actions according to their own ideas of what is propcr, he is charged with the obligation of protecting them, as far as possible, both by prescribing the lines upon which the ordinary routine of their work shall be conducted, and by declaring what precautions shall be taken by them to minimize the danger arising from special emergencies.<sup>2</sup> The duty upon which the responsibility of the master in this regard is predicated is, therefore, one particular branch of the general duty of the master not to expose his servants to extraordinary

<sup>2</sup>The language used by the courts in v. St. Louis, K. & N. W. R. Co. (1887) referring to the obligation to promul- 93 Mo. 348, 6 S. W. 371, the court cited gate rules is sufficiently illustrated by with approval the following passage the following extracts. Other passages from the treatise of Shearman & Redof a similar tenor will be found in the field on Negligence, § 93: "One who quotations from cases dealing with spe-employs servants in complex and dancial points to be hereafter discussed, gerous business ought to prescribe rules "It is settled doctrine that a railroad sufficient for its orderly and safe mancompany is bound to guard its em- agement. His failure to do so is a perployees against negligence of coemsonal negligence, for the consequences ployees, so far as it can, by the enact- of which he is liable to his servants." ment and promulgation of reasonable. The same statement is also adopted as rules in the management of its busicorrect in Richlands Iron Co. v. Elness." Abel v. Delaware & H. Canal kins (1893) 90 Va. 249, 17 S. E. 890. Co. (1891) 128 N. Y. 662, 28 N. E. 663. The subjoined statement of the general It is the master's duty "to make and promulgate sufficient rules and regulations for the conduct of the business in its ordinary run, and for any extraordinary occasions that may be reasonably anticipated." Slater v. Jewett (1881) 85 N. Y. 73, 39 Am. Rep. 627. safety and protection of his employees, "When a railroad company's employees a failure to adopt proper rules, as well are known to be doing their work in a resulting the company [master] to defective or improper rules is such negchange the manner of operation by some regulation or rule." Boing v. New York, ble for all injuries resulting therefrom."

O. & W. R. Co. (1897) 151 N. Y. 579, Wood, Mast. & S. § 403; 3 Wood, Rail-45 N. E. 1028. "The intestate, upon enway Law, § 382. A master is bound to "make and promulgate proper rules and assented to the ordinary risks informable in the proper rules in the company of the company [master] to be for all injuries resulting therefrom." ment and promulgation of reasonable The same statement is also adopted as and assented to the ordinary risks in- for the government of his servants and cident to the service. But employers business, whenever it is so large or cannot avail themselves of this assent complicated as to make his personal suunless they take reasonable precautions pervision impracticable." Murphy v. to insure the servant's safety while in *Hughes* (1898) 1 Penn. (Del.) 250, 40 the performance of his duties, and there Atl. 187. "Without such regulations can be no exemption from liability for their employees would be at the mercy injuries sustained by a servant when of others [coemployees] whom they had such injuries are traced to the employ- no election in employing, or over whose er's failure to take such precautions, actions they have no control." Pitts-Within the operation of this principle burg, Ft. W. & C. R. Co. v. Powers a corporation is bound to carry on its (1874) 74 III. 341. "The rule is well business under a proper system and un-settled that it is the duty of all persons der reasonable rules and regulations, and corporations having many men in and if, through a failure to establish their employ in the same business to such, a servant is injured, the corporations having many men in and if, through a failure to establish their employ in the same business to such, a servant is injured, the corporation is liable. Ford v. Lake Shore & observed, will afford protection to the M. S. R. Co. (1891) 124 N. Y. 493, 12 employees. This is the more necessary L. R. A. 454, 26 N. E. 1101. In Reagan where the manner of doing business is

dangers.3 See chapter 1., subtitle B. The adoption and maintenance of defective or imperfect rules are manifestly as much negligence as the entire failure to establish any rules.4 Where an employer knows, or ought to know, that a certain rule is inefficient, either because it is not calculated to furnish proper protection, or because it is habitually disregarded by employees, it becomes his duty to adopt such other additional regulations as will secure the safety of the servant concerned.<sup>5</sup> Negligence is predicable of his failure to see that a rule which was adequate for the protection of the servants was properly carried out.6 (See § 214, post.) The test of the sufficiency of a rule is that it shall be reasonably well calculated to secure the safety of the employees if it is faithfully obeyed,7 or that it protects the servant, as far as reasonably can be done, against the hazard of the negligence of coemployees;8 or that, if faithfully and carefully observed, it will give reasonable protection to the employee concerned; or that it constitutes a safeguard upon which a person of ordinary prudence may rely, as affording reasonable protection against the danger to which the workman was exposed in the particular case.<sup>10</sup>

One of the tests of the sufficiency of the rules adopted by a master for the government of his servants and his business is that they have

such that the danger or safety of an employee at any given time depends 206, 24 S. W. 250. upon the way in which some other employee is engaged at the same time. lett (1891) 54 Ark. 289, 11 L. R. A. In such a case, where the action of one 773, 15 S. W. 831, 16 S. W. 266. employee may make that dangerous "Hannibal & St. J. R. Co. v. Kanawhich, if he took no action, would be ley (1888) 39 Kan. 1, 17 Pac. 324. For safe, it is undoubtedly the duty of the common employer to make such rules as will enable the person whose safety 71, 29 N. Y. Supp. 897; Texas & P. R. is put at risk, to be advised of the danger and to avoid it." Eastwood v. Retsof Min. Co. (1895) 86 Hun, 91, 34 N. Y. Supp. 196.

a case in which the absence of regulations was held to raise for the jury the question whether the master was guilty of negligence, the court remarked, arguendo: "It is the duty of the master having control of the times, places, and conditions under which the servant is required to labor, to guard him against probable danger in all cases in which that may be done by the exercise of reasonable caution." McGovern v. Central Vermont R. Co. (1890) 123 N. Y. 280, 25 N. E. 373.

\* Texas & N. O. R. Co. v. Echols (1894) 87 Tex. 339, 27 S. W. 60, 28 S. W. 517.

<sup>5</sup> Fordyce v. Briney (1893) 58 Ark.

<sup>c</sup> See St. Louis, A. & T. R. Co. v. Trip-

similar expressions, see Warn v. New York C. & H. R. R. Co. (1894) 80 Hun, Co. v. French (1893; Tex. Civ. App.) 22 S. W. 866; Evansville & T. H. R. Co. v. Tohill (1895) 143 Ind. 60, 41 N. E. 709, 42 N. E. 352. A rule easily <sup>8</sup> Reagan v. St. Louis, K. & N. W. R. followed by servants, and, when fol-Co. (1887) 93 Mo. 348, 6 S. W. 371. In lowed, securing safety to coservants, is a reasonable compliance with the duty owing by the company to them. Niles v. New York C. & H. R. R. Co. (1897) 14 App. Div. 70, 43 N. Y. Supp. 751.

\* Abel v. Delaware & H. Canal Co. (1891) 128 N. Y. 662, 28 N. E. 663.

<sup>9</sup> Abel v. Delaware & H. Canal Co. (1886) 103 N. Y. 581, 57 Am. Rep. 773, N. E. 325; Davis v. Staten Island Rapid Transit R. Co. (1896) 1 App. Div. 178, 37 N. Y. Supp. 157. 10 Fordyce v. Briney (1893) 58 Ark. 206, 24 S. W. 250.

been in force for a considerable length of time and have accomplished the purpose contemplated. 11

The presumption of law is in favor of the sufficiency of the rules adopted by a master for the government of his servants and business, as bearing upon the question of negligence of the master rendering him liable for injury to a servant.<sup>12</sup> Unless those rules are shown to be "palpably unreasonable, or clearly insufficient," the master ought not to be charged with negligence on account of their adoption and use.13

That the risks arising from a defective system are prima facie not among those assumed is a necessary consequence of predicating a duty to put in force and maintain a safe system. 14 See § 2, ante. But the presumption thus entertained in the servant's favor is, of course, overcome by evidence showing that the servant went on working with a full comprehension of the hazards to which the master's system exposed him. See chapter xvII. Since, however, rules are merely a formal statement of certain arrangements which the master intends to conform to himself, and which he expects his servants to conform to also, the mere fact that the servant knew that no proper rules had been promulgated on a given instance will not prevent a recovery, if the arrangements themselves were such as to indicate a lack of due care.15

"Murphy v. Hughes (1898) 1 Penn. the business of a railroad this duty is (Del.) 250, 40 Atl. 187 (in charge to especially important in view of the danjury); Rex v. Pullman's Palace Car Co. gers of the employment, and the serious (1897) 2 Marv. (Del.) 337, 43 Atl. 246. consequence likely to ensue from the negligence of coemployees." Abel v. 22 Murphy v. Hughes (1898) 1 Penn. (Del.) 250, 40 Atl. 187 (in charge to jury).

13 Little Rock & M. R. Co. v. Barry (1898) 43 L. R. A. 349, 28 C. C. A. firming 40 S. W. 1060 (instruction held 644, 56 U. S. App. 37, 84 Fed. 944, holding that rules of a railroad company, ification, that the servant could not rebased upon the wisdom and experience cover if he knew of the master's failure

based upon the wisdom and experience cover if he knew of the master's failure of many years of railroad operations, to establish suitable rules). In Sheewhich do not provide for warning the han v. New York C. & H. R. R. Co. employees upon special or extra trains (1883) 91 N. Y. 332, it was argued by of the movements and whereabouts of the defendant's counsel that the plain-other locomotives liable to meet or be tiff took the risk of defects in the deovertaken by the special or extra trains, fendant's system of running trains by are not unreasonable, and the operation telegraphic orders; but the court said: are not unreasonable, and the operation of a railroad in accordance therewith is not negligence.

"There are cases where such an argument might apply, but I am not aware of any principle which releases the massisks of the business is subject to the qualification that the master must exercise reasonable care to guard the servant, while engaged in his duties, from ant, while engaged in his duties, from art, to provide rules which, faithfully unnecessary hazards, including hazards carried out, would insure safety. There from negligence of coemployees. In

211. Limits of the duty to promulgate rules.—The extent and quality of the obligation of the master to make rules for the guidance of his servants will be more clearly understood if we advert to the decisions in which the language used has a special relation to the limits of that obligation. On the one hand we find in the cases such positive forms of statement as these: That the law imposes the duty of making and enforcing reasonable rules and regulations, in so far as that is reasonable and practicable; and that the master in "making rules for the government of his employees is bound to use ordinary care, and to anticipate and guard against such accidents and casualties as may reasonably be foreseen by its managers exercising such ordinary care."2

The same or similar conceptions are also expressed by negative forms of phraseology such as these: That an employer is only bound to use ordinary care in formulating rules, and it is not reasonable to proceed upon the assumption that every injury to an employee can be guarded against and prevented by making such rules, and that it is the duty of the employer to anticipate and guard against, by rules or otherwise, only such accidents and casualties as might reasonably be foreseen by him in the exercise of ordinary prudence and care;3 that the failure to adopt rules is not proof of negligence, unless it appears from the nature of the business in which the servant is engaged that the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity of such precaution; 4 that an employer

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ties, and public policy forbids that one R. Co. v. Graham (1898) 96 Va. 430, should be implied." Compare Wild v. 31 S. E. 604. Whether, in the operation Oregon Short Line & U. N. R. Co. of trains, emergencies which no system (1891) 21 Or. 159, 27 Pac. 954; Ford of rules can anticipate and provide for v. Lake Shore & M. S. R. Co. (1891) have arisen, and whether, in view of such 124 N. Y. 493, 12 L. R. A. 454, 26 N. E. emergencies, the company has acted with the care which the circumstances demand, are questions of fact for the trial court. Sprague v. New York & N. E. 1028.

2 Warn v. New York C. & H. R. R. E. R. Co. (1894) 80 Hun, 71, 29 N. Y. Supp. 897.

3 Berrigan v. New York, L. E. & W. of an inexperienced engineer, and the R. Co. (1892) 131 N. Y. 582, 30 N. E. 591.

4 Morgan v. Hudson River Ore & I. "The superintendent and train defollowing conclusion of the trial court:

\*Morgan v. Hudson River Ore & I.

\*The superintendent and train deco. (1892) 133 N. Y. 666, 31 N. E. 234.

To a like effect, see Ely v. New York C. orders or proper messages to guide him & H. R. Co. (1895) 88 Hun, 323, 34

N. Y. Supp. 739; Burke v. Syracuse, B. Hawleyville, and failed to exercise reade N. Y. R. Co. (1893) 69 Hun, 21, 23

N. Y. Supp. 458; Daley v. Brown (1899) 45 App. Div. 428, 60 N. Y. condition of business and situation of Supp. 840. The unanticipated character of the accident was also one of the grounds of the decision in Norfolk & W. amounting to a want of reasonable Vol. I. M. & S.—30. cannot be held liable on the ground of a failure to make rules to provide for a contingency which could not reasonably be anticipated.<sup>5</sup>

Where specific testimony is introduced for the purpose of establishing that the work in question should have been methodized by formal rules, it is for the court to say, in the first place, whether that testimony is sufficient to show a case in which the duty to make rules rested upon the master.<sup>6</sup> If that point is decided in favor of the plaintiff, the question whether the master's duty in the premises has been properly performed is for the jury. Where the necessity for and practicability of providing rules to meet the given circumstances are apparent from the averments of the complaint and from the testimony by which those averments are supported, the mere fact that neither the pleadings nor the evidence indicate exactly what rules should have been established does not render it a misdirection to charge the jury that the defendant would be liable if he did not establish rules to protect his employees.8 But in the absence of evidence showing that rules would be useful or feasible under the circumstances, the master cannot be found negligent in not having promulgated them.9 It is, therefore, error to leave the case to the jury where the plaintiff has offered no evidence which indicates that other employers in the same business had promulgated any such rule, or that the suggested rule was necessary or practicable, or that the ne-

(unexpected, unusual, and unexplained failure of air brake to work).

\*\*Texas & N. O. R. Co. v. Echols (1894) 87 Tex. 339, 27 S. W. 60, 28 S. W. 517. In an action by an employee, working under the directions of his foreman, for an injury sustained in attempting to shift a heavy engine into place, the fact that defendants had made a rule requiring the boom, which was attached to the engine, to be lowered before moving or shifting the engine, and that other contractors had made similar rules, is sufficient to authorize the submission of the question 546. was attached to the engine, to be low-v. Lyon (1888) 123 Pa. 140, 2 L. R. A. ered before moving or shifting the engine, and that other contractors had made similar rules, is sufficient to authorize the submission of the question of the necessity of such a rule to the jury. Daley v. Brown (1899) 45 App. Take the submission of the question of the necessity of such a rule to the jury. Daley v. Brown (1899) 45 App. Take the submission of the question of the necessity of such a rule to the jury. Daley v. Brown (1899) 45 App. 230.

care in not providing, in some way, for the special direction of Conrad under Co. (1891) 61 Hun, 11, 15 N. Y. Supp. the circumstances disclosed by the evi- 384; Warn v. New York C. & H. R. R. dence. The collision was due to the in- Co. (1891) 80 Hun, 71, 29 N. Y. Supp. competency of conductor Conrad, and 897; Texas & N. O. R. Co. v. Echols to the negligence and want of reason (1894) 87 Tex. 339, 27 S. W. 60, 28 S. able care of the defendant, its superintendent, train master, and despatchers, (1896; Tex. Civ. App.) 36 S. W. 1114; as above stated."

W. 517; Southern P. Co. v. Wellington tendent, train master, and despatchers, (1896; Tex. Civ. App.) 36 S. W. 1114; as above stated."

Gulf, C. & S. F. R. Co. v. Finley (1895)

Whalen v. Michigan C. R. Co. 11 Tex. Civ. App. 64, 32 S. W. 51; and (1897) 114 Mich. 512, 72 N. W. 323 the cases cited passim in subtitle C of unexpected, unusual, and unexplained this chapter. The ages where the in (unexpected, unusual, and unexplained this chapter. In a case where the infailure of air brake to work).

cessity and propriety of making such a rule was so obvious as to make the question one of common knowledge and experience. 10 cially is it unwarrantable to infer culpability in the absence of such evidence, where it appears that the rules actually promulgated by the defendant supplied an adequate protection against the occurrence of accidents like the one in question, so far as they could be prevented by rules.11

If the plaintiff relies upon the theory that some specific rule should have been promulgated under the circumstances, he must show not only that the rule suggested was necessary, 12 but that it was reason-

ditional rule which would have been use- cies. less and supererogatory. See § 217, <sup>12</sup> Corcoran v. New York, N. H. & H. subd. d, for the specific facts of the case. R. Co. (1901) 58 App. Div. 606, 69 N. In Simpson v. Central Vermont R. Co. Y. Supp. 73,

only that the rule suggested was necessary, 12 but that it was reason
10 Berrigan v. New York, L. E. & W.

Co. (1892) 131 N. Y. 582, 30 N. E.

464, plaintiff's counsel contended that
57; Larow v. New York, L. E. & W. R.

the defendant might have made further
Co. (1891) 61 Hun, 11, 15 N. Y. Supp.

384; Morgan v. Hudson River Ore & I.

remarked that "so long as the rules
Co. (1892) 133 N. Y. 666, 31 N. E. 234; which are promulgated will, if observed,
Ely v. New York C. & H. R. R. Co.

(1892) 88 Hun, 323, 34 N. Y. Supp.
39; Doing v. New York, O. & W. R. Co.

(1893) 73 Hun, 270, 26 N. Y. Supp. 405, (1887) 14 App. Div. 70, 43 N. Y. Supp.
Reversed in (1897) 151 N. Y. 579, 45

T51, it was held that the fact that an
N. E. 1028, but not upon this point; old and experienced employee, fully
Corocran v. New York, N. H. & H. R.

aware of the possible dangers of the sitCo. (1901) 58 App. Div. 606, 69 N. Y.

Supp. 73. A sawmill owner cannot be
charged with negligence for failing to
direct one employed as sawyer by special rules to observe care towards an
offbearer engaged in certain work with
for when was not complex, and
there was no evidence that it was customary in sawmills to direct employees
by special rules. Olsen v. North Pacifle Lumber Co. (1900) 40 C. C. A.

427, 100 Fed. 384.

"Berrigan v. New York, L. E. & W.

"Berrigan v. New York, L. E. & W.

"Berrigan v. New York, L. E. & W.

28 Hun, 492, 29 N. Y. Supp. 533. See
also Sheehan v. New York C. & H. R. R.

Co. (1892) 131 N. Y. 582, 30 N. E. 57;

Rudik v. Lehigh Valley R. Co. (1894)

Property from injury or destruction, and
S Hun, 492, 29 N. Y. Supp. 533. See
also Sheehan v. New York C. & H. R. R.

Co. (1893) 11 N. Y. 332; Evansville & ficers of the company deemed this sysT. H. R. Co. v. Tohill (1895) 143 Ind. tem of signals and rules for damages
also Sheehan v. New York C. & H. R. R.

Co. (1893) 1 N. Y. 332; Evansville & ficers of the company deemed this sysT. H. R. Co. v. Tohill (1895) 143 Ind. tem of signals and rules for damages
also in avoiding all court denied that the company was negrule constitutes a neglect of duty, in not ligent in omitting to promulgate an adbeing able to foresee certain contingen-

able and proper, and, if observed, would have adequately protected the employees.13

As a master is entitled to conduct his business on the assumption that servants will use ordinary care (see §§ 30-30b, ante), he is not under any duty to make rules for the purpose of regulating acts which are in themselves negligent.14

The principle that a master is not bound to adopt any particular methods of work (see § 35, ante) involves, in the present connection, the corollary that, where the rules promulgated by an employer afford ample protection if they are duly observed, the fact that different rules for the same emergency have been adopted by other employers is not sufficient to show that he is negligent.<sup>15</sup>

212. Relation of this duty to that of instruction.— One of the main purposes of a rule being to place servants in possession of certain information which they are not in a position to acquire by their own unaided observation, it is only natural that the situations in connection with which the master's duty to promulgate rules is discussed should sometimes be essentially similar to those in which his liability is made to turn upon the performance of his duty to instruct. See chapter xvi. The availability of protective means and appliances, or the possibility of avoiding injury by the adoption of certain methods, are considerations which excuse the master only in so far as workmen may be able to understand the proper course to adopt under the given circumstances.1 Following out this conception, we are led to

12 Larow v. New York, L. E. & W. R. pany may even have in use a system of Co. (1891) 61 Hun, 11, 15 N. Y. Supp. orders or signals shown to be less safe than that adopted by another railroad than that adopted by another failroad company is not charge-able with negligence because of its omission to make a rule for the protection of brakemen against injury received in boarding moving freight cars, where there was opportunity to board them while they were standing. McDugan v. New York C. & H. R. R. Co. (1894) 10 Misc. 336, 31 N. Y. Supp. 135. An employee is not entitled to a rule forbidding him from walking into an empty elevator shaft. Poindexter v. Benedict Paper Co. (1900) 84 Mo. App. 352.

18 Smith v. New York C. & H. R. R. Co. (1895) 88 Hun, 468, 34 N. Y. Supp. 881. In Hannibal & St. J. R. Co. v. Kanaley (1888) 39 Kan. 1, 17 Pac. 324, the court argued as follows: "A railroad company is not required to change its orders or signals. A railroad company has adopted a different system of orders or signals. A railroad company without being liable to its employees for the consequences of the use of such orders or signals. If the employees thinks proper to continue in the service of the company with the knowledge of the orders or signals in use, it is at his own risk, and all that he can require of the company is that he shall not be deceived as to the degree of danger he incurs." Compare also §§ 209a, 218, as to the effect of the servant's appreciation of the risks incident to the master's system, and see further, as to decisions, chapter XVII.

1 For this reason it was held, in Tully v. New York & T. S. S. Co. (1896) 10 App. Div. 463, 42 N. Y. Supp. 29, Affirmed (1900) 162 N. Y. 614, 57 N. E. 1127, that it was for the jury to say whether the defendant, by furnishing upon the dock lamps and lanterns available to employees engaged in loading a 14 A railroad company is not charge- company, without being liable to its em-

the conclusion that the omission to frame rules cannot be made the basis of a charge of negligence, where the servant is already in possession of all the information which he could obtain from a rule.<sup>2</sup> In this point of view it is clear that the simpler the operations to be performed, the less ground will there be for inferring the existence of an obligation to frame rules.3 More especially is it unwarrantable to in-

vessel, and by having materials to cover on such presumption without being the hatchways in the lower deck near guilty of negligence, and may hold the them, which the employees might have master liable for any harm that results placed over them, had done all that from the absence of the rule. But reasonable care required to make the there is no authority that we know of place of work reasonably safe, or which exacts of the master the duty whether it should, by means of rules, of cautioning the servant against a danhave directed its agents to advise work men temporarily employed to work uphis work, may see and guard against as on its vessels as to any precautionary well as could the master himself if pressure. them to use, in order to secure their to give the warning." safety. Compare Latorre v. Central <sup>3</sup> Negligence cannot be predicated of Stamping Co. (1896) 9 App. Div. 145, the failure of an employer to promul-41 N. Y. Supp. 99, where the main is gate rules for the guidance of men en-

on its vessels as to any precautionary well as could the master himself if pres-means which it might be desirable for ent, or anyone else whom he might put

sue was whether a minor employee gaged in loading ore on cars, and morshould have been instructed, and the ing them along the track only a few court said that, under the circumstan- hundred feet in length, not by engines ces, the jury would have been justified but by their own strength, or that of a in finding that such instruction was horse. Morgan v. Hudson River Ore & necessary, or that there should have I. Co. (1892) 133 N. Y. 666, 31 N. E. been some rule or regulation on the sub- 234. A complaint is bad which is based on the theory that a railroad company <sup>2</sup>Thus, the employer's failure to is bound to make rules in respect to the promulgate a written rule cannot be operation of its trains in its freight made the basis of an action, where oral and coal yards, so as to protect an eminstructions covering the same subject- ployee from risks incidental to his emmatter have been given. Whalen v. ployment, or those arising from his own Michigan C. R. Co. (1897) 114 Mich. negligence or that of his coservants. 512, 72 N. W. 323. In Houston & T. C. Voss v. Delaware, L. & W. R. Co. R. Co. v. Strycharski (1894) 6 Tex. (1898) 62 N. J. L. 59, 41 Atl. 224. The Civ. App. 555, 26 S. W. 253, 642, the court there laid down in general terms, court discussed the liability of the em- that there is no principle of law comployer as follows: "It is certainly the pelling the establishment of rules preduty of railway companies to have suit- scribing the manner in which the work able regulations for the doing of their of the master shall be done by the servbusiness, which will give reasonable ant. But this broad statement is, of protection to their employees where the course, to be read with reference to the exposure is such that prudence requires facts involved. The decision in Sanner it. But all risks which an employee in- v. Atchison, T. & S. F. R. Co. (1897) curs in the service cannot be so pro- 17 Tex. Civ. App. 337, 43 S. W. 533, also vided against by previous regulation. supports the doctrine enunciated in the There are some from which, by the use text. A railroad company is not negliof his senses, he must protect himself. gent in failing to publish rules for the Such are those which are open and pat-regulation of such simple work as the ent to his observation. Such was that moving of cars by hand on a siding from which appellee suffered. When down a slight grade. Moore Lime Co. the circumstances are such that the v. Richardson (1897) 95 Va. 326, 28 S. master is required, in the exercise of E. 334 (plaintiff's decedent walked bedue care, to have a rule for the protec- hind the car he was pushing, and was tion of the servant, the latter may pre-caught by another which overtook it). sume that the rule exists until he ought Negligence is not chargeable to a railto know the contrary; and he may rely road company for its failure to prefer culpability where those operations are of such a nature that the servant's safety cannot be imperiled by any act or omission of his co-employees, but depends wholly upon the degree of skill, care, and caution which he himself uses.4

213. Common usage as a test of the performance of the duty.— Common usage being one of the tests by which the question whether a master's duty has been performed is decided (see chapter vi.), the fact that other individuals or corporations engaged in the same business had or had not found it necessary to make rules to regulate the particular subject-matter is one which it is proper to consider in determining whether a rule ought to have been promulgated under the circumstances, or whether the rule actually promulgated protected the servant sufficiently. The fact that no rule covering the circumstances

scribe rules for warning an employee who went under a rear car, without the knowledge of the engineer, to fasten a Abel v. Delaware & H. Canal Co. brake rod, and was injured by the (1891) 128 N. Y. 662, 28 N. E. 663, the starting of the train. Norfolk & W. R. trial judge had admitted in evidence, Co. v. Graham (1898) 96 Va. 430, 31 against the objection of the defendant, S. E. 604. A railroad company is not bound to make rules to govern its labound to make rules to govern its laboures as to what should be done to secure the remnants of the stacks of ties and among other rules those enacted for borers as to what should be done to secure the remnants of the stacks of ties and among other rules those enacted for borers as to what should be done to secure the remnants of the stacks of ties are the protection of repairmen, and instructed the jury upon the obligation and prevent them from falling. Texas of the defendant to make and promuled N. O. R. Co. v. Echols (1894) 87 Tex. gate proper rules for the conduct of its 339, 27 S. W. 60, 28 S. W. 517. The business. He referred to the fact that court said: "In this case the work to be done was of that character which be had admitted the rules of other combandation for the rules of any other company, but to better enable you to judge and determine, greater than attends any work commoning to the different rules that the rules of the discovery of the disco work."

15, ante.

of the master the precaution of pre- on this point the judge proceeded: "I scribing regulations for the discharge of think rules might have been suggested, such duties does not exist here, and not adopted by any company. You therefore the rule does not apply to have a right to consider whether some this case. The same requirements aprule which occurs to you, even though ply to all employers, railroads, manu- no company had adopted it, would have facturers, merchants, farmers, and in been a better rule, and given better profact in every branch of business, when tection, and such a one as ought to have the business is such that the danger to been adopted and maintained.' The dethe servant exists by reason of the very fendant's counsel excepted to that part nature of the service to be performed; of the charge 'in relation to the jury and it applies to neither when that dan- determining what were proper rules, ger may not be reasonably anticipated and they might conclude what rules on account of the character of the should be." But the court of appeals said: "If the charge is to be construed <sup>4</sup> There is no obligation to make rules as leaving it to the jury to determine, to lessen the dangers of the work of irrespective of the evidence, what rules oiling a dynamo. Fritz v. Salt Lake & ought to have been adopted for the O. Gas & E. L. Co. (1899) 18 Utah, safety of the repairmen, and to find the 493, 56 Pac. 90. Compare § 211, note one way or the other on the question of the defendant's negligence, in conformout of which the injury arose has been promulgated by other employers in the same kind of business, at the very least points strongly to the conclusion that the failure to promulgate such a rule is not actionable negligence.<sup>2</sup> In some jurisdictions, as shown in §§ 44 et seq., compliance with the usage of any considerable majority of the class of employers to which the defendant belongs is treated as being conclusive in his favor. So far as the duty to make rules is concerned, the effect of such compliance is left somewhat obscure by the few New York cases in which the question has been considered.3

ity with a conclusion so reached, the (1892) 131 N. Y. 582, 30 N. E. 57; charge was undoubtedly erroneous. But Morgan v. Hudson River Ore & I. Co. this is not the fair interpretation of (1892) 133 N. Y. 666, 31 N. E. 234. the charge. The plain object of the court was to guard the jury against Co. (1893) 73 Hun, 270, 26 N. R. E. 254.

Source was to guard the jury against Co. (1893) 73 Hun, 270, 26 N. Y. Supp.

Graph of the charge. The plain object of the source was to guard the jury against Co. (1893) 73 Hun, 270, 26 N. Y. Supp.

Graph of the charge. The plain object of the source was to guard the jury against Co. (1893) 73 Hun, 270, 26 N. Y. Supp.

Graph of the charge. The plain object of the suppression of the court was to guard the jury against Co. (1893) 73 Hun, 270, 26 N. H. E. 254. been adopted by other companies than porations engaged in business of a sim-had been adopted by the defendant. ilar character, and no experts or other This is very apparent from what fol-witnesses had given testimony tending lows the clause quoted: 'So, that some to show that any rule was necessary or other company has adopted a rule, you practicable in such a case; nor was the can't hold, as matter of right, that this evidence such as to make the necessity company should have adopted it. If, and propriety of making and promulthe defendant company, or of all com-ticable. But the position taken by the panies, to have a foreman with the sec-court of appeals in the *Doing Case* rention men, to warn them of the approach ders it difficult to say whether this de-

gan v. New York, L. E. & W. R. Co. higher tribunal. In Crowe v. New York

on examining the rules of other compa-nies and those that prevailed here, you ous as to make the question one of com-should think that one set of them was mon experience and knowledge. The not a reasonable protection, and the abstract correctness of this doctrine other was, it would help you very much was not denied by the court of appeals, in getting at what ought to be done. but it was held that the principle which in getting at what ought to be done. But it was held that the principle which That is the reason why this evidence really controlled the case was that, was admitted.' The effect of the charge was that the jury were to weigh the evidence, and, in view of the rules and dangerous manner, it is his duty adopted by different companies, determine whether the defendant had discharged its duty in the premises, and that they were not to find a rule proper in (1893) 73 Hun, 270, 26 N. Y. Supp. or improper because some other company has adopted or rejected it. The court was endeavoring to aid the jury at the in weighing the evidence which related to the rule under which the defendant's rules or regulations governing the load-business was conducted, and that adopted on the same subject by other companies. We do not think the jury derivative or the rule under which the defendant's rules or regulations governing the load-business was conducted, and that ing of rails upon a flat car by gangs of adopted on the same subject by other companies. We do not think the jury derivative or regulations governing the load-business. We do not think the jury derivative or regulations governing the load-business. We do not think the jury derivative or regulations governing the load-business. We do not think the jury derivative or regulations governing the load-business. We do not think the jury derivative or regulations governing the load-business. We do not think the jury derivative or regulations governing the load-business. We do not think the jury derivative or regulations governing to a rail-L. R. Co. v. McGrath (1885) 115 Ill. thrown on the car from the opposite 172, 3 N. E. 439, it was held proper on side, unless rules relating to such work 172, 3 N. E. 439, it was held proper on side, unless rules relating to such work the cross-examination of a witness to have been adopted by other companies. ask whether it was not the custom of or a rule would be necessary and praccision would be upheld upon the facts <sup>2</sup> See this point emphasized in Berri- disclosed, if it came under review in the

213a. Habitual practice; how far a legal substitute for a rule.— An obvious corollary of the proposition that the master is responsible for the exercise of due diligence in directing the mode and manner of carrying on his business is that he is not liable where the mode in which it is carried on, by his authority, is reasonably safe, prudent, and careful, howsoever that result may be brought about. Whether an employer who is charged with culpability in omitting to promulgate formal rules is entitled to shelter himself under the plea that the casualty which produced the injury would not have occurred if a certain customary method of doing the work had been followed depends upon whether that method has actually become an incident of the management of his business, not only with his sanction and approval, but also in such a sense that his employees comprehend that he requires and expects them to conform to it. In other words, such a method is regarded as the legal equivalent of a rule when it is recognized and regularly enforced by the employer, and not otherwise. Subject to the qualification thus indicated, the accepted doctrine is that a charge of negligence for not making rules is avoided by the proof of a rule and practice, actually in force, which rendered any other rule apparently unnecessary.2

On the other hand, the fact that certain employees were in the

C. & H. R. R. Co. (1893) 70 Hun, 37, same business had made rules for such 23 N. Y. Supp. 1100, it was laid down cases." 23 N. Y. Supp. 1100, it was laid down cases."

that a railway company cannot be held negligent in failing to promulgate a (1894) 123 Mo. 131, 24 S. W. 1053, 27 rule which has never been adopted. In S. W. 327.

Eastwood v. Retsof Min. Co. (1895) 86
Hun, 91, 34 N. Y. Supp. 196, on the other hand, the position has been distinctly taken that the fact that no such (Rutledge v. Missouri case just cited tinctly taken that the fact that no such (Rutledge v. Missouri P. R. Co. [1894] rules as those suggested had ever been 123 Mo. 131, 24 S. W. 1053, 27 S. W. made by other employers is not concars, was thrown to the ground by the them. The court said: "Where the bus-sudden checking of the train in response them. The court said: "Where the bus-

sudden checking of the train in response iness is complicated, the circumstances to an unauthorized signal by another are those which do not occur often, and employee. The evidence showed that the danger is not serious, it may well be that the fact that other people engaged in the same business have found no necessity for making rules for the particular case may be almost conclusive that given by the person engaged in the such rules are not necessary. But where the circumstances are such that any person can see what might happen in a given case, and the danger is plain and obvious, the jurors might be at liberty or custom was a part of the mode of to infer that rules to protect the employees, the court said: "That practice or custom was a part of the mode of conducting defendant's work, and its long continuance implies that it had the sanction of defendant. The employees were expected to conform to it as part of the usual course of the defendant's the danger is not serious, it may well be there were printed rules prescribing the

habit of observing a custom or rule for their own protection will not operate as a discharge of the employer's duty to see that the department of his business to which it relates is conducted upon a safe system, where there is no evidence that it was published by printing, or generally known to that particular class of employees against whose acts it was supposed to be a safeguard, or that it was regularly prescribed by the the employer in some way, or that he required it to be obeyed.<sup>3</sup> Still less will the mere supposition or "general under-

them, incident to his employment, to car repairer caused by the failure to act as a watchman to protect the plaintiff from injury, said: "True, no written or published regulation of the company to that effect was shown; neither 9 N. E. 325. In Rutledge v. Missouri
did any witness in the employ of the company testify that he had been 1053, 27 S. W. 327, supra, Macfarlane, charged by any officer of the company J., dissented on the ground that the
with the duty of watching for the safety of other employees working under and enforced the custom under discuscars upon the tracks; but many such sion was, under the circumstances, one
witnesses testified that their duty in for the jury to determine. witnesses testified that their duty in for the jury to determine. that behalf was well understood by

business. . . . What greater prothem and other employees of the comtection would the plaintiff have had pany. It was a sort of common law of from the existence of a formal rule, di- the company, obligatory upon its emrecting the work to be done in the man-ployees, and as thoroughly understood ner in which the men already observed? by them as though it had been embodied How can it justly be said that there is in the printed regulations, and read by need of a particular rule, or negligence the officers of the company to them. It in failing to declare it, when the practhus became a rule or custom of the tice which it would prescribe has alcompany, as well as an understanding ready been adopted and is followed by between its employees." In Byrnes v. the men to whom it would apply? New York, L. E. & W. R. Co. (1893)... The practice of the workmen, 71 Hun, 209, 24 N. Y. Supp. 517, it was no less than any possible rule, sancheld that the establishment by a railtioned the repetition of the first signal, road company of a rule for the inspecin some circumstances, by another em- tion of loaded cars before they are sent ployee, in order to catch the eye of the out was not proved by the testimony of engineer. The latter (who testified an employee, having charge of the busiengineer. The latter (who testined an employee, having charge of the bust-for plaintiff) declared that he stopped ness at a station, that he considered it the locomotive and train in response to a part of his duty to make such inspec-a lantern signal given by someone. If tion and so instructed the men under that signal, at the time plaintiff was him, and that it was his custom to give hurt, did not originate with the plain- such instructions,—especially where it tiff, there was a plain violation of the is possible the fault of such person in custom and practice of the yard, quite failing to inspect such car caused the as much as there would have been a vi- accident for which recovery is sought, olation of the rule, had one existed to and he was contradicted by two witthe same effect." In Luebke v. Chicago, nesses. In Texas & P. R. Co. v. Camp. M. & St. P. R. Co. (1885) 63 Wis. 91, bell (1894) 39 S. W. 1104; (1897) 16 53 Am. Rep. 266, 23 N. W. 136, the Tex. Civ. App. 665, 39 S. W. 1105, failcourt, in ruling that sufficient precauture to reduce to a written rule a custion had been taken to secure an emtom by a railway company requiring ployee working under a car, where the employees engaged in handling cars at evidence showed that, while he was una given point to notify those engaged in der the car, three trainmen in the employ of defendant were standing by the the repairing before setting cars in upon ploy of defendant were standing by the the repair track was held not to render car, and that it was the duty of each of the company liable for an injury to a them, incident to his employment, to car repairer caused by the failure to

standing" of defendant's employees be deemed competent evidence of the existence of a rule.4

As illustrative of the above doctrine, it may be noted that, where the consequences of a violation of a rule by the injured employee are in question (see chapter xix.), a custom which has been regularly observed is, for legal purposes, equivalent to a rule promulgated by the master.<sup>5</sup> But in such a case as this, it is obvious that the question whether the custom was enforced or not by the employer is immaterial. The servant's incapacity to recover is referable to the principle that he knows himself to be doing his work in a manner which is likely to cause him injury.

In any jurisdiction where the duty to see that a rule is carried out is regarded as non-delegable (see chapter xxx1.), the doctrine that an habitual practice is the juridical equivalent of a rule will sometimes operate to the disadvantage of the master.6

213b. Duty to bring the rules to the notice of the servant.—The failure to bring a rule to the knowledge of the employee or employees by whose agency it is to be carried out obviously involves the same consequences, in a juridical point of view, as the entire omission to frame that rule.1

\*James v. Northern P. R. Co. (1891)
46 Minn. 168, 48 N. W. 783.

\*An experienced locomotive fireman who, in violation of a well-understood custom among engineers and firemen, where any of the red lights which they went under an engine to clean out the ash pan without notifying the engineer, and was scalded by the engineer's blowing off the engine, was held chargeable ure of the train hands to obtain a red with such contributory negligence as to preclude a recovery for the injury in Crane v. Chicago, M. & St. P. R. Co. (1896) 93 Wis. 487, 67 N. W. 1132. a view to carrying such a light, that a So, also, a steam ferry company is not liable for the death of an oiler on a particular kind of lamp was conliable for the death of an oiler on a particular kind of lamp was constructed for the purpose of being displayed. By many courts, however, it may be presumed that the facts thus played. By many courts, however, it may be presumed that the facts thus played. By many courts, however, it may be presumed that the facts thus played. By many courts, however, it may be presumed that the master is not lianot be in the engine room to notify him should be going into a dangerous place and the engineer should not be in the engine room, to withdraw the starting bar and place it on the floor of the engine room to notify him not to start, was disobeyed by the deceased. Stevens v. San Francisco & N. P. R. Co. (1893) 100 Cal. 554, 35 Pac.

165.

\*In Denver & R. G. R. Co. v. Sipes that defendants had a rule requiring a (1899) 26 Colo. 17, 55 Pac. 1093, it boom which was attached to the engine

rules of a railway company did not ex- and that other contractors had similar

In Denver & R. G. R. Co. v. Sipes that defendants had a rule requiring a (1899) 26 Colo. 17, 55 Pac. 1093, it boom which was attached to the engine was held that the mere fact that the to be lowered before shifting the engine,

The duty of promulgation is usually considered in relation to the question of the servant's knowledge of some particular rule as an element which it is necessary to establish before he can be held guilty of contributory negligence in violating it. This aspect of the duty is discussed in subtitle D.

214. Duty to enforce the rules promulgated .-- (See also cases cited in § 217, infra.)—An employer does not discharge his whole duty by merely framing and promulgating proper rules for the conduct of his business, and the guidance and control of his servants. under the obligation of enforcing the rules, in so far as that result can be attained by exercising a reasonably careful supervision over his business and his servants.<sup>1</sup> In other words, a master's duty does

duty it was, to direct the work of shifting the engine, and who had charge of the work, and hired the laborers, who were to obey his instructions, the men promulgation and enforcement. If that engaged in shifting the engine being all rule was not intended to apply to such under his direction, and not that of the engineer. Daley v. Brown (1901) 167 fact whether the defendant had pernicularly and possible formed the measure of its duty, within (1899) 45 App. Div. 428, 60 N. Y. Supp. 840. A rule which relieves the employee of the obligation to give the employee notice of dangers similar to those against which rules are commoning promulgated as a safeguard stands of defective machinery, and permitting ly promulgated as a safeguard stands of defective machinery, and permitting on the same footing as any other rule. employees to habitually disregard the Thus, where a railroad company, in an safeguards that have been provided to action for injuries caused by a collision insure the safe running and operation with a "wild" train, admits that it was of trains." Coppins v. New York C. & run without any precaution or notice in H. R. R. Co. (1890) 122 N. Y. 557, 25 advance that such a train was to be ex
N. E. 915. pected, and, in order to rebut any pre-

rules, authorized a finding that the rule rule of the defendant, said "If . . . [it] should have been communicated to the was intended to apply to a train like the foreman, who had authority, and whose one in the inspection of which the plainduty it was, to direct the work of shift- tiff was injured, it became a question of

By promulgating a printed rule, the sumption of negligence on the premises, master does not become responsible for relies upon a rule dispensing with such its observance in every case which it notice, the defense will not be allowed, fits. "A rule is but a direction or comunless it shows that its employees were duly informed of the rule, or had such knowledge of its usage and practice in the premises as would be equivalent to actual notice of the dangers arising from the particular occurrence which the rule was designed to obviate. Olson to the certainly is not an insurer of its observance." Rutledge v. Missouri P. R. Co. (1894) 123 Mo. 121, 24 S. W. 1053, 27 S. W. 327. Where a mine is observance v. Ward (1859) 1 El. & El. hundred feet into the earth, by means 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261. Whittaker v. Delaware & H. Canal Co. (1891) 126 pany that a signal called a "tally" shall N. Y. 544, 27 N. E. 1042, Followed in be sounded at twenty-three minutes be Warn v. New York C. & H. R. R. Co. fore 5 o'clock every evening, at which (1894) 80 Hun, 71, 29 N. Y. Supp. 897, time the cars shall cease running up where the court, referring to a certain unless it shows that its employees were mand as to the mode of carrying on the where the court, referring to a certain and down the incline, and the workmen

not end with prescribing rules calculated to secure the safety of employees. It is equally binding on him honestly and faithfully to require their observance.2 It has been said that the duty of seeing that the regulations are obeyed is specially imperative where young persons are employed.3

In some cases negligence in respect to the enforcement of a rule may be inferred where the defendant has noticed that it is constantly being violated, and is therefore insufficient for the protection of certain employees unless some other employee is personally present to see that the precautions which it contemplates are properly observed.4

Whether the master was negligent in failing to enforce a rule adopted by it is a question of fact for the jury.<sup>5</sup>

It is evident that, in order to recover for a breach of this duty in cases where the master was not personally supervising his business, the servant must rely on the theory that the agent to whom the enforcement of the rules was intrusted was a vice principal by virtue

the foreman of repairs. It was aspectation against such improper use; serted by the company that if this rule second, whether they were guilty of was sufficient, when faithfully observed neglect, either in not taking precauby its employees, to guard against the tions, or in respect to the sufficiency of danger, the company had discharged its the precautions taken by them; third, duty. The court, however, said: "This whether the plaintiff was injured by a reasonably prudent person might rely 117 Mass. 319. upon rules and regulations to afford

shall have the right of way for the protection. But if the master sees space of seven minutes to reach the surproper to rely upon such methods of face, it is negligence on the part of the protection to his servants, and the occompany to allow the "tally" to be casion demands it, he should also adopt given by an employee stationed at an such measures as may be reasonably intermediate point on the incline, where necessary to secure the observance of it is impossible for him to know when such rules. The fact that rules have cars will be sent down by the engineer been adopted is only evidence of the deat the top. Silver Cord Combination gree of care and diligence exercised by

at the top. Silver Cord Combination gree of care and diligence exercised by Min. Co. v. McDonald (1890) 14 Colo. the master in any given case."

191, 23 Pac. 346.

Richmond & D. R. Co. v. Hissong Co. (1895) 92 Hun, 91, 36 N. Y. Supp. (1893) 97 Ala. 187, 13 So. 209; St. 336, Reversed (1898) 157 N. Y. 109, 51 Louis, A. & T. R. Co. v. Triplett (1891) N. E. 744, but not on this point. 54 Ark. 289, 11 L. R. A. 773, 15 S. W. Whether masters can be held liable on 831, 16 S. W. 266. Laxity in the enthe ground that they neglected to take forcement of rules is negligence. Texas proper precautions, in relation to an el- N. O. R. Co. v. Echols (1894) 87 Tex. evator. to prevent persons in their emforcement of rules is negligence. Texas of N. O. R. Co. v. Echols (1894) 87 Tex. 339, 27 S. W. 60, 28 S. W. 517.

"Parent v. Schloman (1897) Rap.

Jud. Quebec, 12 C. S. 283.

"St. Louis, A. & T. R. Co. v. Triplett business, depends upon three questions (1891) 54 Ark. 289, 11 L. R. A. 773, 15 of fact: First, whether the condition of S. W. 831, 16 S. W. 266, where the only the elevator, its relation to the business rule promulgated for the protection of of the defendants, or to the work in men working on repair tracks was one which the plaintiff was engaged, and all which forbade men to do switching on such tracks without the permission of as to require of the defendants some the foreman of repairs. It was as precaution against such improper use: seems to be the general rule of law, reason of the want or insufficiency of when the circumstances are such that such precaution. Avilla v. Nash (1875) either of his official rank, or for the reason that the duty belongs to the non-delegable class. These aspects of the question are discussed in chapters xxviii., xxix., and xxxi., post.

215. Construction and meaning of rules.— When duly brought to the knowledge of the servants, and assented to by them, a rule constitutes a written contract between them and the master. Its construction, therefore, must always be a question exclusively for the court.<sup>1</sup> The proper course, therefore, is for the court to instruct the jury as to the meaning of the rule in question.2 Yet it has been held that, where the language of a rule, when read in the light of the circumstances inducing its promulgation, is fairly susceptible of a certain construction, and that construction has always been placed upon it by employees, it is a question of fact for the jury, whether one of those employees was negligent in acting on the assumption that this construction was the correct one.3

By one court it has been laid down that, when a rule is clear and explicit, free from ambiguity and equivocation, evidence of usage and custom is inadmissible to vary or alter its terms.4 By another, the more restricted doctrine has been formulated that evidence is not admissible to show that employees interpreted and acted upon a rule as bearing a certain signification, without showing that the plaintiff himself so understood or so acted on the rule, or knew that the other employees did so.<sup>5</sup>

Like other written documents, rules are to be given a reasonable construction.6

<sup>1</sup> Western & A. R. Co. v. Moore 654. The reversal on rehearing (1900) (1893) 94 Ga. 457, 20 S. E. 640. The 22 Ky. L. Rep. 1141, 60 S. W. 2, does construction of a contract, unless there not affect the case as an authority for is something peculiar to the words, by the above point.

reason of the custom of the trade to which the contract relates, is for the (1895) 88 Tex. 604, 32 S. W. 515, Afcourt. Per Lord Cairns in Bowes v. firming (1895; Tex. Civ. App.) 32 S. Shand (1877) L. R. 2 App. Cas. 455, 46 W. 799.

L. J. Q. B. N. S. 561, 36 L. T. N. S. 857, \*Memphis & C. R. Co. v. Graham 25 Week. Rep. 730. See also Parsons, (1891) 94 Ala. 545, 10 So. 283. The Contract of a contract pulse of evidence is that usage is Contr. p. 610. This doctrine is as general rule of evidence is that usage is sumed to express the correct rule of admissible to explain what is doubtful, sumed to express the correct rule of procedure in all the cases cited below, with one exception to be noted presently. A witness cannot be asked whether, under some particular rule, there would be any objection to doing a certain thing in a certain way, as this would be asking him to construe the rule, and this is not within the domain of verbal evidence. Pennsylvania Co. v. Stocke (1882) 104 Ill. 201.

\*Louisville & N. R. Co. v. Hiltner (1900) 21 Ky. L. Rep. 1826, 56 S. W. following case one rule declared that a

construction of a contract, unless there not affect the case as an authority for

An ambiguous rule promulgated by a corporation for the government of its employees in a dangerous service should generally be taken in its stronger sense against the corporation and in favor of the

work train "must not leave a station, said that it was his right to see the orwhen directed to run by special order, der, if one had been received, and that unless the conductor and engineer have until he saw it he should have acted a copy of the same in their possession;" on the presumption that none had been while another required the conductor to sent, but such a course on his part was show his order to the brakeman, and not required by the rules. They prothe engineer to show his to the fireman. vided that train and engine men should The conductor of such a train received be held equally responsible for the vioa message stating that a certain passen- lation of any of the rules governing the ger train was fifty-three minutes late, safety of the trains, and that they and kept his train at a station until should take every precaution for the half an hour after this period had exprotection of trains, even if not provid-pired, the train crew having meantime ed for by the rules; but they also pro-taken their dinner at a place about two vided that the conductor should have blocks away, where it was doubtful charge and control of the train and of man of the former was killed. The fail to show their telegraphic orders as company sought to escape liability on provided by rule 101, but we find noth-the theory that the fireman was guilty ing in the rules which required them to of contributory negligence in not flaving refused to obey the directions of the Chicago, M. & St. P. R. Co. (1894) 90 conductor until he had first satisfied lowa, 259, 57 N. W. 894. A special bulhimself that such directions were authorized by a new telegraphic order sutrains when passing certain particular perseding the one which announced switch points designated therein, has that the passenger train was late. The no application to switch points genercourt, however, refused to set aside a ally; and, in the absence of evidence verdict finding that the fireman was not showing that the point at which the negligent in remaining at his post, say-disaster occurred was of the particular ing: "It is scarcely necessary to say class of switch points embraced within

whether a passing train would have all persons employed on it, and made been heard, and then ran out his train him responsible for its movements while without having inquired whether the on the road, 'except when his directions passenger train had passed through the conflict with the rules, or involve risk station, and without having received or hazard,' in either of which cases the any message regulating the movements engineer was to be held alike accountof his own train. A collision took able. Brakemen and firemen were replace between the work train and the quired to report every instance when belated passenger train, and the fire-the conductors and engineers should man of the former was killed. The fail to show their telegraphic orders as ing: "It is scarcely necessary to say class of switch points embraced within that such a rule would destroy the dis- the terms of such order, a court does cipline essential to the proper manage- not err in charging the jury that this ment of trains, and we find nothing in order could have no application to the the record which requires that it be enpoint in question. Western & A. R. Co. forced in this case. Whether Davies v. Bussey (1894) 95 Ga. 584, 23 S. E. knew that No. 3 had not passed when 207. Evidence that a railroad company the conductor ordered his train out on- has promulgated rules requiring track to the main line is not shown. It is repairers to examine their sections probable, but not certain, that he would daily to ascertain if the track is safe, have heard the train had it gone and to keep them and the cattle guards through the station while he was at in good repair, is inadmissible in an acdinner. But conceding that he should tion to recover for injuries received by have known that it had not yet arrived, a brakeman through a collision with it does not follow that he knew his the wing fence at a cattle guard, where train should not have been ordered out, there is no allegation that the fence He knew he had not seen a telegraphic which caused the injury is not in good order which announced any further order, and the rules gave the track rechange in the time of No. 3, it is true, pairers no authority to remove such but he did not know what information fences. McKee v. Chicago, R. I. & P. the conductor had received. It may be R. Co. (1891) 83 Iowa, 616, 13 L. R. A. employee. Obscurity of language which renders rules unintelligible to employees creates a species of trap for them, and, where the consequence of holding a given rule valid will be to disable an employee

817, 50 N. W. 209. A railroad company inspectors are at work under or about is not liable to a section hand injured the car or train, and that the car or by a passing engine while he was cleantrain so protected shall not be coupled duty, upon stopping his train, to give Indianapolis & St. L. R. Co. (1889) 130 the signal for the flagman to be sent III. 334, 22 N. E. 704. back, and the duty of the conductor to take that precaution without the signal.

ing the tracks at a crossing, on the to or moved until the signal is removed ground of failure to observe a rule re-by the car inspector, and that, when quiring a lookout on the footboard of a car or train is standing on a siding so an engine backed across a public high-protected, other cars shall not be placed way, as the rule is for the protection in front of it without first notifying the of the public, and not employees. Carlson car inspector, that he may protect himof the public, and not employees. Carlson car inspector, that he may protect himv. Cincinnati, S. & M. R. Co. (1899) 120 self, does not apply to a regular passen-Mich. 481, 79 N. W. 688. A rule of a ger train which has stopped at a starailroad company requiring that at all tion on the main track. Warn v. New stations where automatic block signals York C. & H. R. R. Co. (1898) 157 N. are not used, a red signal will be at Y. 109, 51 N. E. 744, Reversing (1895) once displayed next the track on which a train has passed, and kept there unture requiring warning signals to be til it has been gone the length of time displayed at an adequate distance from given in the time-table between it and the place where work is to be done "which the train which should follow if not will render the track upsafe or impassed. the train which should follow, if not will render the track unsafe or impasmore than ten minutes, but in all cases sable, or unsafe for trains at their uskept there for five minutes; and that ual rate of speed," has no application no train will pass such signal until the to a case where a bridge which has sunk five minutes have elapsed, unless other- about an inch below its proper level is wise ordered in the time-table or by spe- being "surfaced." Under such circumcial instructions,—does not require the stances it is rather the duty of the employee whose duty it is to display workmen to clear the track for the such signal to place it on the track, or trains, and the track is not impassable such signal to place it on the track, or trains, and the track is not impassable so near thereto he will be struck by a nor even dangerous within the meaning passing train, or to keep it there the of the rule. Aurandt v. Chicago, M. & full ten minutes, where that is the time St. P. R. Co. (1894) 90 Iowa, 617, 57 before the next train is due. Foss v. N. W. 442. The effect of evidence that Old Colony R. Co. (1898) 170 Mass. it was a part of the duty of trackmen 168, 49 N. E. 102 (recovery denied on to look out for wild trains, and that the ground that the servant had either they had no other means of protection placed the light in an unprecessarily except to take care of themselves is not placed the light in an unnecessarily except to take care of themselves, is not dangerous place, or tried to remove it qualified by a rule that wild trains without taking proper precautions). "must run cautiously around curves Where there is no rule which, in express terms requires the engineer to trackmen," the proper interpretation of give any signal for sending out a flag- the rule being that the caution has refman to protect a train, in case of a erence to the safety of the train, not of stoppage on the main line, but a rule the trackmen. Sullivan v. Fitchburg states that "five short blasts of the R. Co. (1894) 161 Mass. 125, 36 N. E. whistle is a signal to the flagman to go 751. A rule requiring car repairers, back and protect the rear of his train," while at work on main or side tracks, and the conductor is also required to to put out a blue flag as an indication protect his train by flagging, in case of of their presence, does not apply to stoppage, the construction to be placed cars upon which repairs are being made on the rules is that it is the engineer's in the shops or shop yards. Quick v.

<sup>7</sup> Western & A. R. Co. v. Moore (1893) 94 Ga. 457, 20 S. E. 640, hold-International & G. N. R. Co. v. Culpep- ing that, under a rule of a railroad per (1898) 19 Tex. Civ. App. 182, 46 company, in these words: "Conduct-S. W. 922. A rule of a railroad com- ors and trainmen are required to be at pany, providing that certain signals on terminal stations thirty minutes before the end of a car shall denote that the car the leaving time of their trains. Brake-

from recovering damage, on the ground that he violated its provisions, the courts very properly apply the principle that rules are to be strictly construed against the master.8

men must examine the coupling appa- R. A. 817, 50 N. W. 209. In Louisville men must examine the coupling apparatus and brakes before train starts,

& N. R. Co. v. Kenley (1893) 92 Tenn
and report to the conductor such as are
207, 21 S. W. 326, where the question
not in good order,"—it is prima facie
was whether the promise of a conducincumbent upon brakemen to examine
tor to repair a car was binding on the
brakes only at terminal points before
the starting of a train. To this printhe effect that conductors, flagmen,
ciple the following decisions would also
brakemen, and train porters were to reseem to be referable.

A firemen temport to and receive their instructions seem to be referable. A fireman temporarily in charge and control of an the company is an "engineman" within appliances. A rule of a railroad compart the company that enginemen pany that when a train "stops, for any are responsible for the proper managecause," danger signals must be given, ment of their engines, and must use great care in switching and handling their trains to avoid danger to persons and property, and must avoid all unnecessary jerking. Louisville & N. R. Co. v. Morgan (1896) 114 Ala. 449, 22 So. 20. A rule to the following effect, "Coach switching conductors must see that brakemen, with good and sufficient brakes, are on any moving cars; and ern P. R. Co. v. Poirier (1897) 167 U. they are cautioned as to making flying S. 48, 42 L. ed. 72, 17 Sup. Ct. Rep. 741 switches (switch rope being furnished). Avoid such switching, even if it increas- of one train which was running a short es your work," is advisory only, and distance ahead of another failed to comimposes caution on the employees when ply with such a rule). making such switches, but does not forbid them. Youll v. Sioux City & P. R. Co. (1885) 66 Iowa, 346, 23 N. W. 736. Rules prohibiting switchmen from using ration itself enters upon the task of any tools or appliances of any kind framing rules which shall stand as law which are not "safe," and stating that unto its employees, the law-making employees will be upheld by the com- power should be reasonable in framing pany in refusing to use tools, machin-such rules, and should express them in ery, rolling stock, or appliances which such language, and so directly, as to are unsafe, cannot be construed in such be entirely unequivocal. If, by the a sense that their violation can be in-formulation of rules, it undertakes to ferred where an employee makes a pilot-meet the varying exigencies which may bar coupling with a "Janney" coupler, arise in the conduct of its business, sub-if such a coupling, although more dan-stituting direction to him for a discregerous than one made with the ordinary apparatus, can be made safely by the exercise of due care. Kerns v. Chicago, M. & St. P. R. Co. (1895) 94 Inoughous the exercise of which he would be answerable, their statutes must be at least unequivocal, and within the comprehension of the class of persons upon whom tools" shall be placed within 5 feet of they are designed to operate. Nothing the rail, applies to loose tools, etc., which are liable to be accidentally which are liable to be accidentally be borne in mind that the persons or moved by the wind or other causes, dinarily employed in the conduct of without the concurrence and against this business, and for the government of the wish of the railroad company, and whom these rules are designed, are not not to permanent structures, such as learned or skilled in the technical rules cattle guards. McKee v. Chicago, R. I. of statutory interpretation; and therefore the cattle guards. McKee v. Chicago, R. I. fore, if they be not couched in such gerous than one made with the ordin-tion which otherwise the employee

port to, and receive their instructions from, the master of trains, had any apincluding the placing of torpedoes on the track at least thirty telegraph poles from the rear of the train, seems to be applicable to trains stopped by accident or obstruction, or unexpectedly compelled to stop between stations and not one which is intended to prescribe the course of action to be followed every time a train stops at a station. North-(the contention was that the conductor

<sup>8</sup> As was well said in Western & A. R. Co. v. Bussey (1894) 95 Ga. 584, 23 S. E. 207, "When the [a railroad] corpo-

216. Rules prescribed must be definite and intelligible.—It is sufficiently obvious that an employer cannot be said to have discharged his duty in regard to the framing of rules unless their provisions are sufficiently specific to furnish the employees affected with adequate information respecting the acts which are to be done in order to carry out the employer's ideas as to the proper manner of performing the work. So, also, it is as much the duty of a master to specify in a

company to me for any results of discation to the present case." obedience or infraction thereof. I have A general rule that fre obedience or infraction thereof. I have read the above carefully and fully understand it." The court said: "It may be fairly presumed that the rules referred to and quoted from in the contract were carefully prepared, deliber-company from liability for injury to a contract by the fall of the fairly presumed that the rules referred to and quoted from in the contract were carefully prepared, deliber-company from liability for injury to a contract by the fall of timber than the fall of timber than the fall of timber than the rules referred to and advected and or the reserved to the present case.

1 A general rule that freight is to be safely loaded so that it cannot fall off to be referred to another than the rules are the case. written or printed document. It is gondola car on which it was piled above Vol. I. M. & S.-31.

terms as to make them intelligible to allowable, therefore, to notice the employees, or if they be so far equivocal as to express one thing and mean tain whether or not, fairly construed,
another, it would be a harsh rule of that phraseology embraces such a
law which would hold the employee ancoupling as was attempted in this case.

Swerable where he conformed to the exThe plaintiff was neither coupling nor

The plaintiff was neither co press direction of the master, but in uncoupling cars, nor did he go between doing so violated what the latter may the cars, nor was the engine attached to be pleased to term the spirit of a rule." any cars or train. The evidence is, in There it was held that, notwithstanding substance, that the plaintiff, who was a rule of the defendant company requiring all trains to stop of school. way usually practised by employees, upon the footboard of the pilot on the ing all trains to stop at scneume meeting and passing points, it was not erupon the footboard of the photon on one ror to refuse a request to charge, in an tender, and while there attempted to withdraw with his hand, without using that it was the duty of the engineer to a stick, a pin and link from the coupstop his train at the point where the ling apparatus of the engine, the encollision occurred, it not appearing that gine and tender being in motion backcollision occurred, it not appearing that the same was either a schedule meeting or passing point. It was also denied to be error to charge the jury that the engineer, under such rule, could pass other than schedule meeting and passing points "at such rate of speed as common prudence dictated as safe." In Richmond & D. R. Co. v. Mitchell (1892) 92 Ga. 82, 18 S. E. 290, the plaintiff, as part of his contract of employment with the company, subscribed an instrument to the following effect: "I fully understand that the rules of the Richmond & Danville Railroad Comtant and adopted them than against one who pany positively prohibit brakemen from and adopted them than against one who ocupling or uncoupling cars, except merely assented to and agreed to be with a stick, and that brakemen or bound by them when they were preothers must not go between the cars under any circumstances, for the purpose The strong probability is that, in preof coupling or uncoupling or adjusting paring the rules, such a case as the prespins, etc., when an engine is attached to ent, though it might frequently occur, said cars or train; and in consideration was overlooked, and therefore was not of being employed by said company, I provided for. We think this is the hereby agree to be bound by such rule, truth of the matter, and we hold with and waive all or any liability of said confidence that the rules have no appli-

ately adopted, and embodied in some servant by the fall of timber from a

rule the means by which the notice of danger for which it provides is to be given, as it is his duty to direct that such notice shall be given.<sup>2</sup> But a rule which requires employees of one class to protect themselves by certain precautions against the possible consequences of certain acts of employees of another class cannot be impugned on the ground of insufficiency because it does not in terms forbid the latter class of employees to do those acts.3

car and the stakes, it was left to the sion and mistake. Texas & P. R. Co. judgment and discretion of the foreman v. Eberhart (1897; Tex. Civ. App.) 40 whether to use the stakes or not, and S. W. 1060, Affirmed in (1897) 91 Tex. in this particular instance they were 321, 43 S. W. 510. not used for the reason that they supposed the lumber would stay on the car comb (1894) 9 Ind. App. 198, 36 N. E. over the short distance it was to be 39 (rule requiring that actual notice of carried. And it is because of the failance and switching done in the daytime on ure of the defendant to require the use repair track should be given to the men of the stakes in all cases that the negrous property was to be given by whom notice was to be given. lect of its servants in this case is imperson by whom notice was to be given, puted to it. There was no rule, and held not sufficient, as a matter of law). puted to it. There was no rule, and the only method or system was such as the foreman in each particular case should deem the safe and proper one to pursue. Under such a state of facts provided that "men repairing cars must the employer must be deemed constructively present during the loading of the cars, and the acts of his agents are in law deemed to be his acts. The improper and negligent loading of the cars is thus traced directly to the defendant, and its negligence established." stop his train before passing such signard v. Lake Shore & M. S. R. Co. nal." The trial judge, under the defendant, and its negligence established." stop his train before passing such signard v. Lake Shore & M. S. R. Co. nal." The trial judge, under the defendant, and its negligence established stop his train before passing such signard. The trial judge, under the defendant services and the acts of his agents are in the cars; "another that "a red flag by a flag when under and between the cars;" another that "a red flag by night, indicates danger; on perceiving such, the engineer shall immediately stop his train before passing such signard. The trial judge, under the defendant is exception, submitted to the 26 N. E. 1101. Where car repairers are jury the question as to the sufficiency of business, enter from either end, and the not in terms prohibit the coservants of

the sides without stakes to hold it, al- custom is to protect such car repairers though stakes were furnished by the by placing a blue flag at one end only company, to be used in the discretion of of a car which is undergoing repair, the its servants. In the following case the company is negligent in not promulgat-court said: "Method or system as to ing a more definite rule than one which loading lumber, there was none. Have merely provides that "blue is a signal ing furnished a good car and stakes to be used by car inspectors." Chicago, that might be used, the manner of load-B. & Q. R. Co. v. McGraw (1896) 22 ing lumber was left to the judgment Colo. 363, 45 Pac. 383. A rule for the and discretion of its agents and serve protection of car repairers is essential-ants. It was not sufficient for the de-ly defective where it omits to designate fendant to show that its employees the person by whom the danger signal knew that the rule I have quoted ap- may be removed. Abel v. Delaware & plied to lumber, and also knew that the H. Canal Co. (1891) 128 N. Y. 662, 28 general usage required it to be staked, N. E. 663. A railroad company is and that stakes were furnished and guilty of negligence in allowing a numavailable to the men in the particular ber of different employees to undertake case before us. All this may be as the duty of warning or causing to be sumed to be true, and yet the fact exists warned employees engaged on the rethat the use of the stakes was not enpair tracks, of the switching of cars joined upon the servants by any rule onto such tracks, without making it of the defendant or by any instruction certain who is to discharge such duty ever given them. Having furnished the in each instance, so as to avoid confu-

26 N. E. 1101. Where car repairers are jury the question as to the sufficiency of required to work on a siding which the rules, the only suggestion made as trains may, in the ordinary course of to their insufficiency being that they did

## C. Performance of the duty in specific cases.

217. Operation of trains considered with reference to the safety of train crews.—(Compare the cases cited in note 2 to § 209, ante.)

a. Generally.—The duty of a railroad company to make and enforce regulations for the safety of its servants embraces the duty of knowing where its trains are, and of giving such orders as are reasonably necessary to protect the trainmen. Such a company, therefore, is bound "to use ordinary care and prudence in making and publishing . . . sufficient and necessary rules for the safe running of its trains."2 According to the usual system in vogue, the movement of trains upon each division of a road is controlled by a single person, who is stationed at some convenient point, and issues his directions by telegraph according to a definite system, which rests partly upon fixed time-tables arranged beforehand and promulgated to the employees affected, and partly upon special orders adopted to meet emergencies for which the time-tables have not adequately provided. But the law does not require a railroad company to direct the movement of its trains by orders from the train despatcher alone, nor does the law require it to adopt any particular form of orders, or any particular system for communicating them. It has the right to direct the movement of its trains by train orders alone, or by train orders and signals, or by signals alone, or by time card alone.3

the plaintiff from moving other cars Smith (1890) 76 Tex. 611, 13 S. W. upon the one from which the red flag 562. was shown and under which the plain'2 Cooper v. Central R. Co. (1876) 44
tiff was. But the court of appeals said: Iowa, 134; Lewis v. Scifert (1887) 116
"This idea, however, was necessarily included in the regulation which required R. Co. v. Camp (1895) 13 C. C. A. 233,
a red flag to be hung out from a car in 31 U. S. App. 213, 65 Fed. 952. "A to warrant the submission of the case Iowa, 134.
to the jury."

\*Hannib

process of repair, and the rule must railroad company is bound to regulate have been so understood by any person the time and manner of running its of common intelligence. It is not sugtrains, so as to avoid collisions, and to gested that . . . [the coservant] enable all its servants to know when a was ignorant of the meaning of the signary and the suggested that . . . [the coservant] so so so to avoid collisions, and to gested that . . . [the coservant] train may be expected, and thus avoid nal. The rule would not be any more danger." Shearm. & Redf. Neg. 3d ed. effective to prevent the accident, or \$ 93, quoted in Reagan v. St. Louis, K. more likely to insure observance, had it & N. W. R. Co. (1887) 93 Mo. 348, 6 been followed by a provision, in express S. W. 371. An instruction stating the words, forbidding the employees from duty of a railway company in regard moving cars against, or in the direction to the promulgation of rules calculated of, another car from which a flag was to secure the safe operation of its trains exhibited. We think that there was no is not improper, where the complaint proof of neglect on the part of the defendant to make and promulgate suitable and proper rules for the informable and proper rules for the informable and government of its employees, Cooper v. Central R. Co. (1876) 44

<sup>3</sup> Hannibal & St. J. R. Co. v. Kanalcy <sup>1</sup> Galveston, H. & S. A. R. Co. v. (1888) 39 Kan. 1, 17 Pac. 324. It is

b. Rules as to the meeting of trains.—Rules cannot be regarded as defective because they permit the despatch of two trains five minutes apart, with orders to stop at the same siding to allow another train to pass.4

Culpability is predicable where the form of despatch authorized by a rule is such that there is considerable risk of a misunderstanding as to the time at which the trains are to meet.5

It is negligence to order trains to meet at night at a "blind" siding, i. e., one where there was no telegraph station, and no signal house by which it might be recognized.6

To require or permit trains to reach a given station at the same moment may or may not be negligence, according to circumstances.7

Where a train is ordered to meet, during the night, at a certain siding, another one with an engine designated by a specified number, it is not negligence to omit to notify the employees on the former train that a third train with an engine having a number, which, in a dim light, is apt to be mistaken for the number mentioned in the despatch, will also be met at the same siding.8

c. Rules as to notifying the crews of regular trains regarding the position of other trains of the same class.—In a recent case the court held that, in view of the fact that the rules for the operation of trains on 58,000 miles of railroad in the United States are framed on the theory that it is more conducive to safety to require the men at all times to look out for, and protect themselves against, other trains without notice of their whereabouts and movements, than it is to undertake to give them such notice, a company which has adopted such

As, where train despatchers were alappend the figures corresponding to that word without inserting them in brackets. McLeod v. Ginther (1882) 80 Ky. 399.

Mexican C. R. Co. v. Glover (1901)
 C. C. A. 334, 107 Fed. 356.
 Wright v. New York C. R. Co.

error to instruct a jury to the effect (1858) 28 Barb. 80. The court said: that information to employees operating "This was a question of fact, to be a railroad train, as to the position of solved by experience in running trains. another train on the road, must be If there is no difficulty in stopping the another train on the road, must be in there is no dimedity in stopping the given by the train despatcher. Houston train at the proper place, and no dander T. C. R. Co. v. Stewart (1899) 92 ger of running by at any time, including the control of the night, then timing the trains in this manner would not be negligence, assuming, of course, that the up train (1895) 60 Ill. App. 194 (second of the should run on to the side track. But two trains ran too quickly onto the sidif experience shows that there is daning and collided with the first). down train running by the east switch, lowed to use the word denoting the hour then it would be gross negligence to at which trains were to meet, and to provide for the arrival of the trains at the same moment, as there would be great danger of a collision."

\* Brown v. Southern R. Co. (1900) 126 N. C. 458, 36 S. E. 19 (number specified was "54," the other being

"64").

rules is entitled to an instruction that they are neither unreasonable nor insufficient, although three competent witnesses have testified that such notice should be given.9 A general rule requiring trains to "approach all stations under full control, expecting to find trains using main tracks within station limits," has been considered far more certain to secure employees against rear collisions than a rule requiring the train despatcher to notify each train of the position of those going in the same direction. 10

On the other hand, it has been laid down that a railway company owes to employees engaged in operating trains the duty of exercising ordinary care to inform them of the whereabouts of other trains upon the track, so as to enable them to guard themselves from injury. 11

place. It was also held that a case in the same direction on the same track that the company was bound to provide for them, as for an exceptional emergency not covered by its general rules (1899) 92 Tex. 540, 50 S. W. 333. gency not covered by its general rules (whether a system of operating trains, (see next subdivision of this section), under which, where trains of the same

\*\* Little Rock & M. R. Co. v. Barry hind its scheduled time, and had (1898) 43 L. R. A. 349, 28 C. C. A. stopped to attach freight cars at a sidoccasionally. Another case in which it R. Co. (1892) 93 Mich. 409, 53 N. W. is held that an extra train may, so far 536. This case was approved in Nolan as regards the absence of any duty of v. New York, N. H. & H. R. Co. (1898) notification, be treated as a regular 70 Conn. 159, 43 L. R. A. 305, 39 Atl. train, is where a special order is issued 115, where it was stated that the code that a train which is behind time is to of rules under review was substantially follow another train running on its regthe same as that adopted by 90 per cent ular schedule at an interval of time, the of the railroad companies of the United minimum of which is fixed by the gen-States, and the doctrine was enunciated eral practice of the road. Such an orthat a railroad company was not neg- der, it is declared, raises a clearly deligent in failing to adopt a rule requir- fined duty on the part of the men on ing trains proceeding in the same direct he following train to look out for the tion (the rear train at a greater rate one in front. For a collision between of speed than the forward train), to be the trains, therefore, the company cannotified of their respective positions, not be held liable on the theory that spewhere the rules in force forbade the cial directions to be on the lookout rear train to leave a station in less than should have been given to the crews of ten minutes after the departure of the both trains. Nor, if the interval beforward train, and provided for signal- tween the two trains at the last station ing at a proper distance in case the for- passed before the collision exceeded that ward train was detained beyond its allowed by the rules, can negligence be usual time, or stopped at an unusual predicated of the omission to order the agent at that station to hold the folwhich a snow plow was at work behind lowing train. As that was in its proper another train did not present conditions position, there would have been no reaso different from those which in gen- son for holding it. Kennelty v. Baltieral attend the movement of trains in more & O. R. Co. (1895) 166 Pa. 60, 30 Atl. 1014.

(see next subdivision of this section), under which, where trains of the same and to see that the conductors of the class are going the same way, neither two trains were specially notified by is notified of the movements of the telegraph of the relative positions. This other, although the one following is to was decidedly an extreme application make faster time than the other and of the doctrine, as the plow was throwing snow so as to render it difficult for care, was held to be a question for the the lookout to see ahead, and the forjury, in *Illinois C. R. Co. v. Neer* ward train was upwards of an hour be-

d. Rules as to the operation of trains not provided for in the reqular time-tables.—When the regular time-tables are departed from in the operation of trains, such orders should be issued by the company as will afford reasonable protection to the trainmen. 12 When it introduces a change into the time-table, a duty immediately arises to notify all the employees who may be affected thereby that such a change has been made, and to specify what course they are to adopt in respect to the movements or stoppages of the trains operated by them. 13

In the cases so far cited the point to be determined was whether the train despatchers had properly discharged the discretionary duty imposed upon them of regulating the movements of trains in emergencies not provided for in the rules. But circumstances of a similar nature are sometimes viewed as raising the question whether an obligatory course to be followed should have been prescribed by general orders, embodied in rules. Thus, it has been held that a jury is justified in finding that a railroad company is guilty of negligence in failing to make a rule that, in cases where it is desired to give to a wild train the right of way over a regular train, and for that purpose to hold the latter at a certain station, the detaining message received by the operator is to be shown to the conductor or engineer of the regular train, and that a communication shall be sent back from them to the effect that they have received and understood the despatch.<sup>14</sup>

pany to observe its rules by notifying plaintiff. Compare case cited in note an extra train ordered to run over the 15, infra.

working limits of a work train, that

14 Sheehan v. New York C. & H. R. R.

also declared that the fact that in a few the work train is within such limits, instances a railroad company has de- and to guard itself against the work parted from its usual practice of al- train, was held to be negligence render-lowing trains of the same class to run ing the company liable for injuries realong the same section of track without ceived by an employee on the work lowing trains of the same class to run along the same section of track without notifying either of the other's movethantifying either of such failure. In O'Laughlin v. New train, it was held to be for the jury to say whether anything was omitted which might reasonably have been done by the (1895) 40 W. Va. 675, 22 S. E. 83, company to prevent a collision which holding that, when a company sends a courred between a regular and an extract about its business, whether in charge of engine, train, or hand car, of he required trains to run under special the change in the schedule, and that, if orders, failed to insist on receiving it intrusts this duty to others, by bell, from the local operator to whom his orwhistle, or otherwise, it makes such ders were transmitted an assurance that others its vice principals to that extent. Similarly, in Louisville, N. A. & C. R. Co. R. Co. W. Heek (1898) 151 Ind. 292, 50 N. tion of collisions had been taken was sufficient to support a verdict for the pany to observe its rules by notifying plaintiff. Compare case cited in note

The language used in one case indicates that it is optional on the company's part either to provide by specific rules for the discharge of the duty of regulating the movements of extra trains, or to leave those movements to be regulated according to the discretion of the train despatchers.15 But, so far as the extent of the company's ulti-

matter of fact, the jury might well find 84 Ill. 109.

that it did not take such reasonable 15 A railroad company is under the ance of a right understanding of the require, receive a notification that the order, actually given, as to train '50,' construction train is ahead of them, required that one mode of communica- and be cautioned to keep a sharp looktion rather than another should be out. Chicago, B. & Q. R. Co. v. Young adopted, was for the jury to say. (1887) 26 Ill. App. 115.

Co. (1883) 91 N. Y. 332. The court Among other facts they could consider said: "Having ordered '337' (the wild that the effect of starting train '50' on train) to travel on the time of '50' its prescribed time was as well known (the regular train) the defendant was to the defendant when it directed '337' bound to exercise every reasonable preto move, as it was after the collision." caution that train '50' should not leave In Dana v. New York C. & H. R. R. Co. Cayuga before the arrival of '337.' No (1883) 92 N. Y. 639, involving the same reason is given for not communicating facts as the case just cited, the plain-with the conductor and engineer of train tiff was nonsuited, and the court of ap-'50' before it reached Cayuga, or at peals set aside the nonsuit for reasons least on its arrival there. The defendant similar to those which had led them to annulled its time-table,-made it im- sustain a verdict for the plaintiff in the perative upon '337' to move in spite of earlier case. In Sutherland v. Troy & the pre-arranged right of '50,' and not B. R. Co. (1891) 125 N. Y. 737, 26 N. only omitted, as to '50,' the exceedingly E. 609, a similar ruling under similar proper and wise conditions on which facts was made. The Sheehan Case alone '337' was permitted to obey, but was also followed by the supreme court failed to send any communication whatin a decision holding that the fact of ever to 'No. 50.' Its omission to do so an extra engine's having been denot only defeated all previous precau- spatched to a specified station without tions, but converted them into means of any precautions being taken to notify destruction. The object should have the crew of a shifting engine in the been to prevent train '50' from running yard at that station justifies a finding according to the time-table. . . that the company is responsible for in-lnstead of communicating with the enjuries caused by the shifting engine gineer and conductor, the defendant after its crew had jumped from it to escommunicated with a third person—the cape a collision. Nary v. New York, O. telegraph operator [at Cayuga] . . . & R. R. Co. (1890) 29 N. Y. S. R. 630, 'for orders.' The train was made sub- 9 N. Y. Supp. 153. So, also, where an ject to his will, and the object in view extra freight train was ordered to run became dependent upon his memory, from a station ahead of a passenger and his faithfulness in obeying the or-train then due by the time-table, it was der, and the probabilities of its attain- held that the jury was warranted in inment were thereby lessened. It cannot ferring negligence from the company's be said, therefore, as matter of law, failure to provide a rule that, under that the defendant so dealt with the such circumstances, the employees in problem before it as not to expose the charge of the following train should be plaintiff—its servant—to perils against always notified to moderate its speed which he might have been guarded by sufficiently to avoid a collision. Chiproper diligence on its part, and, as cago, B. & Q. R. Co. v. McLallen (1876)

care to protect him from accident as duty of seeing that, at the last telethe exigencies of the situation required. graph station which extra trains pass . . . The law does not exact absobefore entering upon a section of the lute certainty, but when life is at stake road upon which a construction train it demands that care shall be taken to is at work, they shall, either by the provide so as far as possible against all promulgation of appropriate rules, or contingencies, and whether the import by special orders issued as occasion may mate responsibility is concerned, it would seem to be entirely immaterial which position is taken in those jurisdictions in which train despatchers are deemed to be vice principals as regards the control of trains; and this doctrine is believed to be universally accepted in the United States, at all events. See chapter xxxi.

As an employer has a right to conduct his business on the assumption that his employees will discharge a duty which he imposes upon them by his rules, a railroad company operating a single-track road cannot be held negligent in failing to promulgate a rule that the crew of a regular train shall be notified of the position of an irregular train, where there is a rule in force which requires employees in charge of irregular trains to keep them out of the way of regular trains, and forbids, under any circumstance, the occupation of the main track by irregular trains within ten minutes of the schedule time of a regular train.16 One court has even gone to the length of adducing the doctrine of assumption of risks as a ground for relieving a railroad company of the duty of notifying the men on one train of the movements of another train which had abandoned its schedule time.17

The adoption and promulgation of rules permitting regular trains to be converted into extra trains running without a schedule, and requiring trains of the latter class to take a side track at least five minutes before the arrival of any schedule train, at the last station to which it is safe for the extra train to run, exonerates the company from liability for the death of an engineer of a schedule train from a collision between it and such extra train running ahead of its ordinary schedule, owing to the fact that the rule as to the side tracking has not been observed by his coservants in charge of the latter train. 18

the correctness of this decision appears may be referred to the doctrine of comtobe more than doubtful. It virtually mon employment, and this seems to be company may, without culpability, cast be sole ground on which it can be company may, without culpability, cast based. See, however, the similar rulupon trainmen the duty of guarding themselves against the approach of special trains, and there is great difficulty (1895) 143 Ind. 59, 41 N. E. 709, 42

1896) 146 Ind. 202, 45 N. E. 96.

17 In Relyea v. Kansas City, Ft. S. & proximately due to the fact that a secG. R. Co. (1892) 112 Mo. 86, 18 L. R. tion of the forward train was left
A. 817, 20 S. W. 480, it was held, without much argument, that a railroad company is not guilty of negligence in ordering a train to run ahead of schedules.

The accident in question was proximately due to the fact that a secgraph secondary of the forward train was left standing on a grade while some of the ordering a train to run ahead of schedules.

The accident in question was proximately due to the fact that a secgraph secondary of the forward train was left standing on a grade while some of the ordering a train to run ahead of schedules. ule time without giving the conductor ly, got under way, and running down of the forward train notice thereof, pro- the incline came into collision with the vided this is not an unusual course, and train which was ahead of its proper specials are to be expected at all times. time. The actual decision, therefore, The correctness of this decision appears may be referred to the doctrine of com-

With regard to the extent of the duty to provide for the prevention of collisions in the special emergency created by a snow storm, it has been held that the fact that a rule requiring that, in foggy weather, when a train cannot be seen at 300 yards, the trackmen shall suspend ordinary work and patrol the track, acting as signalmen to warn trains of danger, had not been extended so as to make it applicable during the existence of unusual snow storms, does not justify an inference by the jury of negligence by the company, rendering it liable for injury resulting from the fact that a train ran past a signal station and struck another train which was standing just beyond it.19

218. — of employees engaged in track work.— (Compare the cases cited in note 12 to § 209, ante.)—Several decisions recognize the existence of a duty on the part of a railway company to provide by rules, or general directions of some kind, for the safety of employees who are

N. E. 352. The court said: "The special verdict before us not only fails to the trackmen, proceeded as follows: find that the appellant had no rule by which the operatives of extra trains were to so run as to protect regular varience from collision, but it is, as we have seen, expressly found that the company maintained rules under which regular trains might be converted into extra trains; that trains of an inferior class should clear the right of way for also in avoiding all liability for damtrains of superior class, by taking a side track at least five minutes before the arrival of any schedule train at the last station to which it was safe for such inferior train to run; that No. 19 wholly failed to act in accordance with said rules, and did not take the side track at Pursell, where No. 20 could have passed in safety, but continued beyond ticular rule constitutes a neglect of

passed in safety, but continued beyond ticular rule constitutes a neglect of said station to where the collision ocduty, in not being able to foresee cercurred. Thus it appears that obedience tain contingencies. It is true that the to said rules by No. 19 would have trackmen could have been relieved from made the passage of No. 20, running by the work of clearing the tracks by the the schedule, entirely safe. the schedule, entirely safe.

10 Niles v. New York C. & H. R. R. pose, or by the assignment of other emCo. (1897) 14 App. Div. 58, 43 N. Y. ployees; but it is significant that Niles
Supp. 751. It was contended by plainhimself, an old and experienced emtiff's counsel that the same necessity for ployee, and knowing of the dangers to patroling a track arose when there was be apprehended from the storm more a severe storm as when there was a fully than others, deemed it unnecdense fog, and that it was for the jury essary for the protection of his train, to say whether the company had not though much impeded by the snow, to to say whether the company had not though much impeded by the snow, to been negligent in failing to provide a adopt the precaution of dropping or rule by which the trackmen should be sending back a trainman to warn any required to act as signalmen in both train that might be following. . . . cases. The court, however, after point- And yet is it urged that the company ing out that during snow storms the itself was negligent in not requiring a charging of the track from snow was a presenting of that the character during a clearing of the track from snow was a precaution of that character during a matter of paramount importance. and severe snowstorm."

engaged in repairing the track, or in doing some other kind of work which exposes them to the risk of injury from rolling stock, with the handling of which they have nothing to do.1

But the advantage which the servants receive from the predication of such a duty is greatly curtailed by the operation of the doctrine

¹ Such employees should be notified of assigned him, and while performing a change in the running time of trains. that duty at the place designated." Baltimore & O. R. Co. v. Whittington Cincinnati, I. St. L. & C. R. Co. v. Lang (1878) 30 Gratt. 805. In the absence (1888) 118 Ind. 579, 21 N. E. 317. A of any rule requiring sectionmen to railway company is negligent in failing guard against irregular trains, or of to provide suitable rules for the conany care to notify them of the approach trol and operation of hand cars furof such a train, proof of the death of a nished to a bridge repairing gang for sectionman, while going with a hand the purpose of transportation to the car on a special order, through a colliplace where they are to work. Wallin sion with a wild train, creates a prima v. Eastern R. Co. (1901) 83 Minn. 149, facie case of negligence on the part of 54 L. R. A. 481, 86 N. W. 76. A rule the company. In the following case the prescribing that a flag should be set by court said: "It [the defendant com-track repairers to serve as a signal to pany] was bound to know the nature of engineers to slacken speed or stop is the service it had ordered him to per- sufficient for their protection on a tresform, the place where it was required to the Bruen v. Uhlmann (1899) 44 App. be performed, and, with this knowledge, Div. 620, 60 N. Y. Supp. 222 (1898) 30 it had no right to put him in peril by App. Div. 453, 51 N. Y. Supp. 958. sending out an irregular train without Whether a railway company is neglin some way giving notice that its train gent in omitting to provide a rule for had been sent out, or by so regulating the purpose of warning a trackman of its speed and management as to prevent the approach of trains, where his work in speed and management as to prevent the approach of trains, where his work injury to those engaged in the service requires him to assume such a position required of them by the special order. that he cannot, without interrupting by the order of the appellant, the spethe work, see any considerable distance cial duty in which the intestate was enalong the track, is a question for the gaged was enjoined upon him, and having thus required him to perform the Murphy (1893) 50 Ohio St. 135, 33 N. duty, it had no right to send over its E. 403. Evidence that a trackman was road a train which the employees energing over by a train at a place where road a train which the employees, enrun over by a train at a place where gaged as was the intestate, had no reathere was a double curve rendering it son to expect would make obedience to impossible to see an approaching train the special order unusually perilous. Until it was close at hand; that there It may be true that the intestate was were several public crossings which the bound to know of the danger from regulace. lar trains, running according to time-place; that the neighborhood was a tables or rules, and yet not be true that thickly-settled one within the limits of he was bound to know that a wild or a city; that no signal of the train's apirregular train would be run over the proach was given by bell or whistle road, and so run as to bring about a either at the crossing or in approaching collision. The peril from the wild the curve; and that the train which train he was not bound to anticipate, caused the injury was engaged in a for the reason that, from the assurance brisk race with another train on a par-impliedly contained in the special order allel road, the pace maintained being, assigning a designated duty to him, he so far as appeared, in strict accord with had a right to assume, in the absence the rules of the company,—is sufficient of countervailing facts, that, if he him-to take to the jury the question of the self exercised care and diligence, the company's negligence in failing to procompany would not send out a wild vide regulations for the purpose of train without exercising ordinary care warning persons working at such places and diligence to prevent injury to him of the approach of trains. Dick v. Indwhile traveling in the usual way to the ianapolis, C. & L. R. Co. (1882) 38 place where he was called by the duty Ohio St. 389.

which prevails in some jurisdictions,—that the fact of their having received a general warning, or of their having been in some other way informed that they are to be exposed to constant danger from the irregular movements of trains, is sufficient to let in defense of assumption of risks as respects the general condition of the work, or of contributory negligence as respects the servant's failure to govern his conduct as a prudent man would have done in view of the possible perils to which the rules have called his attention.2

<sup>2</sup> It has been held not to be negligence Co. (1897) 25 C. C. A. 223, 51 U. S.

on the part of a railroad company to App. 157, 79 Fed. 903, holding that evsend out a wild train without previous idence as to the rules adopted by other warning to a gang of sectionmen, where companies for the conduct of engineers its rules, known to such men, provide in approaching a curve is properly exthat the train preceding the wild trains cluded in an action for the death of a shall carry a red signal, but that if it station master, who was run over on a is impossible for those running the wild certain curve where he had worked so train to see that the train preceding long that he must presumably have carries such signals they must run at been familiar with the mode in which a slow rate of speed around all curves. his employers allowed their trains to Shepard v. Boston & M. R. Co. (1893) approach the curve. In Olson v. St. 158 Mass. 174, 33 N. E. 508. There, Paul, M. & M. R. Co. (1888) 38 Minn. Holmes, J., after quoting the rules 117, 35 N. E. 866, where the plaintiff mentioned, proceeded thus: "Stopping was traveling on a hand car which at this point it is plain that the defend-came into collision with a snow plow, it ant had a right to send trains over its was held that he assumed the risk of tracks at whatever times it saw fit, and injury from this cause. The court the rules on their face gave notice that said: "The evidence tended to show it intended to exercise its right. The that a quarter or more of the trains rules also gave notice on their face that sent out are specials or extra,—dewhile the signal ordered would be a spatched without notice,—and that such warning when it was seen, in some cases is the uniform practice of the defendno such warning could be given, and ant; and that during the month of Feb-therefore that all persons interested ruary, 1884, to the date of the accident, must look out for themselves. The mo- such trains over that section of the ment a man has notice that a train may road averaged one or more each day; come along a track without warning at and also that the exigencies of the busiany hour, if he is run down by such a ness and the impracticability of notitrain when he is traveling on the track fying sectionmen in advance, owing to the other way, it is impossible for him the nature of their work, extending to escape the imputation of negligence over miles of track, and often remote merely by showing that such trains from telegraph stations, obviously renwere few and the chance of their com- dered it necessary to dispense with noing small. Furthermore, the plaintiff tice, and to adopt the present uniform implies that they knew the train was practice in conformity with rule 70, coming by his testimony that they did i. e., that no notice would be given of the not know when it was coming. On the passage of extra trains. And this fact other hand, despatching a wild train itself, and the nature of the employ-without signal is not necessarily negliment, would naturally suggest the imwithout signal is not necessarily negliment, would naturally suggest the imgence in the defendant." Compare Crisportance of extra caution on the part of well v. Pittsburgh, C. & St. L. R. Co. the men. and a reason for the rule. We (1888) 30 W. Va. 798, 6 S. E. 31, where think, therefore, there was evidence for the correctness of the same doctrine approve that the deceased had notice of court, though the case really turned the usage of the company, and that it upon whether a foreman held to be a was error for the court to refuse the device principal had neglected any of the fendant's first request to charge the duties imposed upon him by the rules. jury to the effect that, if they should Henion v. New York, N. H. & H. R. R. find that the deceased knew of such us-

In Scotland, a distinction is taken between trackmen working on the main line and those engaged in yards where there are numerous sidings. As regards the latter class, it is held that a railway company is negligent in not making regulations calculated to secure their safety when it becomes necessary to run an engine with the tender in front, past the place where they are at work.3

The refusal of a railroad company to make a regulation requiring engineers of trains approaching a quarry to sound their whistles before reaching it, for the protection of workmen at such quarry, is not unreasonable where another rule is established requiring the workmen to give signals to approaching trains when there is any reason for slowing up or stopping the trains, and it does not appear that the proposed regulation would have afforded protection to the workmen.4

age and practice of the company, he road yard, pointed out that the case could not recover." In Chicago & N. was distinguishable from those in W. R. Co. v. Donahue (1874) 75 Ill. which the absence of some such precau-106, where a switchman was run over, tion has been held to be negligence in the evidence showed that a watch or regard to strangers having occasion to lookout was kept from the engine, but cross the track. Compare the cases none from the rear car, and, according cited in § 200a, ante. to a special verdict, the train had on it \* Cairns v. Caledon the usual number of hands and none of the persons in charge was guilty of negligence in discharge of his particular duty. The question, therefore, was presented, whether the company was guilty of negligence in not providing rules whereby a switchman should have been any virtue except in cases of persons kept on the rear end of the train that produced the injury. The court said: "Whatever might be the duty of the company in this regard, so far as the public are concerned, where its track would have after the train comes in crosses a public highway, we are not prepared to hold it is under any such robligation to its own employees operating trains on its own private grounds. The court said: "In Kansas City, Ft. S. & M. R. Co. W. Hammond (1894) 58 Ark. 324, 24 S. W. 723, the court said: "The rule suggested by appellee as a proper one could, under no circumstances, possess any virtue except in cases of persons near enough to the quarry, and the would have far enough away to have more time to get off the track than they would have after the train comes in view and sounds the whistle, as is the rule in vogue, or as was done in the obligation to its own employees operating trains on its own private grounds. The work of the court said:

The Mansas City, Ft. S. & M. R. Co. W. Hammond (1894) 58 Ark. 324, 24 S. W. 723, the court said: "The rule suggested by appellee as a proper one could, under no circumstances, possess any virtue except in cases of persons near enough to the quarry, and the virtue except in cases of persons near enough to the quarry, and the rule in vogue, or as was done in the obligation to its own employees operating to the rule in vogue, or as was done in the obligation to its own employees operating to the rule suggested by appellee as a proper one could, under no circumstances, possess whereby a proper of the court said: "The rule suggested by appellee as a proper one could, under no circumstances, possess any virtue except in cases of persons near enough to the quarry, and the rule in vogue, or as w the usual number of hands and none of 16 Sc. Sess. Cas. 4th series, 618. have a brakeman on the end of a car therefore, would only be applicable to pushed by a switch engine in the rail- special instances, and its application, if

<sup>3</sup> Cairns v. Caledonian R. Co. (1889)

we do not understand it is the duty of ning hand car, in a rugged and hilly the company to place one employee on country, where the transmission of the lookout to warn others of approach-sound is obstructed and the sound iting danger, and that it is necessary for self is lost in the more immediate noise them to observe due care. It is their of the running car. Sounding the whisduty, without warning, to observe such the at the quarry, or at any other point, care. This is a part of their undertak- would, of course, afford no protection to care. This is a part of their undertakvould, of course, afford no protection to
ing, and any omission is at their peril."
So, also, in Loring v. Kansas City, Ft.
from their destination as that they will
S. & M. R. Co. (1895) 128 Mo. 349, 31 be overtaken. The positive evil of the
S. W. 6, the supreme court of Missouri
rule suggested is made apparent, for,
in holding that neglect of duty by a
having taken the place of a better rule, railroad company toward a section hand perhaps, it is nevertheless, of itself, in cannot be predicated of its failure to that case useless. The suggested rule,

219. — of car repairers.— The work of repairing a car while it is standing upon a track in a yard where switching is in progress is one of peculiar danger, and the courts have always held railway companies to a strict account in regard to the duty of protecting employees engaged in such work, so far as that object can be attained by proper regulations. In fact, as already mentioned (§ 207, ante), one of the very earliest cases, in which the employer's duty in regard to rules was discussed, established the doctrine that it is the duty of railway companies to provide for the protection of this class of workmen by proper regulations.<sup>1</sup> The general principle, therefore, is well settled, that it is the duty of a railroad company to establish regulations advising its servants engaged in moving cars on a track of the where-

gence in causing and permitting a lo-

attempted to be extended beyond these special instances, might interfere with the application of more salutary general rules. We are unable to say that the legation is broad enough to admit evicefusal of the company to have the regulation suggested by the appellee was unreasonable. At all events, it was error to submit the question to the jury."

1 Vose v. Lancashire & Y. R. Co. (1858) 2 Hurlst. & N. 728, 27 L. J. work, and thereby rendering it unsafe Exch. N. S. 249, 4 Jur. N. S. 364. There the trial judge asked the jury, first, whether the deceased was guilty of negligence; secondly, he said that no railway company by establishing rules could justify its servants in not taking upon the tracks and switches of the attempted to be extended beyond these comotive to run against the place at could justify its servants in not taking upon the tracks and switches of the due care of human life; if they drove yard as would render the place and emwagons into a place where men were at ployment reasonably safe. While a work, it was the duty of the company servant assumes the risks ordinarily into see that proper rules for the safety cident to his employment, and all open of such persons were established; and and visible risks, including the negline asked the jury whether there was gence of a fellow servant, yet he has a negligence; whether the shuntsman, right to presume that the master will pointsman, and driver did all that the exercise due care for his safety by prorules of the company required; and viding, when necessary, all such needwhether the accident was caused by the ful rules for the conduct of its business, company not giving proper directions to or such precautionary measures, as will its servants? The jury found that the not needlessly expose him to risks not accident was owing to the defective necessarily resulting from his employrules, and that no person, other than the ment. This being so, we hold the landefendants, was guilty of negligence. A guage of the complaint broad enough to verdict entered for the plaintiff upon cover the negligence imputed to the de-this finding was sustained. In Wild v. fendant. Nor does this work any hard-Oregon Short-Line & U. N. R. Co. ship. If it had desired a more specific (1891) 21 Or. 159, 27 Pac. 954, a cause statement of the negligence imputed to of action on the ground of the failure it, that end could have been attained by to promulgate suitable rules for the a motion to make the allegation more safety of car repairers was sufficiently specific; but the defect is not fatal to stated where the complaint imputed to the sufficiency of the complaint as statthe defendant carelessness and negli-ing a cause of action."

abouts of an employee at work in this dangerous position, and to provide adequate means of warning him of the approach of danger.<sup>2</sup>

(1890) 78 Tex. 657, 15 S. W. 108; shop. The brakeman evidently On the day that the deceased was killed dangerous and reckless manner. point about 800 feet from the doors and place to do his work. The defendant

<sup>2</sup> International & G. N. R. Co. v. Hall there kicked or shunted it towards the Promer v. Milwaukce, L. S. & W. R. Co. that the force applied would send the (1895) 90 Wis. 215, 63 N. W. 90; and car past the pile of iron where they inthe other cases cited in this section. In tended to have it stop, and possibly an action by a car repairer for injuries through the doors, and he attempted to resulting from the car under repair be- control the movement with the brake, ing struck by a moving train, it is er-but, for some reason, it did not work, ror to nonsuit the plaintiff, where the and the car ran past the pile of iron, defendant admits that, while cars are and killed the deceased, who was work-being repaired (as this was), on tracks ing inside one of the crippled cars. He other than the repair tracks, "ordinary had no means of guarding against such prudence, care, and the customs and a peril, as it was impossible for him to regulations of the company, require see the approaching car, even if the that such work should not be done ex- work at which he was employed would cept while the car is being protected by permit him to be on the lookout, since watchmen or other suitable protection," the doors were closed and there were no and no evidence is offered that any such windows. The court said: "The quesprotection was provided. Luebke v. Chition is whether this was an accident, or
cago, M. & St. P. R. Co. (1883) 59 Wis. the result of some neglect or breach of
127, 48 Am. Rep. 483, 17 N. W. 870. duty on the part of the defendant. A
In Doing v. New York, O. & W. R. Co. loaded car was driven through the door
(1897) 151 N. Y. 579, 45 N. E. 1028, of a workshop filled with busy men and
the evidence tended to establish the following of them was billed. That the the evidence tended to establish the fol-one of them was killed. That the de-lowing facts: The deceased was at fendant's workmen in attempting to lowing facts: The deceased was at fendant's workmen in attempting to work repairing a crippled car in the repair shop, which occupied the whole of a building 50 feet wide and about 200 not reckless, experiment, cannot well be feet in length. Three tracks passed denied. The danger of the experiment through the shop through doors which consisted in moving cars in such a way were kept closed, and there were no windows on the side where the tracks where they would stop. If, upon the entered the building from the yard. Occasion in question, the force applied the vard and were connected with the stop at the pile of scrap iron, the dethe yard and were connected with the stop at the pile of scrap iron, the demain track and other tracks by ceased would not have been killed; but switches. The three tracks were used if the force applied was sufficient to for the purpose of moving crippled cars send it 20 feet further, and it could not and material into and from the shop to be controlled by the brake, the danger the main and side tracks. The cars to the men inside the shop was so obviwere moved by being kicked or shunted ous that the manner in which this part by means of force applied to them by en- of the defendant's work was carried on gines some distance from the shop, and may very well be characterized as reck-in that way propelled by the momentum less. We will assume then, what can-into or near the shop doors and con- not be questioned, that the workmen trolled while in motion by the brakes. were doing the defendant's work in a some of the men who worked in the these workmen were doing nothing but yard or about the shops were moving what, according to the testimony, they cars on the tracks outside the shop for had been doing for years before. If the the purpose of collecting and moving defendant permitted its employees to scrap iron. There was a pile of this carry on its operations upon these three iron near one of the tracks, about 20 tracks outside the shop in such a manfeet from the shop door, and the men ner as to endanger the lives of those inwanted to load it upon a car. With side, who could not protect themselves, this end in view they placed a car alit failed to discharge to the deceased ready loaded with 24,000 pounds of the duty which the law imposed upon scrap iron on one of these tracks at a it of furnishing him a reasonably safe

By some companies the rule has been adopted that the switches leading to such a track must always be locked, and this precaution is presumably entirely adequate.3 Considering the lamentable frequency with which car repairers are injured, and the fact that these employees are, as was observed very truly in the case last cited, entirely helpless so far as any precautionary measures that they might take to protect themselves are concerned, it is perhaps to be regretted that the courts have ever conceded that anything short of this or some other provision for absolutely blocking the repair track should have been deemed adequate to absolve a railroad company from a charge of negligence. But the cases impose a much lower standard of liability, the accepted doctrine being, that the company performs its whole duty by issuing suitable directions for the placing of danger signals to notify the other employees of the fact that the repairs are going on.4

proper rules and regulations, so far as that was reasonable and practicable." Compare also the cases cited in § 209, note 1, ante.

had the power to control and regulate in the direction from which a train its business. The law imposed upon it could approach, and that trainmen the duty of making and enforcing such shall, under no circumstances, back or reasonable rules and regulations for couple onto any car while such flag is the government of the men in its service, as to prevent or guard against injury by one servant to another, in so

W. 260 (accident caused by failure of far as that was reasonable and practiforeman of car repairers to move red
cable. It could certainly put an end
flag to end of the section of cars last
to the practice of propelling cars upon run on the repair tracks. Adequacy of
these tracks by a force that could not rule decided, as matter of law). A regbe controlled, and it could provide for ulation which has been pronounced very moving them in some other and safer efficient is the following: "A blue flag way. In other words, it could change by day and blue light by night, placed this method of doing the work by makin the drawhead or on the platform or ing proper rules and regulations to that step of a car at the end of a train, or end. The jury could have found from car, standing on a main track or siding, the evidence that the practice of kick- denotes that car repairmen are at work ing or shunting cars upon these tracks underneath. The car or train thus proin the direction of the doors of the re- tected must not be coupled or moved pair shop was known to the defendant. until the blue signal is removed by the The danger to be apprehended from repairmen." Abel v. Delaware & H. such a practice was so obvious that the Canal Co. (1886) 103 N. Y. 581, 57 Am. defendant, in the proper discharge of Rep. 773, 9 N. E. 325. There the only the duties which it owed to its employ-rule which had been made bearing upon ees, was bound to guard against it by the case was as follows: "A red flag by day and a red lantern by night, or any signal violently given, are signals of danger, on perceiving which the train must be brought to a full stop as a See St. Louis, A. & T. R. Co. v. Triplett (1891) 54 Ark. 289, 11 L. R. A. 773, 15 S. W. 831, 16 S. W. 266.

A railroad company is not required to have a watchman or bumpers to protect repair tracks where one of the rules provides that car inspectors and promulgated such a rule as the former repairment before they concept and promulgated such a rule as the former repairment before they concept and promulgated such a rule as the former repairment before they concept and promulgated such a rule as the former repairment before they concept and promulgated such a rule as the former repairment before they concept and promulgated such a rule as the former repairment before they concept and promulgated such a rule as the former repairment before they concept and not proceed until it can be done with safety." The court, in upholding the plaintiff's contention that it was, under the circumstances, a question for the jury to determine whether the defendant should not have a promulgate such as the former repairment. repairmen, before they go under or be- one above set out, or one substantially tween cars, shall display a red signal equivalent to it, said: "This rule

If it is practicable for a railroad company to prescribe a certain distance along which cars to be repaired must be moved on a repair track, in order to prevent any danger of their being struck by moving locomotives or cars on the adjacent tracks, the question should be submitted to the jury whether or not the company was negligent in failing to provide reasonable regulations on the subject.5

220. — of employees working in yards.— (As to trackmen working in yards, see § 218, notes 1 and 3, ante.) Where an injury is caused by cars running through an open switch on to a siding and coming into collision with other cars standing there, evidence that a rule had been promulgated requiring conductors to look after the switches used by their engines shows that the company had adequately performed its duty in regard to the opening and closing of the switches.1

the hazard of the negligence of coemcourt are worth quoting: "Donnelly, on the first trial, testified substantially flag was put up and maintained wherever the repairmen were at work, and by the switchmen, as it probably was, the repairmen would be protected, except as against the reckless or heedless essential to the efficiency of the rule that it should designate the persons authorized to remove the flag. It was (1895; Tex. Civ. App.) 33 S. W. 737; shown that this was done by the rules second appeal (1897) 15 Tex. Civ. App. of the New York Central Railroad 493, 40 S. W. 546. which provide that the repairmen alone 1 In Davis v. Staten Island Rapid

seems, from its phraseology, to have should have power to remove the flag been mainly, if not exclusively, intend- from cars on a repair track. The same ed for the government of moving trains, rule was recommended in railroad man-and was not very well adapted for the uals published before the occurrence of protection of men under stationary the accident in question. It is obvious moval, so as to protect the repairmen as repairmen engaged in repairing the far as reasonably could be done against cars, would leave the repairmen exposed to the danger of the mistake or negliployees." The following remarks of the gence of the brakemen. If it was left for the brakemen to determine for themselves whether there were men enthat the only rule he heard of was rule gaged in repairing the cars, and wheth-63, and what the repairmen told him, er the flag might be safely removed or viz.: That they worked under the pronot, and to act upon their judgment in tection of a red flag. It is evident that removing it, the chances of accident if this was the extent of the regulations would be greatly increased." In Pool on the subject, the repairmen had a v. Southern P. Co. (1899) 20 Utah, very inadequate protection. If the red 210, 58 Pac. 326, the sufficiency of such signals was also implied in the general statement that a railway company is the meaning of the signal was known bound to make and promulgate a rule requiring the placing of danger flags on cars when repairers are under them, and forbidding any coupling to be done conduct of the switchmen. But it was by a locomotive while they are so engaged.

A railroad company is under the duty of prescribing definite rules for the making of flying switches.2

The doctrine embodied in the larger part of the authorities is that, in the absence of any positive testimony going to show the feasibility or usefulness of any code of rules which might be framed for the purpose of warning employees of the approach of detached cars in railway yards, a jury is not warranted in finding that the failure to promulgate such a system was culpable.3

death of Davis. It imposed upon conductors of trains the duty of looking after the switches. All that could be required from the company was that the rule should impose upon some of the employees the duty of seeing that the switches were closed. That is all that the respondent contends for. If the rule had provided, in the form suggested by the respondent's counsel, that the person who opened the switch should close it, it would, in that form, have constituted no greater safeguard against danger than the rule in force. The duty would have rested on an individual, just as the present rule imposes it, and it could have been neglected and omitted with as much ease as it was neglected in the instance before us. The proximate cause of the accident was not due to the failure of the defendant to make a proper rule, but to the neglect of a duty imposed by the defendant conductor Sherman. For neglect the defendant was not liable."

<sup>2</sup> Chicago & N. W. R. Co. v. Taylor (1873) 69 Ill. 461, 18 Am. Rep. 626. An averment that the defendant negligently omitted to provide rules, signals, or systems in cases of flying switches, or of shunting or kicking cars, states a cause of action. Reagan v. St. Louis, K. & N. W. R. Co. (1887) 93 Mo. 348, 6 S. W. 371. There the defendant contended that the joining of the cars for the purposes and in the manner described in the petition was so common, public carrier, that the company is not necessary, and frequent, especially in bound to adopt it. Rutledge v. Misthe case of freight trains, that it could souri P. R. Co. (1894) 123 Mo. 121, 24 not be said to involve any extraordi- S. W. 1053, 27 S. W. 327. A railroad nary risk. But the court said: "We company is not bound, for the protecdo not agree to the proposition. It is tion of its car repairers when going to certainly a complex business, requiring or from their places of work in moving care, and must be dangerous if not done cars in its freight yards, to have upon

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Transit R. Co. (1896) 1 App. Div. 178, far as other servants are concerned, 37 N. Y. Supp. 157, the court said: whose business requires them to be in "Rule 132, if faithfully executed by the and out of the cars, liable to be jolted. conductor, was ample to provide In these cases of making a flying against such an accident as caused the switch, and of shunting, or kicking of death of Davis. It imposed upon concars, it is feasible and perfectly proper to have some rules and regulations to warn persons liable to be injured."

<sup>8</sup> As it is utterly impossible for a railroad company to move its trains, when being made up or when being broken up, according to a time-table, there is no negligence in not prescribing regulations for the management of trains entions for the management of trains engaged in and about the freight and engine houses and depots. Haskin v. New York C. & H. R. R. Co. (1873) 65 Barb. 129, Affirmed (1874) 56 N. Y. 608. See also Atchison, T. & S. F. R. Co. v. Carruthers (1896) 56 Kan. 309, 43 Pac. 230; Corcoran v. New York, N. H. & H. R. Co. (1901) 58 App. Div. 606, 69 N. Y. Supp. 73; Besel v. New York C. & H. R. R. Co. (1877) 70 N. Y. 171; Larow v. New York, L. E. & W. R. Co. (1891) 61 Hun, 11, 15 N. Y. Supp. 384 (negligence alleged here, was that the defendgence alleged here, was that the defendant omitted to make and promulgate a rule to the effect that an engine should not enter upon a siding upon which there was another engine and cars without giving a signal or sending notice to the employees on that train). "A rule which would require no movement of the engine to be made . . . except in response to a signal from one person, when he might be in a position where his signal could not be seen by the engineer," is regarded as being such an unreasonable impediment to the prompt despatch of defendant's business as a under proper regulations, at least so such cars a light, or man to handle it,

But in one case it has been laid down without qualification that it is the duty of a railway company to frame rules for the purpose of regulating the movements of trains in its yards when employees are engaged in coupling cars.4 Under either theory it must evidently be unwarrantable to predicate negligence of the failure to frame such rules, where the injury was caused by a car which, to the plaintiff's knowledge, was to return to the place where he was working before a certain duty had been fully performed, and it is manifest that he could have avoided the danger simply by using his eyes.5

or to require a man to precede each car sel, that a rule of this tenor which had to announce its approach. Crowe v. been promulgated for the protection of New York C. & H. R. R. Co. (1893) 70 car repairers should have been extended Hun, 37, 23 N. Y. Supp. 1100. The so as to cover the case mentioned in the court said: "Great care and precautext, was rejected. The court said: tion are required on the part of rail- "The question here is whether, by the road companies when they are moving exercise of such prudence and foresight, cars in places where the general public they could have adopted any other prehave a right to pass, to in some man-cautions against injury to the employner announce their approach; but a dif- ees than such as they did, or whether ferent rule obtains in the companies' there were still others that would sug-yards, where cars are being distributed gest themselves to men of ordinary in-and trains made up. The employees telligence and vigilance. They had a about such yard understand the situa-tion; they know the manner of doing was supposed to need regulation. One the business therein, that cars frequent-of these rules provided that when a locoly pass along without notice of their motive was moving backward, its sigapproach, and they assume the risks in- nals must be displayed upon the bumpcident to the business as thus con- ers. It was made the duty of the yard ducted. Whether the foreman left the master to see that cars were brought towork when it was completed, or a few gether with as slight a jar as possible, minutes before, is not important. It and coupled with coupling sticks. The was completed when Crowe left, and he engineers were required to use the utwas completed when Crowe left, and he engineers were required to use the utunderstood the situation. The men most care in pushing cars into turnwere properly protected while the work outs, so as to avoid injuring them or terms heretofore mentioned. It is suggested that the work was not completed cars, 'and as, for various causes, it is until the men had arrived at the tool dangerous to expose the hands, arms, house with their tools, and that until or person between the same,' they were then they were entitled to some special protection to which they might not be the situation so as to act prudently. entitled perhaps when engaged in other the deceased made the coupling alone, business about the yard. No reason is though he was not required to do so, suggested for such a rule, and none occurs to us. They were entitled when going to the tool house to the same procoworkers to help him. He could have going to the tool house to the same processor coworkers to help him. He could have tection and care on the part of the comused a lamp, but did not, though he had pany to which they were entitled when a full supply. There were coupling pany to which they were entitled when a 1n11 supply. There were coupling moving about the yard performing sticks in the caboose for the use of the their ordinary daily business." In Berdeceased, which, when used, had the efrigan v. New York, L. E. & W. R. Co. fect, as the court below said, of length (1892) 131 N. Y. 582, 30 N. E. 57, it ening the arms."

was held that a company was not bound to formulate a rule which would recover a light by night and a red [5]. quire a red light by night and a red 51.
flag by day to be exhibited from the end

6 Houston & T. C. R. Co. v. Strycharof a car which was being coupled. ski (1894) 6 Tex. Civ. App. 555, 26 S. There the contention of plaintiff's coun- W. 253, 642,

In cases of this type, the servant's appreciation of the risks is also sometimes a material element.6

221. Automatic and unauthorized movements of cars. - A railway company may be found negligent if it fails to provide rules for the purpose of ensuring that rolling stock which is left standing on any portion of its tracks shall not be moved to the injury of its employees, whether by the action of physical forces, or by the interference of unauthorized persons. So, also, negligence may be inferred where no rules have been promulgated for the purpose of warning employees engaged in loading or unloading a car that it is to be put in motion.2

222. Track repairing as it affects the safe operation of trains.-A railroad company engaged in repairing or altering its tracks, so as to render them dangerous, owes the duty to its trainmen of providing rules and regulations to protect them against such danger.1

223. Loading of cars. - A railway company may be held liable on

tem of bumping an empty car against for the jury. Matteson v. New York a car which has been loaded with coal, C. R. Co. (1862) 62 Barb. 364. to set the latter in motion, without spe-

\*On the ground that the conditions and resulting risks were known to him, it has been held that a railway company does not owe a brakeman the duty of providing for the stationing of a watchman on the rear end of backing trains. Chicago & N. W. R. Co. v. Donahue (1874) 75 Ill. 106.

\*Lake Shore & M. S. R. Co. v. Topliff (1895) 2 Ohio Dec. 522 (car escaped on to the main line from a siding constructed on an incline). An employer is guilty of negligence toward a brakeman upon a freight train handling upon a coal track 600 feet long having a descending grade of 2 feet 7 inches, with no means of preventing their escape upon the main track except by setting the brake on the car nearest thereto. Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. (1898) 32 C. C. & H. R. R. Co. (1895) 35 Hun, 506.

\*\*Lake Shore & M. S. R. Co. v. Toledo, St. L. & K. C. R. Co. (1893) 32 C. C. & H. R. R. Co. (1895) 35 Hun, 506.

\*\*Lake Shore & M. S. R. Co. v. Toledo, St. L. & K. C. R. Co. (1893) 32 C. C. & H. R. R. Co. (1895) 35 Hun, 506.

\*\*Lake Shore & M. S. R. Co. v. Toledo, St. L. & K. C. R. Co. (1893) 32 C. C. & H. R. R. Co. (1895) 35 Hun, 506.

\*\*Lake Shore & M. S. R. Co. v. Toledo, St. L. & K. C. R. Co. (1894) 78 Hun, 492, 29 N. Y. Supp. 533. Compare § 208, notes 8 and 9, any attention to the subject on the part of the company's officers, the question of the com 533. Compare § 208, notes 8 and 9, any attention to the subject on the part of the company's officers, the question <sup>2</sup> A coal company which adopts a sys- whether the company was negligent is

the ground that it had established no system with regard to the use of side stakes on flat cars, and that it is not absolved from liability merely by reason of the fact that the station agent at the place in question had, according to his custom, made a casual inspection to see if the load had been properly placed.1

224. Work in concerns other than railways.—The failure of the owner of a machine shop to make and enforce rules as to the use of screens to prevent employees from being injured by flying chips of iron warrants a jury in finding him to have been negligent.<sup>1</sup>

It is the duty of a lumber company to provide rules, by means of which servants working at the foot of a chute down which heavy logs are constantly being thrown shall receive warning that a log is about to fall.2

A mine owner is negligent in not providing a signaler, and a proper code of signals, to regulate the hoisting of a cage in a shaft.<sup>3</sup> But the fact that such an employer did not frame rules to regulate the movement of ore cars moved by horse or hand power on a slightly inclined track cannot be imputed as negligence, where there is no

\*\*Bushby v. New York, L. E. & W. R. quoted applied to lumber, and also Co. (1887) 107 N. Y. 374, 14 N. E. 407. knew that the general usage required In Ford v. Lake Shore & M. S. R. Co. it to be staked, and that stakes were (1891) 124 N. Y. 493, 12 L. R. A. 454, furnished and available to the men in 26 N. E. 1101, the same subject undertheapter are laborate discussion, the court saying: "In the case before us it was clearly the duty of the defendant to adopt some system for the loading of any rule of the defendant or by any insumber upon open cars, that would have regard for the safety, not only of its servants and those traveling over its left to the judgment and discretion of road, but to the safety of all persons who should be in the vicinity of its or not, and in this particular instance cars. The importance and extent of they were not used for the reason that the business, and the manifest danger more than the obligation which the law and should not fall from the car. But proper one to pursue." method or system as to loading lumber, there was none. Having furnished a good car and stakes that might be used, the manner of loading lumber was left to the judgment and discretion of its agents and servants. It was not sufficient for the defendant to show that its employees knew that the rule I have

the business, and the manifest danger they supposed the lumber would stay from the falling of heavy sticks of tim- on the car over the short distance it ber from the cars, required this. But was to be carried. And it is because there was no rule on the subject. The of the failure of the defendant to reonly rule shown to exist had no partic- quire the use of the stakes in all cases ular reference to lumber more than any that the neglect of its servants in this other freight, and it expressed nothing case is imputed to it. There was no rule, and the only method or system put upon the corporation,—viz., to take was such as the foreman in each particdue care that freight was safely loaded ular case should deem the safe and

Smith v. Lidgerwood Mfg. (1900) 56 App. Div. 528, 87 N. Y. Supp. 533.

Hartvig v. N. P. Lumber Co. (1890) 19 Or. 522, 25 Pac. 358.

<sup>3</sup> Murdock v. Mackinnon (1886) 12 Sc. Sess. Cas. 4th series, 810.

evidence that such rules are in use in any business of a similar character, or that any rules were necessary or practicable in such cases.4

Where a servant sent into a grain bin is buried under a mass of grain which had adhered to the sides, it is properly left to the jury to determine whether the omission to make rules and regulations prescribing the conditions under which servants should be required or permitted to enter the bins at the bottom was or was not a neglect of such reasonable care and precaution as a master engaged in such business was bound to take under the circumstances of the case.<sup>5</sup>

Negligence may be inferred where employees working in a salt bin are not protected by rules which either provide for warning them when the salt is about to be drawn off, or forbid the drawing off when they are in the bin.<sup>6</sup>

## D. WHEN A RULE IS BINDING UPON A SERVANT.

225. Introductory statement.—In a later chapter (xix.), the cases exemplifying the doctrine that a servant who violates a rule promulgated for the guidance and protection of himself and his coemployees is guilty of contributory negligence, as a matter of law, will be collected. But it will be convenient to review, in the present chapter, the principles upon which the courts have determined, under its various aspects, the question which in every instance must be answered before that doctrine is applied; viz., whether the rule alleged to have been disobeyed was one which was binding upon the servant.

226. No rule deemed to be binding unless it is brought to the knowledge of the servant.— Both on principle and authority it is manifest that, in so far as the servant's contributory negligence is predicated merely from his failure to perform the duty prescribed by a rule, he must be shown to have had knowledge of it before he can be held culpable on the ground of his not having obeyed it. In other words, he cannot be held negligent in respect of an act which is only improper because forbidden by a rule, unless he knows of the rule. This doctrine is a corollary of the general principle that "negligence can only

<sup>\*</sup>Morgan v. Hudson River Ore & I.

Co. (1892) 133 N. Y. 666, 31 N. E. 234
(plaintiff was one of several workmen engaged in loading ore cars, and had crept under one of the cars to sweep some ore off the rails, when a car on v. Minneapolis & St. L. R. Co. (1883) the grade above him was started in 30 Minn. 231, 15 N. W. 241; Little some way, owing to the improper act of Rock, M. R. & T. R. Co. v. Leverett some coservant or outsider in removing the blocking).

\*\*McGovern v. Central Vermont R. 300, 9 So. 252; Central R. & Bkg. Co. Co. (1890) 123 N. Y. 280, 25 N. E. 373.

be affirmed in respect of circumstances and conditions known to the party to whom it is imputed."2 (Compare chapter x., ante.) The rules of the master, accordingly, are not admissible as evidence on the issue of the servant's negligence in violating them, unless there is also testimony going to show that he had knowledge of them.3

So far as regards the binding effect of a rule, it is immaterial how it has come to the knowledge of the employee. Knowledge, either express or such as the law will imply, without reference to the means by which it is acquired, binds the employee to compliance.4

The general question as to when knowledge is imputed to the servant is discussed in chapter xxx., post.

227. When a servant is deemed to have knowledge of a rule.-The obligations predicated as a result of the principle stated in the preceding section affect both the master and the servant.

In the case of a rule issued by a private person, there can evidently be no presumption indulged like that which, in the case of a public statute, charges the persons affected by it with knowledge of its

499; Covey v. Hannibal & St. J. R. Co. (1887) 27 Mo. App. 170; Pieart v. Chiett (1881) 25 Kan. 188; Louisville, N. cago, R. I. & P. R. Co. (1891) 82 Iowa, A. & C. R. Co. v. Berkey (1893) 136 148, 47 N. W. 1017; La Croy v. New Ind. 181, 35 N. E. 3. In Parker v. York, L. E. & W. R. Co. (1890) 57 Hun, Georgia P. R. Co. (1889) 83 Ga. 539, 67, 10 N. Y. Supp. 382 (Reversed in [1892] 132 N. Y. 570, 30 N. E. 391, but admission of a rule book as evidence, merely on the ground that the evidence showed that the plaintiff had knowledge of the rule which he violated); when the plaintiff was injured. The Sprong v. Boston & A. R. Co. (1874) court took the ground that, as the question when the court took the ground that, as the question when the court took the ground that, as the question was one not going to their ad-83; Louisville, E. & St. L. Consol. R. missibility, but to their binding effect Co. v. Utz (1892) 133 Ind. 268, 32 N. upon his conduct, there could be no obe. 881; Bonner v. Moore (1893) 3 Tex. [Civ. App. 416, 22 S. W. 272; Georgia P. in the defendant's case. Their verification would be a subsequent matter. So. 764; Louisville & N. R. Co. v. Perry (1888) 87 Ala. 392, 6 So. 40; Louisville (1890) 90 Ala. 5, 7 So. 823, it was said 623, 18 S. W. 681 (disapproving instruction which would absolve the master from liability if he merely had rules each employee should either be furwhich, if observed, would have prevented the injury); Chicago, B. & Q. where he can read or hear them read, R. Co. v. Oyster (1899) 58 Neb. 1, 78 N. W. 359; Gregory v. Ohio River R. all other means of acquiring knowledge, Co. (1893) 37 W. Va. 606, 16 S. E. 819. should be denied. Port Royal & W. C. Brown v. Louisville & N. R. Co. R. Co. v. Davis (1894) 95 Ga. 292, 22 (1895) 111 Ala. 275, 19 So. 1001.

(1888) 87 Ala. 392, 6 So. 40; Louisville (1890) 90 Ala. 5, 7 So. 823, it was said & N. R. Co. v. Hawkins (1890) 92 Ala. that the mere fact that the plaintiff de-241, 9 So. 271 (sustaining a demurrer nies all knowledge of the rule which he to a plea which did not aver knowledge is charged with violating is not sufficient to prevent its being put in eviG. N. R. Co. v. Hinzie (1891) 82 Tex. dence.

623, 18 S. W. 681 (disapproving in
4 A request to charge to the effect

provisions.1 Hence, "where rules are prescribed or regulations adopted for the government of employees in and about the discharge of their duties, it is the duty of the employer to give notice of their existence, and so to promulgate them as to afford to the employee a reasonable opportunity of ascertaining their terms."2 The duty of informing a servant of a rule is specially imperative where he is hired to fill a position temporarily.3

The question whether the master had adequately performed this duty is bound up, and is always considered in connection, with the question, whether the servant was chargeable with notice of the contents of the rule under discussion. Each of these questions is primarily one of fact for the jury.4 But, as in all the employers' liability cases in which the knowledge, actual or constructive, of the servant is to be determined, the courts have exercised very freely their privilege of controlling or setting aside verdicts.

In the absence of evidence going to show fraud, it is clear that a servant cannot be heard to assert that he was ignorant of a rule, when he had expressly contracted with reference to its provisions.<sup>5</sup> The same conclusion is unavoidable where an employer has taken the precaution of requiring an employee to sign a written statement to the

<sup>1</sup> Gregory v. Ohio River R. Co. (1893) be warned of such alterations, is no evthe servant of the rules by which he Conway v. Belfast & N. C. R. Co. was to be bound. Pilkinton v. Gulf, C. (1877) Ir. Rep. 11 C. L. 345, Affirming & S. F. R. Co. (1888) 70 Tex. 226, 7 S. (1875) Ir. Rep. 9 C. L. 498.
W. 805. But this decision seems to be contrary to general principles.

"Bast Tennessee, V. & G. R. Co. v. Turvaville (1893) 97 Ala. 122, 12 So.

contrary to general principles.

2 Port Royal & W. C. R. Co. v. Davis
(1894) 95 Ga. 292, 22 S. E. 833. This
general principle holds although the plaintiff, in a written application for McNee v. Coburn Trolley Track Co.
employment, has undertaken to "study (1898) 170 Mass. 283, 49 N. E. 437; employment, has undertaken to "study the rules governing employees, carefully keep posted, and obey them." Carroll v. East Tennessee, V. & G. R. Co. (1889) 82 Ga. 452, 6 L. R. A. 214, 10 In Brennan v. Michigan C. R. Co. (1889) 82 Ga. 452, 6 L. R. A. 214, 10 In Brennan v. Michigan C. R. Co. (1892) 93 Mich. 157, 53 N. W. 358, the sponsible for an injury caused by the servant's ignorance of rules, where his superior officer has failed to comply he acknowledge of a particular rule was proved by a writing in which superior officer has failed to comply he acknowledged, over his signature, with his repeated requests to furnish him with a copy of them. Gulf, C. & S. F. R. Co. v. Kizziah (1893) 4 Tex. with them. In another case no questive that he had received a copy of the rules, and promised to make himself familiar with them. In another case no questive that he had received as to the servant's knowledge where he had subscribed the see personally that the printed notices rules. Ward v. Chesapeake & O. R. Co. (1894) 39 W. Va. 46, 19 S. E. 389. In Finley v. Richmond & D. R. Co. who ought, in the course of business, to

37 W. Va. 606, 16 S. E. 819. In one idence of systematic mismanagement on case it has been held that, in the ab- the part of the company. His duty is sence of proof to the contrary, it will fully performed if the notices are hand-be presumed that the master notified ed to his subordinates for distribution.

effect that he has read and understands the rules.6 But where the express agreement simply binds the servant to ascertain the provisions of the employer's rules, it will not be construed as referring to any rules except those which the master has taken some active steps to bring to the servant's knowledge. The undertaking of an employee, entered into in writing as one of the terms of his employment, to "study the rules governing employees, carefully keep posted, and obey orders," does not extend to any unknown rules not promulgated to him.7

Another situation in which it is probable that no court would permit a servant to plead ignorance of a rule is presented in those cases where it is shown that printed copies of the rules were distributed among the employees whom they concerned, with instructions to study their provisions.8

the plaintiff's knowledge was assumed entitled to have it admitted in evidence. waiving all and any liability of the entered its service, and it contains spemade in a case where the servant had the cars are in motion, and that he was

abide by them.

risks of the forbidden act, and hold the of the employment, but that its exist-company harmless for any injury he ence was known to Oakes." company harmless for any injury he ence was known to Oakes." might sustain while doing it. The trial "Carroll v. East Tennessee, V. & G. court excluded the paper on plaintiff's R. Co. (1889) 82 Ga. 452, 6 L. R. A. objection, on the ground that it was in- 214, 10 S. E. 163. competent and immaterial, and was in conflict with the provisions of the statute (Code, § 1307), and in contravensaying: "It may be that, regarding

595, 25 U. S. App. 16, 63 Fed. 228, think it very clear that defendant was where he had signed an agreement It is the agreement upon which Oakes company to him for the results of an in- cific directions as to the manner in fraction of the rule. See also Lake which he was expected to perform the Erie & W. R. Co. v. Craig (1897) 25 C. duties of his employment. It advised C. A. 585, 47 U. S. App. 647, 80 Fed. him that it was regarded as a danger-488, where a similar assumption was ous act to attempt to uncouple when acknowledged the receipt of the rules, expressly forbidden to attempt to do and had agreed carefully to study and that. The article signed by him is an admission by him that he knew of that <sup>6</sup> In Sedgwick v. Illinois C. R. Co. prohibition, as well as an agreement (1887) 73 Iowa, 158, 34 N. W. 790, an that he would assume all the risks of (1887) 73 lowa, 188, 34 N. W. 790, an that he would assume all the risks of the forbidden act, and hold the compury received while attempting to unpany harmless for any injury he might couple cars in motion, it appeared that sustain while doing it. . . The acontract had been signed by him, in fact that he contracted to hold it harmwhich he acknowledged that he had less is quite immaterial. The defend-been made acquainted with a rule of ant had the right to introduce the paper the company, strictly forbidding any in evidence, then, because it showed, attempt to uncouple moving cars, and not only the existence of the rule, and in which he also agreed to assume all that it constituted one of the conditions risks of the forbidden act, and hold the of the employment but that its exist.

<sup>8</sup> In *La Croy* v. *New York*, *L. E. & W. R. Co.* (1892) 132 N. Y. 570, 30 N. E. 391, the court assumed that, if the tion of public policy. This exclusion rules of the company had been put in the supreme court held to be erroneous, possession of the employees concerned, with instructions to read and observe the instrument simply as a contract be-them, the plaintiff could not have re-tween the parties, some of its provisions covered. In this case the plaintiff's could not be upheld; but we do not knowledge was inferred from his own have occasion to go into that question; testimony that, although he had not for, aside from its character as an agreebeen furnished with a book of the rules, ment, there are grounds upon which we nor required to read it, he had had ac-

It is also clear that the servant is subject to something more than the obligation of merely acquainting himself with the contents of the rules which have been actually placed in his hands, and that he is, to some extent at least, bound to take active steps to ascertain their provisions. As bearing upon the question of the servant's knowledge of a certain rule, therefore, it is always competent to introduce evidence showing that printed copies of that rule had been posted at the places where it was customary to post the rules affecting the class of employees to which the injured servant belonged.9 The effect of such

cess to it and had actually read it. In common carrier which transports them Corcoran v. Delawarc, L. & W. R. Co. (1891) 126 N. Y. 673, 27 N. E. 1022, S. R. Co. v. Rosenzweig (1886) 113 Pa. one of the rules provided that "every 519, 6 Atl. 545), and sound reasoning employee must acquaint himself with these rules and directions, and keep a greater stress of necessity and of duty copy of them in his possession. New rules are made from time to time as occasion requires. Notice of them is given on the bulletin boards of the company at Buffalo, East Buffalo, Elmira, and Binghamton. Employees must keep themselves informed of new rules by examining these bulletin boards." which the highest promptings of duty It was shown that the rules were and self interest demanded he should printed on the back of the time-tables, know; and so the point has been ruled." and were kept for distribution at all Alcorn v. Chicago & A. R. Co. (1891) points where the men could get them.

They were kept for distribution in the held error to refuse to admit in evionic company at East Buffalo, where the relationship is the point base and self interest demanded he should printed on the back of the time-tables, know; and so the point has been ruled." and were kept for distribution at all Alcorn v. Chicago & A. R. Co. (1891) points where the men could get them. 511, the servant's knowledge of the rule was proved by the fact that he had receipted for a copy.

 McDonald v. Fitchburg R. Co. (1897) 19 App. Div. 577, 46 N. Y. Supp. (1897) 19 App. Div. 517, 46 N. Y. Supp. 600 (rule requiring the use of coupling sticks posted in the yard where the servant worked); Francis v. Kansas City, St. J. & C. B. R. Co. (1894) 127 Mo. 658, 28 S. W. 842, 30 S. W. 129 (rule affecting a switchman had been duly posted in the yard and the round-house). On the first spread of this house). On the first appeal of this case (1892) 110 Mo. 387, 19 S. W. 935, the court approved a charge to the effect it was the duty of the servants to acquaint themselves with rules which were posted in the manner stated in the text above. In an earlier case the same knowledge of the regulations of the using such sticks, but not the mere fact

office of the master mechanic and yard dence a rule forbidding the coupling of master at East Buffalo, where the plaincars in motion, where testimony had tiff was at work. Upon this state of been introduced by the defendant going the evidence no suggestion was made to prove that it had been in force sevthat the rules had not been properly eral years; that it was printed on the published. In *Darracott v. Chesapeake* back of the time-tables distributed to & O. R. Co. (1887) 83 Va. 288, 2 S. E. employees; and that a special copy was posted in all particularly public places along the road. In this case the court followed the doctrine laid down in Alexander v. Louisville & N. R. Co. (1886) 83 Ky. 589, where it was said that the fact of the plaintiff's not having been furnished with a copy of the printed rules, and being ignorant of their existence, did not constitute sufficient reason for rejecting them in this case, and they were properly admitted; for it was his duty to acquaint himself with those rules which manifestly he might have done by the use of ordinary diligence. Memphis & C. R. Co. v. Askew (1890) 90 Ala. 5, 7 So. 823; holding that where plaintiff has denied all knowledge of a rule requiring the use of a coupling stick, it is competent for the defendant court remarked: "In numerous in to prove, as bearing upon the fact of stances it has been held that passengers the plaintiff's knowledge, the fact that must equip themselves with a sufficient he had frequently seen other employees

evidence is, according to some of the authorities, always for the jury.<sup>10</sup> This position would doubtless be taken by all courts where the rule in question was not included among those contained in the general printed schedule, and the testimony upon which the defendant relies, as tending to show promulgation in another way, is vague and indefinite.<sup>11</sup> Nor can it be held, as a matter of law, that a servant had constructive notice of a rule which the evidence fails to show was posted during the term of his employment; 12 or of one which was posted in such a manner that it could not be seen without making a more minute search than can reasonably be demanded from him; 13 or of one which is not satisfactorily shown to have been sent to the intermediate agents who were responsible for the final steps by which it was to be brought to the servant's knowledge.14 But, in some cases, posting on the regular bulletins in the ordinary way seems to be treated as sufficient to carry constructive notice of a rule to the servants affected by it.15

The longer the period during which the servant has had an opportunity to make himself acquainted with the rules for his guidance, the

to by the employees generally in the dis- ey v. Baltimore & P. R. Co. (1890) 8

charge of their duties.

<sup>10</sup> In a Missouri case the court refused to declare, as a matter of law, that a posted in public places where the serv-

by blackboard).

935. Compare the decision that knowledge of a standing order not included in rebuttal, testified that the rule had among the printed rules cannot be prenever been enforced while he was at sumed from the fact that it had been that place, and that he "never knew posted at some previous time, where anything about rules whatever."

that the rules were frequently referred department to which he belongs. Mack-

Mackey, 282.

<sup>14</sup> In Seese v. Northern P. R. Co. (1889) 39 Fed. 487, the question of the servant had notice of a rule, because it servant's knowledge of a rule was held had been recorded in an order book, and to have been rightly submitted to the jury, where a witness testified for the ants doing the same kind of work were defendant that the rule was in force at called by their duties. Francis v. Kan- the time that plaintiff received his incan cearing by their duties. Francis v. Mansas City, St. J. & C. B. R. Co. (1892) jury; that it was one of those made for
110 Mo. 387, 19 S. W. 935.

"Doing v. New York, O. & W. R. Co.
(1897) 151 N. Y. 579, 45 N. E. 1028 rules were sent and distributed to the (defendant sought to establish posting different heads, but could not testify by blackboard).

positively that they were sent to the <sup>12</sup> Francis v. Kansas City, St. J. & C. heads of the management of the yards B. R. Co. (1892) 110 Mo. 387, 19 S. W. at the placewhere the accident occurred; while, on the other hand, the plaintiff,

sumed from the fact that it had been posted at some previous time, where there is no evidence going to show whether it had been torn down, or was still up during the servant's term of service. Wooden v. Western N. Y. & for granted by the court. In Fritz v. P. R. Co. (1892) 46 N. Y. S. R. 77, 18 N. Y. Supp. 768.

13 A servant is not affected with notice of a rule printed on the back of a timetable which is nailed with its face outward, upon the wall of the office of the

less hesitation will a court feel in setting aside a verdict in his favor,16

Both on principle and authority it is clear that, in the absence of specific notice, a servant is not chargeable with a knowledge of the contents of rules designed to regulate the conduct of a class of employees different from that to which he belongs.<sup>17</sup>

The fact that a rule was not printed will not absolve the servant from the consequences of disobeying it, if it was one which was well recognized, and was duly promulgated by word of mouth. ject of writing or printing rules is merely that the proper course of conduct may be definitely prescribed, and more certainly brought to the attention of every person having to enforce or execute the rules, or to rely on their execution.18

228. Reasonableness.—The general principle is that a master has the right to make such reasonable rules as to the manner in which his business shall be conducted as are necessary either for his own protection or for the safety of his employees.1 Such a mode of stating the nature of the right implies that, when the consequences of a servant's violation of a rule are in question (see chapter xix., post), its reasonableness is always a preliminary issue in the case. In most instances the rules are so obviously calculated to secure the servant's safety that this issue is not directly discussed, the decision that the servant's action is barred on account of his violation of a rule being an implied declaration that it is reasonable. But in some cases the courts have rendered specific decisions upon the reasonableness of the rule under

position. Helm v. Louisville & N. R. ord is that he had reasonable opportu-Co. (1895) 17 Ky. L. Rep. 1004, 33 S. nity to become acquainted with it, which W. 396. In Shenandoah Valley R. Co. for the purposes of the present case, is v. Lucado (1889) 86 Va. 390, 10 S. E. equivalent to actual knowledge."

422, the court, after quoting one of the 422, the court, after quoting one of the defendant's rules, said: "These rules to know whether the rules and schedules were in force, and had been for several provided for the running of the defendsection foremen, Jennings among the 645. number, for the guidance of themselves and the men under their charge. The C. C. A. 494, 92 Fed. 491. deceased had been in the employ of the company as a section hand for many (1887) 73 Iowa, 158, 34 N. W. 790.

<sup>10</sup> One who has acted as assistant sta- months prior to the accident, and the tion agent for eighteen months will be presumption is that he was acquainted presumed to know the rules of the com- with the rule above quoted. At all pany pertaining to the duties of that events, the fair inference from the rec-

years, when the accident occurred, al- ant's trains on its road were defective though they had not been formally pro- or ambiguous, inasmuch as it was not mulgated by the receiver after his aphis business to run the defendant's pointment. They are printed, and coptrains, or either of them. Georgia R. ies of them had been duly furnished to & Bkg. Co. v. Rhodes (1876) 56 Ga.

<sup>18</sup> Grady v. Southern R. Co. (1899) 34

review, as a step towards the final conclusion that its breach disabled the servant from recovering damages.2

The doctrine that conformity with general usage is a conclusive defense (see § 44, ante) has been applied in one case, with the harsh result that the servant was held to be bound by a rule which virtually required him to do his work in an unnecessarily dangerous way.<sup>3</sup>

Whether the reasonableness of a rule is a question for the court or the jury is one as to which there is much apparent conflict between the authorities. One theory is that this question is always for the court, the reason assigned for this view being that it would otherwise be impossible to secure a uniformity of view, or to insure that a rule pronounced reasonable in one case by a jury might not be pronounced unreasonable by another jury in a subsequent case. 4 Another view is

ling or uncoupling of cars by going in no similar accident had occurred albetween them while they are in motion. though the process had sometimes to Lowe v. Chicago, St. P. M. & O. R. Co. be repeated twice a day, and even more (1893) 89 Iowa, 420, 56 N. W. 519. A frequently. rule requiring coupling and uncoupling

<sup>2</sup> The following rules have been ex-ligent in requiring, in accordance with pressly held valid: A rule setting a universal practice in cotton mills, a apart a special time for the wiping of loom to be fanned for cleansing purmachinery, and forbidding employees poses while it was in motion, where by to wipe it while it was in motion. Shan-such method time was saved and the ny v. Androscoggin Mills (1876) 66 work facilitated, to the benefit of an Me. 429. A rule prohibiting the coup- employee who worked by the piece, and

Kansas City, Ft. S. & M. R. Co. v. of cars to be done by means of a stick, Hummond (1894) 58 Ark. 325, 24 S. and forbidding employees to go between W. 723; Pittsburg, Ft. W. & C. R. Co. cars when a locomotive is attached. v. Powers (1874) 74 III. 341. To the Richmond & D. R. Co. v. Rush (1894) same effect, see Louisville, N. & G. S. 71 Miss. 987, 15 So. 133. A rule which R. Co. v. Fleming (1884) 14 Lea, 128; prohibits jumping on a switch engine State v. Overton (1854) 24 N. J. L. prohibits jumping on a switch engine State v. Overton (1854) 24 N. J. L. while it is in motion, by standing in the 435, 61 Am. Dec. 671; Norfolk & W. R. middle of the track, and stepping on Co. v. Wysor (1886) 82 Va. 250—the footboard. Francis v. Kansas City, cases in which a passenger was the St. J. & C. B. R. Co. (1892) 110 Mo. plaintiff. In Little Rock & M. R. Co. 387, 19 S. W. 935. Rules by which it v. Barry (1898) 43 L. R. A. 349, 28 C. is directed that section foremen shall C. A. 644, 56 U. S. App. 37, 84 Fed. "carefully flag their truck and hand 944, the doctrine was laid down broaders against special and extra trains or by and emphetically that when a resi cars against special and extra trains or ly and emphatically that, when a railengines, which may be run at any time, road company adopts certain rules for day or night, without previous notice to the operation of its trains, the reasonday or night, without previous notice to the operation of its trains, the reasonthem;" and that "special care must be taken in running hand cars and truck cars on all sections of the road where, the cars on all sections of the road where, the cars on of fogs, sharp curves, or other that judges could not arrogate to them-circumstances, risk or danger is involved;" and that "[hand] cars must always be protected by a flag when a clear track cannot be seen for a safe distance." Kansas & A. Valley R. Co. their constitutional right to a trial by v. Dye (1895) 16 C. C. A. 604, 607, 36 U. S. App. 23, 28, 70 Fed. 24, 27.

In Gideon v. Enoree Mfg. Co. issue out of the hands of juries did not, (1895) 44 S. C. 442, 22 S. E. 598, it was decided that a master was not negthat the question is primarily one for the jury.<sup>5</sup> Some courts have enunciated an intermediate doctrine which seems to be more in harmony with general principles,-viz., that the reasonableness of a rule is a mixed question of law and fact, except in plain cases.<sup>6</sup>

In one case a consideration is introduced which, if it were always regarded as controlling, would obviate all necessity for a demarcation between the respective provinces of court and jury, the position taken being that, as between a master and a servant who has deliberately entered into his contract of employment, with full opportunities for ascertaining all his duties and the rules he may be required to comply with, and who is at liberty to withdraw from the service at any time that he finds it objectionable, it is neither for the court nor the jury to determine the reasonableness of a rule.

229. Rules making servants the insurers of their own safety.-By some courts, as will be shown more at length in the third volume of this treatise, all express contracts which limit or take away the serv-

ableness of a rule.

<sup>5</sup> International & G. N. R. Co. v. Hall

passenger.

<sup>o</sup> Bass v. Chicago & N. W. R. Co. (1874) 36 Wis. 459, 17 Am. Rep. 495 (passenger case); Avery v. New York said: "While this position is not with-C. & H. R. R. Co. (1890) 121 N. Y. 31, out the sanction of respectable author-24 N. E. 20 (passenger case); Day v. ity, the better opinion appears to be Owen (1858) 5 Mich. 520, 72 Am. Dec. that the question is generally a mixed 62. In one case the court, in applying one of law and fact. So far as the rea-62. In one case the court, in applying one of law and fact. So far as the reathe doctrine thus enunciated to an orsonableness of a given rule depends upon der suspending a rule by which the running of certain classes of trains was regulated, said: "Whether a rule of a for the jury, under proper instructions railroad company is or is not a reasonable rule is in many cases a question of law; but in this case it cannot be affirmed, as matter of law, that the special order made by superintendent Bar-

judge that all the cases cited to show rett was reasonable. On the contrary, that the reasonableness of rules was a whether such order was reasonable or question of law were, with one excep- unreasonable was a question of mixed tion, cases in which no testimony was law and fact, proper for the determinaintroduced to show whether the rule tion of the jury in view of the circumwas or was not reasonable, and that the stances under which the order was to be decisions were simply to the effect that, executed, and under proper instructions under such circumstances, the court as to the law. The jury found that the could properly determine the reason- order was unreasonable under the circumstances, and we are not prepared to say that the finding was wrong." Pitts-(1890) 78 Tex. 657, 15 S. W. 108; burgh, C. & St. L. R. Co. v. Henderson Texas & N. O. R. Co. v. Echols (1894) (1882) 37 Ohio St. 549. In Pittsburgh, 87 Tex. 339, 27 S. W. 60, 28 S. W. 517. C. & St. L. R. Co. v. Lyon (1889) 123 See also South Florida R. Co. v. Rhodes Pa. 140, 2 L. R. A. 489, 16 Atl. 607 (pas-(1889) 25 Fla. 40, 3 L. R. A. 733, 5 senger case), it was contended that cer-So. 633; Illinois C. R. Co. v. Whitte-tain instructions were erroneous for the more (1867) 43 Ill. 420, 92 Am. Dec. reason that they withdrew from the con-138—cases in which the plaintiff was a sideration of the jury the reasonableness or unreasonableness of the regulation under consideration, and disposed of it as a question of law. The court said: "While this position is not with-

ant's right of action for the master's negligence are indiscriminately upheld.1

In jurisdictions where the position thus indicated is taken, the sole prerequisites to the establishment of an effective defense on this ground is that the servant should have known that the rule had been promulgated,2 and that the agreement which it evidences should have been based upon a sufficient consideration.

Most of the American courts, however, decline to permit employers to stipulate for exemption from the consequences of their own negligence, and in all of these it would doubtless be held, as it has been declared in some cases, that a rule which virtually amounts to such a stipulation is invalid.3 This point of view, however, is not inconsist-

 See Baddeley v. Granville (1887) 19 imposed on the shipper. Bushby v. Q. B. Div. 423, 56 L. J. Q. B. N. S. 501, New York, L. E. & W. R. Co. (1887) 57 L. T. N. S. 268, 36 Week. Rep. 63, 51 107 N. Y. 374, 14 N. E. 407. So far as J. P. 822; Western & A. R. Co. v. Bishop a rule contravenes the principle of law (1873) 50 Ga. 465; Western & A. R. Co. which requires the master to furnish v. Strong (1874) 52 Ga. 461; Galloway and maintain suitable material and apv. Western & A. R. Co. (1876) 57 Ga. pliances for the safe prosecution of its 512; Cook v. Western & A. R. Co. business, it will be regarded as wholly

responsible for the condition of his enworking order). A railroad company whatever, while in the service of this cannot escape liability for injuries company. If an employee is disabled caused by the defective quality of the by accident or other cause, the right to side stakes of a lumber car by the plea claim compensation for injuries will that, according to its system, the duty not be recognized." of loading and adjusting the stakes was

(1883) 72 Ga. 48; Fulton Bag & Cotton inoperative. Memphis & C. R. Co. v. Mills v. Wilson (1892) 89 Ga. 318, 15 Graham (1891) 94 Ala. 545, 12 So. 283 S. E. 322. (rule here related to the examination S. E. 322.

'a In Georgia, however, the distinction of appliances). A contract by which an employee agrees that he will not attact the principle under which an employee agrees that he will not attact tempt to couple or uncouple a car unwhenever it is actually or constructively known to him is not applicable where the rule requires him to waive certain rights not connected with his poses upon the master, to see that the duties as an employee. To bar his implements are in a reasonably safe rights it must be shown that he expressible to that particular rule. The Co. v. Wood (1896; Tex. Civ. App.) 35 mere fact that he kept a copy of the S. W. 879. It has been held that, unrules in his possession, and remained in der such a statute as the employers' lirules in his possession, and remained in der such a statute as the employers' lirules in his possession, and remained in der such a statute as the employers atthe service will not disable him from ability act of Alabama, a rule which recovery. Georgia P. R. Co. v. Dooley requires an employee "to look after and to responsible for his own safety" is invalid. Louisville & N. R. Co. v. Orr

The duty of a master to furnish reasonably safe machinery, being nonassonably safe machinery, being nonassonably safe machinery. sonably safe machinery, being nonas-decision was followed in Richmond & signable, cannot be shifted to his serv- D. R. Co. v. Jones (1890) 92 Ala. 218, ants merely by the promulgation of a 9 So. 276, where the employee had rule requiring them to inspect the apagreed especially to be bound by certain pliances handled by them. Ford v. rules, one of which ran as follows: Fitchburg R. Co. (1872) 110 Mass. 240. "The conditions of employment by the 14 Am. Rep. 598 (rule required that company are that the regular compenthe driver of an engine should be held sation paid for the services of employees shall cover all risks incurred, and gine, and must be sure that it is in good liability to accident from any cause

ent with the position that servants of a particular class may be required by a rule to protect themselves against certain sporadic dangers which are obviously incidental to their special work, and which do not imply the existence of any defect in the plant of the employer.4

230. Rules requiring the servant to examine the appliances used by him.—See § 416, post.

231. Conflict between the obligation of a rule and other duties.— The question of the extent of a servant's duty to observe a particular rule is sometimes determined by the application of the general principle that a person upon whom two inconsistent obligations are imposed by a contract may, without culpability, act upon the assumption that the less binding one may be disregarded. It is considered that a rule has no binding force where the conditions existing at the time the injury was received rendered it practically impossible to obey the rule, and at the same time perform the services required by the employer. In other words, the fact that the plaintiff has disobeyed a rule will not, as matter of law, debar him from recovering, if the defendant conducted his business in a manner which rendered a violation of such rule necessary or probable.2 Under such circumstances it will be inferred that it must have been enacted to serve some

tice will be given to trackmen of the pany to him for any results of disobedipassage of extra trains, and that they ence or infraction of a rule, is not a must govern themselves accordingly, is contract against public policy. It is valid. Where they knew of the rule, merely a declaration on his part that they must be taken to have assumed the the company will not be liable to him risk of the passage of such trains withfor the consequences of certain acts out blowing a whistle or ringing a bell. which the company forbids him to perJolly v. Detroit, L. & N. R. Co. (1892) form. Russell v. Richmond & D. R. Co.

93 Mich. 370, 53 N. W. 526. Rules pro(1891) 47 Fed. 204. viding that extra trains may pass over 1A master is deemed to have waived the road at any time without previous the observance of a rule forbidding an

<sup>4</sup> A rule which provides that no no- which he waives all liability of the com-

notice, and that the foreman of gangs act not necessarily negligent in itself, of track repairers must be always pre- where the duty which his servant owes pared for them, and requiring him to to him cannot be performed without a take various appropriate precautions violation of such rule. Brown v. Louisfor the safety of his subordinates, are reasonable. Criswell v. Pittsburgh, C. 19 So. 1001. In Sedgwick v. Illinois C. & St. L. R. Co. (1888) 30 W. Va. 798, R. Co. (1887) 73 Iowa, 158, 34 N. W. 6 S. E. 31; Olson v. St. Paul, M. & M. 790, the court remarked, arguendo, that R. Co. (1888) 38 Minn. 117, 35 N. W. a servant's violation of a known rule 866 (validity of rule was here assumed). Yet it has been held that a regulation making it the duty of the track foreman to protect himself against all trains, regular and extra, without having any notice whatever of the same, is an unreasonable one. Willawithout having any notice whatever of lis v. Atlantic & D. R. Co. (1898) 122 safety has been mentioned as an addingle one of the same, is an unreasonable one. Willawithout having any notice whatever of lis v. Atlantic & D. R. Co. (1898) 122 safety has been mentioned as an addingle of the properties of the same of the same, is an unreasonable one. Willawithout having any notice whatever of lis v. Atlantic & D. R. Co. (1898) 122 safety has been mentioned as an addingle of the properties of the same of take various appropriate precautions violation of such rule. Brown v. Louispurpose other than the protection of the property of the master, or the proper conduct of his business, or the safety or protection of his employees.3

This general principle involves the corollary that the effect of a special order issued by an employee who is the master's alter ego in respect to the subject-matter will operate so as to suspend pro tanto the obligation of a general order embodied in a rule, and thus convert into

ter of law, that a conductor would, un- him from an observance of the rule, and der such circumstances, be guilty of could not prepare to meet the issue prenegligence in quitting his post tempo- sented by the replication. Louisville plaintiff was allowed to recover on the ment of a train are vested in the conground that he could not conform to the time-table, and at the same time keep his train "under complete control," as one of the rules required. Alabama G. S. R. Co. v. Richie (1895)

<sup>a</sup> Strong v. Iowa C. R. Co. (1895) 94

111 Ala. 297, 20 So. 49, the injury octowa 380, 62 N. W. 799. The court recurred while the plaintiff, who was a marked: "A rule which, if obeyed, brakeman, was between moving cars. would prevent the defendant from propfor a special plea the defendant set out erly carrying on its business, does not not the strong strong of the strong s other things, prohibited employees made in good faith, and in "from getting between moving cars, of any legitimate purpose." while in motion, to uncouple them,"

41 Hun, 407; O'Malley v. New York, L. To this special plea the plaintiff filed E. & W. R. Co. (1893) 67 Hun, 130, 22 a replication, which, in substance, N. Y. Supp. 48. See § 416, note 3, post. It is error to nonsuit the plaintiff where a rule forbids the coupling of cars while in motion, if the evidence of cars while in motion, if the evidence cars, and that this duty could not be is that there was a grade in the yard which rendered it necessary for the cars and that this duty could not be performed without going between the which rendered it necessary for the cars while they were in motion, and to be moved while they were being uncoupled, on account of the links and pins being tightened when they were the cars while they were in motion, and to be moved while they were the cars while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while they were in motion, and to be moved while the his crew, is not necessarily negligence circumstances which rendered it neces-where another regulation imposes on sary for the plaintiff to go between the him the duty of "taking the safe side cars while in motion to uncouple them, in all cases of doubt." What is the in discharge of his duty; and that the "safe side" in any given exigency is a defendant was accordingly not informed question for the exercise of judgment. by the replication what facts were re-A court, therefore, cannot say, as mat-lied upon by the plaintiff to absolve rarily to warn the engineer of the pos- & N. R. Co. v. Mothershed (1895) 110 sibility that he might meet some ob- Ala. 143, 20 So. 67, holding that there struction not known to, or not consid- is no such conflict of rules as will inered by, the company in making out the validate them, where one requires that special order under which the train was trains, upon approaching a "time-table running. Somerset & C. R. Co. v. Gal-station," shall be under full control, running. Somerset & C. R. Co. v. Gal-station," shall be under full control, braith (1885) 109 Pa. 32, 1 Atl. 371. with the expectation that the main In Hall v. Chicago, B. & N. R. Co. track is occupied, and another provides (1891) 46 Minn. 439, 49 N. W. 239, the that the general direction and governductor, who shall be responsible for its proper conduct, and requiring all employees on the train to yield obedience to his proper orders.

a rule of the company which, among commend itself to the courts as being employees made in good faith, and in furtherance

a nonculpable act one which, apart from that special order, would have entailed the consequences of disobedience.4

A special order, however, will supersede a standing rule only where they are essentially conflicting in their terms, or where it is or ought to be foreseen, at the time when the order is given, that its execution is incompatible with the rule, or where such incompatibility afterwards arises owing to some action taken by the giver of the order, with reasonable ground for expecting such a result.<sup>5</sup> Nor is the recipient of a special order which has the effect of superseding a general rule deemed to be free from culpability in obeying the order, unless he has actual knowledge that the employee who gives it is acting within his powers.6

\*Alabama G. S. R. Co. v. Roach press was in motion in the darkness, (1895) 110 Ala. 266, 20 So. 132; Rich- but he evidently believed that he was was mond & D. R. Co. v. Rudd (1892) 88 expected to do it, if requested by the Va. 648, 14 S. E. 361. An engineer's machine tender."

noncompliance with general rules for the operation of trains will not disable gineer to make a run in a certain time him from recovering, where the orders must be executed with due regard to given by the groups of the the general rules which are not incompliance. company required him to run his train patible therewith, and there can be no in a manner different from that prescribed in those rules. Pennsylvania killed by his breach of a rule requiring Co. v. Roncy (1883) 89 Ind. 453, 46 him to approach a station with "great Am. Rep. 173. A brakeman who stands on the pilot of the engine for the purpose of making a running switch, by direction of the conductor and engineer, (1889) 31 Ill. App. 126. who know that the making of running switches is expressly prohibited by the rules of the company, is not guilty of ductor shall have control of all persons contributory negligence, when his duty employed on his train, except when his in that respect cannot be performed in directions conflict with the rules, or in-

given by the governing officers of the the general rules which are not incom-

any other place, and the accident revolve risk or hazard, in which case the sults from the engineer's failure to stop engineer will be held equally accountsults from the engineer's failure to stop engineer will be held equally account-his engine in time. Louisville South-able, and another rule requires that a ern R. Co. v. Tucker (1899) 20 Ky. L. certain train shall remain at a specified Rep. 1303, 49 S. W. 314. An employee station until the arrival of a train in a paper mill is not, as matter of law, from the opposite direction,—the engi-guilty of contributory negligence in at-tempting, on direction by a superior, to peril, detain it as so prescribed unless pull the broken paper off a press at he actually knows that the despatcher night while the lights are out, so as to prevent a recovery for an injury caused proceed before the arrival of the ex-by the unexpected breaking of the pa-pected train. He is not permitted to per and his failure to catch hold of a infer that the conductor has received hand-rail to prevent his falling, not-information which will justify his movwithstanding an order to stop the ing his train in a manner different from presses at night when the paper broke that prescribed by the rules, and to act while the lights were out, where such on that assumption. York v. Chicago, order had been previously disobeyed by M. & St. P. R. Co. (1896) 98 Iowa, 544, others. Sawyer v. Rumford Falls Pa- 67 N. W. 574. The schedule of hours per Co. (1897) 90 Me. 354, 38 Atl. 318. for the running of trains is obligatory The court remarked that the servant upon both conductors and engineers, "was under no obligations to obey an and if an engineer is injured by a colorder to remove broken paper while the lision due to the starting of his train at

232. Waiver of rules, when inferable from the master's acquiescence in their violation.—A principle established by a large number of decisions is that a rule ceases to be binding upon employees, where the master has sanctioned its repeated violation for a length of time sufficient to warrant them in acting upon the assumption that it was abrogated.¹ Other logically equivalent forms in which this principle

cannot excuse himself for his disobedi- 597, 60 N. W. 309. To the same effect, ence of the printed orders of his supe- see Hayes v. Bush & D. Mfg. Co. riors on the ground that he allowed (1886) 41 Hun, 407; Louisville & N. R.

67 N. W. 227. A railroad company company, which is habitually violated cannot plead violation of rules by an with the knowledge of his superior of-employee, where the work was being ficers, and without any effort on their done in the manner in which it had part to enforce it, or where the usage been done for years. Eastman v. Lake and practice of the company would tend

z time not set down in the schedule, he Shore & M. S. R. Co. (1894) 101 Mich. himself to be prevailed upon by the con- Co. v. Reagan (1896) 96 Tenn. 128, 33 ductor to depart from the schedule S. W. 1050; Newport News & M. Valley time. Georgia R. & Bkg. Co. v. Mc R. Co. v. Campbell (1894) 15 Ky. L. Dade (1877) 59 Ga. 73. Rep. 714, 25 S. W. 267; Knickerbocker "There is no doubt that a person or Ice Co. v. Finn (1897) 25 C. C. A. 579, company having authority to establish 51 U.S. App. 256, 80 Fed. 483; Georgia rules for the government of employees P. R. Co. v. Davis (1890) 92 Ala 300, may, in any particular instance, waive 9 So. 252; Atchison, T. & S. F. R. Co. obedience to the rules, or may know-v. Slattery (1896) 57 Kan. 499, 46 Pac. ingly acquiesce in a disregard of the 941; Atchison, T. & S. F. R. Co. v. Sly obethere to the rules, or may knowledge and approval, the rules will be regarded as abrogated or waived."

Note that the presence or to the knowledge and approval, the rule will be regarded as abrogated or waived."

Note that the presence or to the knowledge and approval, the rule will be regarded as abrogated or waived."

Note that the presence or to the knowledge and consent that obedience will not be repaired. The presence or the knowledge and approval, the rule will be vator, notwithstanding a notice that regarded in such a manner, and for such that it was done with his knowledge and approval. The rule will be vator, notwithstanding a notice that regarded in such a manner of the rule will be vator, notwithstanding a notice that regarded in such a manner of the rule will be vator, notwithstanding a notice that regarded in such a manner of the rule will be vator, notwithstanding a notice that regarded in such a manner of the rule will be vator, notwithstanding a notice that regarded in such a manner of the rule will be vator, notwithstanding a notice that regarded in such a manner of the rule will be vator, notwithstanding a notice that regarded as abrogated or waived."

Wright v. Southern P. Co. (1896) 14 sion is strictly forbidden, there being uten. The rule will rule will be reduced that the knowledge and consent rule of the rule will he rule with the knowledge and consent rule of the rule with the knowledge and consent rule of the rule with the knowledge and consent rule of the rule with the knowledge and consent rule of the rule with the knowledge and consent rule of the rule with the knowledge and consent rule of the rule with the knowledge and consent rule of the rule will rule of the rule with the knowledge and consent rule of the rule will rule of the rule will rule a rule . . . may be presumed when ridden with the knowledge and consent a rule . . . . may be presumed when ridden with the knowledge and consent it is frequently and openly violated for of the employer); McNee v. Coburn such a length of time as that the com-Trolley Track Co. (1898) 170 Mass. pany [employer] could, by the use of 283, 49 N. E. 437; Hunn v. Michigan ordinary care, have ascertained its non-C. R. Co. (1889) 78 Mich. 526, 7 L. R. observance." Texas & P. R. Co. v. A. 500, 44 N. W. 502; Fluhrer v. Lake Leighty (1895; Tex. Civ. App.) 32 S. Shore & M. S. R. Co. (1899) 121 Mich. W. 799. "A railway company cannot 212, 80 N. W. 23; Northern P. R. Co. escape liability by showing a violation v. Nickels (1892) 1 C. C. A. 625, 4 U. escape habitally by showing a violation v. Methers (1892) 1 °C. C. A. 025, 4 °C. of rules which are never enforced, and S. App. 369, 50 Fed. 718; Galveston, H. which are habitually disregarded with & S. A. R. Co. v. Collins (1900) 24 Tex. the knowledge and apparent acquies—Civ. App. 143, 57 S. W. 884. In the cence of officers whose duty it is to enfollowing case an instruction was apforce them." Spaulding v. Chicago, St. proved which told the jury that an em-P. & K. C. R. Co. (1896) 98 Iowa, 205, ployce is not bound by a rule of the

is stated are these: That a custom in violation of a rule, known and acquiesced in by the employer or his representatives, amounts to an abandonment of the rule to the extent to which the custom infringes the rule; that the servant's disobedience of a rule is no bar to his action where the master has waived obedience to that rule;3 that an employer is not permitted to set up as a valid defense the injured employee's violation of a rule which the employer has knowingly permitted to be practically abandoned; or that, when rules and regulations established by the master are habitually disobeyed with his knowledge or express consent, or have been disregarded without his express consent in such a manner and for such a length of time as to raise a presumption that he must have become aware of such habitual disregard and approved the same, such rules and regulations will be disregarded.5

It is proper to leave the case to the jury, wherever there is evidence

to mislead him into a violation of the quired of him. But this ruling is not ing to show that the master did not re- cases cited in the ensuing notes. quire obedience to the rule alleged to <sup>2</sup> Barry v. Hannibal & St. J. R. Co. have been infringed, and had sanctioned (1888) 98 Mo. 62, 11 S. W. 308 (engiits violation, are properly refused. neer permitted fireman to make short Louisville & N. R. Co. v. Richardson moves with the engine, while the engine (1893) 100 Ala. 232, 14 So. 209; Chineer himself was not on it). It need cago & W. I. R. Co. v. Flynn (1895) scarcely be said that there can be no 154 Ill. 448, 40 N. E. 332. Where an recovery where the only custom which ficers, who made no objection, it is not rule itself. Central Trust Co. v. East error to deny a request by the defendant to charge the jury that, if the plainFed. 353 (principle also assumed to be tiff did not follow the course prescribed correct in Alexander v. Louisville & N. by the rule, and was consequently in- R. Co. [1886] 83 Ky. 589). jured, he could not recover. Central R. & Bkg. Co. v. Maltsby (1892) 90 Ga. 630, 16 S. E. 953. In Wilson v. Michigan C. R. Co. (1892) 94 Mich. 20, 53 and Wright v. Southern P. Co. (1896) N. W. 797, the court considered that 14 Utah, 383, 46 Pac. 374. The same the doctrine which predicates a waiver phraseology is found in Nichols v. Chiof rules from the master's knowledge of cago & N. W. R. Co. (1900) 125 Mich. their repeated violation applies only to 394, 84 N. W. 470; Cleveland, C. C. & strangers, and limits the cases in which St. L. R. Co. v. Baker (1899) 33 C. C. an abrogation of rules by a railroad A. 468, 63 U. S. App. 553, 91 Fed. 224, company will be inferred as to an employee, to those in which he is compelled this section. by positive orders to violate such rules, or when such a system of timing the (1892) 1 C. C. A. 625, 4 U. S. App. 369, trains or conducting the business is 50 Fed. 718. adopted as to make it necessary to vio
\*\*Tonold v. Rio Grande Western R.\*\*

rule. Little Rock, M. R. & T. R. Co. v. supported by any other case which has Leverett (1886) 48 Ark. 333, 3 S. W. come to the writer's notice, and seems 50. Instructions ignoring evidence tend- to be irreconcilable with the Michigan

employee had, on many occasions, vio- the plaintiff succeeds in establishing by lated a rule, some of the instances be- his evidence is one which he appears to ing in the presence of his superior of- have been disregarding equally with the

> <sup>3</sup> See the passages quoted in note 1, supra, from Alabama G. S. R. Co. v. Roach (1895) 110 Ala. 266, 20 So. 132, and many other of the cases cited in

> <sup>4</sup> Northern P. R. Co. v. Nickels

late rules in order to do the work re- Co. (1900) 21 Utah, 379, 60 Pac. 1021.

that the rule which the servant is alleged to have disobeyed was customarily violated, with the knowledge of the master or his agents.6

In other words, evidence that the rule in question was habitually violated to the knowledge of the employer is admissible for the purpose of repelling the inference of contributory negligence which would otherwise be drawn, as a matter of law, when such violation is proved.7

An analysis of the principle above explained shows that, to enable a servant to take advantage of it, three evidential elements must be established.

In the first place, the servant must show that there had been violations of the rule, so frequent that they might properly be described as habitual. Evidence which shows a violation of a rule on only two occasions, one of them being the occasion of the accident, is not sufficient to show an abrogation of such rule.8 On the other hand, evidence that a rule was habitually disregarded is, therefore, always admissible to excuse a servant's violation of such rule,9 provided the intringements occurred within a reasonably short time before the injury was received.10

In the second place, the servant must show that these habitual violations were known to the master himself, or the employee whose duty it was to enforce the rule.11 To establish such knowledge the serv-

<sup>6</sup> Wright v. Southern P. Co. (1896) served. Horan v. Chicago, St. P. M. & 14 Utah, 383, 46 Pac. 374; Northern P.

654 (judgment reversed on rehearing *Spaulding* v. *Chicago*, *St. P. & K. C. R.* [1900] 22 Ky. L. Rep. 1141, 60 S. W. Co. (1896) 98 Iowa, 205, 67 N. W. 227;

<sup>8</sup> Konold v. Rio Grande Western R. Co. (1900) 21 Utah, 379, 60 Pac. 1021. The strongest case of habitual violation is presented where there is no evidence that the rule in question was ever obeyed. See Northern P. R. Co. v. Private and the seek of the time of the time of the seek of the s is presented where there is no evidence this particular point).

O. R. Co. (1893) 89 Iowa, 328, 56 N.

14 Utan, 383, 46 Fac. 314; Northern P. O. R. Co. (1893) 89 10wa, 328, 56 N. R. Co. v. Nickels (1892) 1 C. C. A. 625, W. 507.

4 U. S. App. 369, 50 Fed. 718, and the other cases cited in this section.

<sup>1</sup> Louisville & N. R. Co. v. Bowcock Northern P. R. Co. v. Nickels (1892) 1 (1899) 21 Ky. L. Rep. 383, 51 S. W. C. C. A. 625, 4 U. S. App. 369, 50 Fed. 580; Louisville & N. R. Co. v. Hiltner 718; Lowe v. Chicago, St. P. M. & O. R. (1900) 21 Ky. L. Rep. 1826, 56 S. W. Co. (1893) 89 Iowa, 420, 56 N. W. 519; 2, but this point was expressly reaf- Louisville & N. R. Co. v. Hiltner firmed). (1900) 21 Ky. L. Rep. 1826, 56 S. W. 654 (judgment was reversed on rehearing [1900] 22 Ky. L. Rep. 1141, 60 S. W. 2, but the reversal does not touch

ant need not show that it has been habitually disobeyed in the actual presence of the master or his agents. It is not material how the knowledge of the disobedience has been obtained. 12 Nor is he required to show that the agents of the master who were charged with the enforcement of the rule had actual knowledge of the custom to violate the rule. Such knowledge may be inferred from circumstances; it may be implied from the universality and notoriety of the custom.<sup>13</sup> If the waiver is claimed as a result of acquiescing in the violations of the rule by some particular employee at a certain post of duty, the question whether knowledge shall be imputed to the master depends upon the opportunities which he may be supposed to have had, under the circumstances, for ascertaining the misconduct of the employee, and the length of time during which that misconduct has continued. Compare §§ 198, 200, ante.14

Lastly, the servant must show that the master, being thus aware of the violations of the rule, took no steps to secure its enforcement. This fact must be established as a necessary step in the chain of proof which leads up to the conclusion that he acquiesced in the continued infraction of the rule. Courts have sometimes used language which, if taken literally, would imply that acquiescence is a necessary inference in all cases where the master had actual or constructive knowledge of the repeated violations of a rule. 15 Such language, however, merely implies that, in the absence of some countervailing factor, it is justifiable to infer acquiescence wherever it appears that the master had such knowledge. Both on principle and authority, it is clear

kuk & D. M. R. Co. (1877) 45 Iowa, <sup>13</sup> Fluhrer v. Lake Shore & M. S. R. 546 (proof of custom to violate, held Co. (1900) 124 Mich. 482, 83 N. W. not to establish a waiver); Nichols v. 149; Love v. Chicago, St. P. M. & O. Chicago & W. M. R. Co. (1900) 125 R. Co. (1893) 89 Iowa, 420, 56 N. W. Mich. 394, 84 N. W. 470 (disapproving 519. of an unqualified instruction that the might be inferred). See also Fluhrer that an employee has been guilty of an v. Lake Shore & M. S. R. Co. (1899) habitual violation of rules framed to sell Mich. 212, 80 N. W. 23 (where cure the safety of trains at switches, master or his agents knew of such violation); Louisville & N. R. Co. v. Scan- (1895) 145 N. Y. 400, 40 N. E. 1. lon (1901) 22 Ky. L. Rep. 1400, 60 S. lation); Louisville & N. R. Co. v. Scanlon (1901) 22 Ky. L. Rep. 1400, 60 S.
W. 643; and the cases cited in the following notes. That frequent disobedience to the general orders of an employer cannot, of itself, operate as a co. (1899) 121 Mich. 212, 80 N. W. 23;
nullification of them, was recently laid Nichols v. Chicago & W. M. R. Co.
down by Hawkins, J., in Vickery v. (1900) 125 Mich. 394, 84 N. W. 470;
Great Eastern R. Co. (1898) 14 Times Newport News & M. Valley R. Co. v.
Campbell (1894) 15 Ky. L. Rep. 714, <sup>12</sup> Strong v. Iowa C. R. Co. (1895) 94 25 S. W. 267.

Iowa, 380, 62 N. W. 799.

existence of a custom in violation of a railroad company for its failure to disrule was evidence from which a waiver cover, after a period of four months,

that the servant's right to claim the advantages of a practical abrogation of a rule is conditional upon there being no evidence that the master did not attempt to enforce it.16

The jury is entitled to infer a practical abrogation of a rule, even though there is no evidence tending to show nonobservance of it under circumstances exactly similar to those existing at the time of the accident.17

The custom or usage which the doctrine contemplates is that of the employees of the defendant himself, not that of the employees of persons in the same line of business.18

To justify the conclusion that a rule has been abandoned "it must

in Wright v. Southern P. Co. (1896) 14 W. 935.

Utah, 383, 46 Pac. 374; Little Rock, M. Utah, 383, 3 S. W. 50. The necessity of 647, 80 Fed. 488 (second appeal after proving the master's acquiescence is new trial ordered in [1896] 19 C. C. A. also emphasized in Francis v. Kansas 631, 37 U. S. App. 654, 73 Fed. 642).

The circuit judge had assumed that had proving the master's acquiescence is new trial ordered in [1896] 19 C. C. A. also emphasized in Francis v. Kansas 631, 37 U. S. App. 654, 73 Fed. 642). City, St. J. & C. B. R. Co. (1892) 110 The circuit judge had assumed that hamo. 387, 19 S. W. 935; Sloan v. Georgia bitual disregard of a rule forbidding P. R. Co. (1890) 86 Ga. 15, 12 S. E. the coupling of cars in motion would 179; Georgia P. R. Co. v. Davis (1890) not avail a servant where the only pregata. 300, 9 So. 252; Fay v. Minneapvious disregard established was in cases olis & St. L. R. Co. (1883) 30 Minn. where the coupling was done in the day-231, 15 N. W. 241; Overby v. Chesatime and on ground free from ice and peake & O. R. Co. (1893) 37 W. Va. snow, whereas the injury in suit was 524, 16 S. E. 813; O'Neill v. Keokuk & received at night and on ground covers. 524, 16 S. E. 813; O'Neill v. Keokuk & received at night and on ground cov-D. M. R. Co. (1877) 45 Iowa, 546; ered with ice and snow; and in cases Gleason v. Detroit, G. H. & M. R. Co. where the coupling had been done while (1896) 19 C. C. A. 636, 43 U. S. App. the cars were moving 2 miles an hour, 89, 73 Fed. 647; Lowe v. Chicago, St. whereas the injury was received when P. M. & O. R. Co. (1893) 89 Iowa, 420, the cars were moving 5 miles an hour. 56 N. W. 519. Where an instruction as to what would amount to abrogation of a (1895) 110 Ala. 266, 20 So. 132, the published rule of the master was predi- court said, with regard to a phrase cated on evidence which was insufficient which had been used in an earlier case, to show abrogation, an objection there- -that "custom and usage may be reto should be sustained. Konold v. Rio lied upon to excuse the violation of a Grande Western R. Co. (1900) 21 Utah, rule" (Andrews v. Birmingham Mineral 379, 60 Pac. 1021. No waiver can be R. Co. [1892] 99 Ala. 438, 12 So. 432), implied where the employees violating —that it was intended as a statement the rule, or saying they could not do of the principle that "a principal may the work in the manner prescribed by knowingly acquiesce in or assent to a the rule, had been promptly discharged. continuous disregard of rules estab-

<sup>16</sup> See the statements of the doctrine C. B. R. Co. (1892) 110 Mo. 387, 19 S.

the rule, had been promptly discharged. continuous disregard of rules estab-Richmond & D. R. Co. v. Rush (1894) lished and promulgated, and for such a 71 Miss. 987, 15 So. 133, as explained length of time as to justify those for in White v. Louisville, N. O. & T. R. whom they were intended to consider Co. (1894) 72 Miss. 12, 12 So. 248. that the principal has abandoned them, Nor is habitual violation material and that they have ceased to be bindwhere the evidence shows that the rule ing," and laid down the following general doctrine: "The custom and usage and the rule itself states that the employees for whose guidance it was railroads, acting independently of any promulgated were in the habit of doing the forbidden act, and that its express railroads, acting independently of any rule regulating the matter, is never admissible to excuse or exempt from liapurpose was to put an end to this practice. Francis v. Kansas City, St. J. & lation of a rule, reasonable and proper,

satisfactorily appear that notice or knowledge of such disregard by the persons for whom they were intended has been brought home to the principal, or to someone whose duty it is to take action, and is authorized to bind the principal. The mere habit of the employee or person bound by the rule to disregard the rule, though done with the knowledge of any immediate superior less than the principal or person authorized to bind the principal by acquiescence or failure to object, will not be sufficient to justify the conclusion that the rules are no longer binding."19

The doctrine of waiver, as above explained, merely serves to absolve the employee from the imputation of contributory negligence, in so far as that imputation is based upon his infraction of the rule in guestion. It does not operate so as to relieve him of the obligation of exercising due care for his own safety, irrespective of that rule.20

233. Rationale of the doctrine of waiver.—In some of the cases, the inability of the master to take advantage of the servant's disobedience of a rule which has been habitually disregarded is viewed as a deduction from the existence of a duty to enforce the rules. 1 But this consideration would seem to be quite out of place in such a connection. Servants who do what they know to have been prohibited, or fail to do what they know to have been prescribed, cannot be free from culpability simply because the control exercised over their conduct by the master was not as efficient as it should have been. Under such circumstances the negligence of the servant still remains as the proximate cause of his injury.

The correct theory undoubtedly is, either that the employer's intention to abolish a rule is deduced from his omission to enforce it, or that this omission amounts to a kind of equitable estoppel in pais, which precludes him from relying on the defense of contributory neg-

adopted and promulgated by proper au and the cases cited passim throughout thority, for the protection of the person this section. of employees and the property of those adopting the rule; nor will custom and tion ignored this principle, it has been

whether a rule exist or not."

regards a brakeman who, in violation

regards a brakeman who, in violation

of a rule, had gone between cars in motion to couple them, the company had

v. Richmond & D. R. Co. (1892) 111 N. waived that rule by knowingly permit
t. 482, 18 L. R. A. 845, 16 S. E. 698; ting it to be violated. Chicago & A. R.

(1894) 114 S. C. 718, 19 S. E. 362; Co. v. Myers (1899) 86 Ill. App. 401.

Northern P. R. Co. v. Nickels (1892)

1 C. C. A. 625, 4 U. S. App. 369, 50 Fed.

7 Co. (1896) 98 Iowa, 205, 67 N.

(1896) 96 Tenn. 128, 33 S. W. 1050;

W. 227; Ohio & M. R. Co. v. Collarn

(1881) 73 Ind. 261, 38 Am. Rep. 134; (1893) 97 Ala. 187, 13 So. 209.

20 On the ground that such an instrucusage excuse the voluntary and unnecheld that it is a misdirection to charge essary risk of an obvious danger, the jury, without qualification, that, as whether a rule exist or not."

ligence so far as it might be predicated from the servant's disobedience to orders.2

234. Waiver considered with reference to an express agreement to obey the rules.— The general principle does not seem to be disputed, that the fact of the employee's having signed a stipulation, which shows not only that he had knowledge of the rule, but also that he understood the dangers incident to the employment, does not furnish any reason for excepting the case from the operation of the general principle that a rule may be waived by its being disregarded for such a time and in such a manner that the employer or his agent is chargeable with notice.1 But in some cases the theory has been advanced

50 Fed. 718, where the court said, arguendo: "To hold that this defendant company could make this rule on paper, it and be bound by it on one day, and

<sup>2</sup> The latter conception seems to be of a solemn contract made for a valuapparent in the statement that the mas- able consideration. It is styled 'Perter's knowledge of an habitual custom sonal Record,' and consists very largely to disregard a rule may be regarded as of questions and answers relative to the "a practical invitation to violate it." qualifications of the plaintiff to serve as McNee v. Coburn Trolley Track Co. a brakeman. It is dated November 12, (1898) 170 Mass. 283, 49 N. E. 437. 1889, and is alleged to have been made And in the statement that, if the masin consideration of the employment of ter permits a certain course of conduct, the plaintiff by the defendant at a subit should not be allowed to hold its em- sequent date, but the evidence discloses ployees to the very letter of its rules in the fact that he was employed by the order to shield itself from liability for defendant on June 26, 1889, more than what it had tacitly permitted. Hunn four months before this paper was v. Michigan C. R. Co. (1889) 78 Mich. signed, and that he remained in the de-526, 7 L. R. A. 500, 44 N. W. 502. Comfendant's service continually from that pare the language used in Strong v. date until he was injured, so that it Iowa C. R. Co. (1895) 94 Iowa, 380, 62 would seem that this writing could not N. W. 799, § 231, note 3, ante. See be successfully claimed to be proof of also Northern P. R. Co. v. Nickels anything more than notice to the plain (1892) 1 C. C. A. 625, 4 U. S. App. 369, tiff of the existence of the rule in this paper was a constant. particular case. But, if it was a contract, it is clear that it could not bar the plaintiff from proving a waiver or call it to plaintiff's attention, and give abandonment of the rule. This writhim written notice that he must obey ing was prepared by the defendant; all that the plaintiff had to do with it was it and be bound by it on one day, and that the plaintiff had to do with it was know and acquiesee, without complaint to answer the questions and sign his or objection, in a complete disregard of it by the plaintiff and all its other employees associated with him, on every day he was in its service, and then escape liability to him for an injury caused by its own breach of duty toward the plaintiff because he disregarded this rule, would be neither good morals nor good law."

1 Fish v. Illinois C. R. Co. (1896) 96 Iowa, 702, 65 N. W. 995. In Northern P. ed to or acquiesced in by the company?

R. Co. v. Nickels (1892) 1 C. C. A. 625, There are at least two parties to R. Co. v. Nickels (1892) 1 C. C. A. 625, Yes.' There are at least two parties to 4 U. S. App. 369, 50 Fed. 718, the court every contract, and this provision was a thus commented on the effect of a writ-representation and a contract on the ing by which the servant agreed to take part of the defendant that it did not upon himself the risk of a violation of and would not acquiesce in the violathe rules: "There is some doubt tion of any of its rules. The plaintiff whether this writing, under the evi- signed the contract and proceeded with dence in this case, rises to the dignity his service. He must have immediately

that a written undertaking of this description obliterates the legal consequences of any previous acquiescence in the violation of the The rights of the parties, it is laid down, are to be determined upon the assumption that these rules were in full force at the time the contract was signed, and the question whether there has been any waiver as regards the signer will depend upon whether the subsequent violations were of such frequent and long-continued occurrence as to create the presumption that the employer had assented to the disuse of the rule. In other words, a rescission of the particular contract thus entered into must be deducible from the acts of the employer before the doctrine of waiver can take effect, and the length of time which had elapsed between the execution of the contract and the accident, and the opportunities which the employer may have had for ascertaining the habitual nonobservance of the rule during that period, became the material circumstances to be considered in deciding whether the servant is entitled to the benefit of that doctrine.2

The doctrine thus enunciated is far from being satisfactory.

discovered that, if there really was any struction to the effect that if there was lation of this rule, if such a rule were really in existence, was a violation of sity of showing that the master was afthe contract on the part of the defendant that it did not and would not ac
2 Richmond & D. R. Co. v. Hissong ant that it did not and would not acquiesce in the violation of any of its rules, and relieved the plaintiff from further compliance therewith; and if, on the other hand, the rule was not really in force, if it had been waived on abandoned the utter dignorary of the or abandoned, the utter disregard of the rule and the defendant's acquiescence therein were competent evidence of the abandonment. In either case the plaintiff had a right to rely on the conduct of the defendant, and to introduce his evidence in this behalf." In *Tullis* v. Lake Erie & W. R. Co. (1901) 44 C. C. A. 597, 105 Fed. 554, another very recent decision of a Federal court of appeals it was held erroproper to evel decision. peals, it was held erroneous to exclude evidence of habitual violation, the trial ployees respecting the observance of court having taken the position that, as rules. Similarly, in Russell v. Richarct to observe the rules, he was bound the court refused to admit that a regular tract to observe the rules, he was bound the court refused to admit that a regular tract to observe the rules, he was bound the court refused to admit that a regular tract to observe the rules, he was bound the court refused to admit that a regular traction of the rules are tractionally tractions as the rules are tractionally tractions are tractionally tractionally tractions are tractionally tractions. by his agreement, though every man on ulation recognized in writing by the the railroad may have disregarded plaintiff's intestate at a certain date them. In Nichols v. Chicago & W. M. could be held obsolete by him three R. Co. (1900) 125 Mich. 394, 84 N. W. weeks later. 470, the court disapproved of an in-

rule about the use of sticks and pins in a custom on defendant's road to do the coupling cars, it was constantly violated work in question as the plaintiff had on this railroad, and that the defendant done it, and it was in conflict with knew of this violation, and acquiesced plaintiff's agreement, it was a waiver in it. This uniform and constant action by defendant of the agreement. But quiescence of the defendant in the viothe disapproval was based on the fact that the instruction ignored the neces-

<sup>2</sup> Richmond & D. R. Co. v. Hissong (1893) 97 Ala. 187, 13 So. 209, where the court modified its decision on the previous hearing ([1890] 91 Ala. 514, 8 So. 776) where the theory of the cases above cited had been applied, and refused to infer a waiver where the plaintiff was injured the day after he had signed the contract. The decision was followed in Louisville & N. R. Co. v. Mothershed (1895) 110 Ala. 143, 20 So. 67, where the period was nine days of service on an extensive system of railroad, during which it did not appear that the company had had time, in the regular course of business, to receive any reports as to the conduct of the emthe first of the Alabama cases cited it is based upon the general principle that parol evidence of a custom is not admissible to vary the terms of a written contract. It is not apparent why this principle, if it is applicable at all under the circumstances, should not preclude the inference of a waiver from what occurs after the execution of the contract as well as the inference that the habitual violations of the rule had made it a dead letter previous to such execution in such a sense that it could not be regarded as embraced by the terms of the contract. Yet, in the case just cited, the court admits that the former of these inferences may be drawn under an appropriate showing of facts. The true view seems to be that the controlling factor in these cases is not the technical rule of evidence thus relied upon, but the broader principle that, where the employer has acted in such a manner as to justify the conclusion that he no longer regards the regulation as binding, every servant whom he hires while the regulation thus remains virtually abrogated should be entitled to the benefit of the assumption that it is not in force. A doctrine which has the practical effect of requiring a servant who is bound by some particular regulation to work amongst other servants in whose favor a waiver of the same regulation may, as a result of the greater length of their service, be implied, seems to be highly anomalous and must certainly be productive of gross injustice in its actual operation.

### CHAPTER XVI.

#### DUTY TO INSTRUCT AND WARN THE SERVANT.

- 235. Introductory.
- A. GENERAL PRINCIPLES.
  - 236. Master's knowledge of the abnormal conditions; necessity for showing.
    - 237. No duty of instruction predicable where the danger in question was actually known to the servant.
  - 238. No duty to instruct a servant as to dangers of which knowledge is imputable to him.
  - 239. Master is prima facie under no obligation to give instruction as to normal or ordinary risks.
  - 240. Master is prima facie bound to give instructions as to all abnormal or extraordinary risks.
  - 240a. Servant's comprehension of the risk, and not merely of the conditions, is the material point to be determined.
    - 241. Master's knowledge of the servant's ignorance of the danger; necessity for showing.
    - 242. Relation of the duty of instruction to the defenses of assumption of risks and contributory negligence.
    - 243. Relation of the duty of instruction to the duty of employing competent servants.
- B. DUTY OF INSTRUCTION CONSIDERED WITH REFERENCE TO THE EXPERIENCE OR IN-EXPERIENCE OF THE SERVANT.
  - 244. Generally.
  - 245. Servant's experience; deductions from.
  - 246. Servant's inexperience; deductions from.
- C. Duty of instruction considered with reference to the servant's minority.
  - 247. Generally.
  - 248. No duty to instruct minors as to risks which they presumably comprehend.
  - 249. Instruction of minors, considered with reference to their age merely.
  - 250. Instruction of minors, considered with reference to their experience.
  - 251. Position of minor servants after being properly instructed.
- D. SUFFICIENCY OF THE INSTRUCTION.
  - 252. Generally.
  - 253. What particularity in the instruction is obligatory.
  - 254. Adequacy of the means by which instruction is conveyed to the servant.

As to the duty of a master to bring his rules to the knowledge of his servants, and the effect of a servant's knowledge or ignorance of a rule which he is alleged to have violated, see §§ 213a, 226, 227, ante.

As to the necessity of showing that the omission to instruct the servant was the proximate cause of the injury, see volume 2, chapter

As to the relation between the duty of instruction and the duty of promulgating rules, see § 212, ante.

As to the duty of warning against transitory dangers incident to the mere use of the appliances, see §§ 209, 209a, ante.

Since the ultimate question to be determined in the cases in which recovery is sought on the ground that no instruction was given is whether knowledge of the particular risk from which the injury resulted should or should not be imputed to the servant, and this question is also involved in the cases in which one or other of the various defenses reviewed in the four succeeding chapters is set up, it has been deemed advisable, for the purpose of facilitating the comparison of the authorities, to collect in a single chapter (xxx.) all the decisions which show the specific circumstances under which constructive knowledge is or is not inferred. In this chapter, only the more general aspects of the master's duty of instruction will be discussed.

235. Introductory.—In the earliest American case in which the master's failure to inform his servant of the existence of a danger was set up, the gravamen of the complaint was a fraudulent misrepresentation as to a material fact. The writer has not found any other example of a resort to this form of action for the same purpose. In a logical point of view it is manifestly preferable to consider the duty of instruction as being an obligation naturally and directly deducible from the general principle reviewed in § 58, ante, viz., that it is negligence to expose a servant to risks of which he is actually or excusably ignorant. But passages like those in the subjoined note show how easily bridged is the interval between the idea of deceit, as suggested by the fact that a danger was wrongfully concealed, and the idea of a mere want of care, as inferred from the fact that certain information was not imparted in a case where a prudent man would have seen that without it the servant was likely to be exposed to unreasonable risks.<sup>2</sup> Compare

Perry v. Marsh (1854) 25 Ala. 659. ter knows of danger which the servant 2 "If a master employs a servant to does not, it is clearly the duty of the do work for him, not knowing of any special or latent danger in the work, of the danger to the servant." Griffiths the servant takes the consequence of v. London & St. K. Docks Co. (1884) any danger there may be in it. The L. R. 12 Q. B. Div. 493. The following master does not mislead the servant, sentence occurs in a charge held to but only avails himself of his voluntary be proper in a case where the eviservice. On the other hand, if the massing dence was susceptible of the constructions.

§ 59, ante. Viewed under one aspect, the essence of the situations in which a duty of instruction is predicated is that a master is liable as for negligence if he or his representative without any warning exposes a servant to danger in a place where the latter has a right to expect safety.3 That such situations may, by merely changing the juridical standpoint, be treated as charging the master with a quasi deception, is sufficiently manifest.

The servant's right to maintain an action on the ground of the nonperformance of the duty of instruction or warning depends upon his ability to establish the following propositions:

- (1) That the master was chargeable with knowledge, actual or constructive, of the existence of the risk. See chapter x., ante.
- (2) That the servant himself did not appreciate the risk, and that his nonappreciation thereof was excusable.
- (3) That the master knew, or ought to have known, that the plaintiff was thus excusably ignorant of the risk, and was by reason of

tion that the servant, although he an employee caused by his falling

The defendant might be held answera-drift, and so alighted on the skylight ble, whatever the particular accident through which he fell. It is not apwhich led to the plaintiff's throwing parent from the report what the court his weight on the end of the board" (i. regarded as the controlling feature in e., of a seat which had tipped up). the case. Carriages running along an Compare also the following decisions: overhead wire for the conveyance of An employer is liable for an injury to parcels in a store, and so adjusted that

tion that the servant, although he an employee caused by his falling knew of the conditions, might not have through a flooring formed partly of understood the resulting risk: "In glass and partly of wood, the whole of such case it is the duty of the master, which was covered by dust and the nanot only to exercise due care, but good faith, towards the servant, and to inform him of the risks he undertakes." warning by the employer's foreman. Pullman's Palace-Car Co. v. Harkins (1893) 5 C. C. A. 326, 17 U. S. App. 22, actual danger. Raftery v. Central 55 Fed. 932.

\*\*Mayhew v. Sullivan Min. Co. (1884) Misc. 560, 35 N. Y. Supp. 1067. So, an 76 Me. 100 (servant fell through lader hole in a platform left without light employee from stepping upon a rotten or railing). In Spaulding v. Forbes canvas covering a hole in a third-story der hole in a platform left without light employee from stepping upon a rotten or railing). In Spaulding v. Forbes canvas covering a hole in a third-story Lithograph Mfg. Co. (1898) 171 Mass. floor is required to notify the employee 271, 50 N. E. 543, the court thus comfort danger, where he is ignorant mented on the evidence: "Whether thereof. Muncie Pulp Co. v. Jones the direction of Lehan be called an order or an instruction, it concerned the Yet. in Reinig v. Broadway R. Co. mode of using the permanent machiner, (1888) 49 Hun, 269, 1 N. Y. Supp. 907, ery, for which the defendant was responsible; and if it was an order, the sion which required that a master who defendant might be held liable for not directs his servant to clean off the snow defendant might be held liable for not directs his servant to clean off the snow seeing that the plaintiff was warned in from a roof should notify him of the connection with the duty imposed upon existence of a skylight in another roof him; if it was an instruction, for lead- suddenly covered by a heavy fall of ing him into a trap. Possibly the plain- snow. The evidence went to show that iff's injury might be attributed to the the servant, when he reached the bot-defendant's maintaining the trap, even tom of the ladder by which he had if its responsibility was in no way affected or enlarged by Lehan's words. jumped off on one side to avoid a snow The defendant might be held answeradrift, and so alighted on the skylight

such ignorance, exposed to an abnormal hazard, over and above those which he was presumed to contemplate as incidents of the employment.4

### A. General principles.

236. Master's knowledge of the abnormal conditions; necessity for showing.— The general principle embodied in the first of the three propositions stated at the close of the preceding section is a controlling element in all actions of which the gist is the master's breach of a duty owed to his servants. The full discussion of this subject in chapter x., ante, renders it unnecessary to enter into it at any length in the present connection. But it will be useful to collect some decisions which explicitly recognize the existence or absence of knowledge on the master's part, as being a material element in actions for a breach of the duty now under review.1

ditions; and the storekeeper is bound warning. He must also give him such to inform the employees of this peculiarity, when he furnishes them with poles to push the carriages. Stock v. means of avoiding it while he is per-Le Boutillier (1897) 19 Misc. 112, 43 forming the service required are appar-N. Y. Supp. 248, Affirmed (1896) 18 ent." Atlas Engine Works v. Randall Misc. 349, 41 N. Y. Supp. 649. The (1885) 100 Ind. 293, 50 Am. Rep. 798. hypothesis underlying the decision apparently was that the danger was not ers by one of its meanings a domain apparent, and that the act which would create that danger was likely to be done for the purpose of loosening the carriages when they happened to stick at some point on the wire. But the precise sis of a classification. In the following service were not available as a ground be avoided. of decision.

when pushed backwards they are likely pose an inexperienced servant, at whose to leave the wire and fall, constitute a hands he requires a dangerous service, dangerous appliance under certain contouch danger without giving him ditions; and the storekeeper is bound warning. He must also give him such some point on the wire. But the precise sis of a classification. In the following theory of the court is not altogether chapter, therefore, it will be disregardclear from its opinion. It will be no- ed so far as the grouping of the cases ticed, also, that the cases cited in § 242, is concerned. The nature of the cirinfra, might readily be referred to the cumstances involved in the action will principle that the circumstances are always indicate the precise ground upon such as to induce a false sense of secu- which a breach of duty is predicated, rity in the servant, if the implied obli- whether the failure to point out a dangations arising from the contract of ger, or the failure to show how it can

of decision.

If a distinction between the words "warn" and "instruct" is to be drawn, Ciriack v. Merchants' Woolen Co. the former evidently implies merely the (1890) 151 Mass. 153, 36 N. E. 789; imparting of information as to the existence of a danger, while the latter instance of a danger, while the latter instance of a danger, while the latter instance of a danger, while the servant (1885) 139 Mass. 150, 6 L. R. A. 733, imparting of information as to the existence of a danger, while the latter instance of a danger instance of a danger v. West End is the latter instance of a danger v. West End is the latter instance of a danger v. West End is the latter instance of a danger v. West End is the latter instance of a danger v. West End is the latter instance of a danger v. West End is the latter instance of a danger v. West End is the latter instance of a danger v. West End is the latter instance of a danger v. West End is the latter instance of a danger v. West End is the latter instance of a danger v. West End is the latter instance of a danger v. West End is the latter instance of a danger v. West End is the latter instance of a danger v. West End is the latter instanc <sup>1</sup> Rooney v. Sewall & D. Cordage Co.

One particular application of the general principle under its negative aspect merits special notice in the present connection; viz., the nonliability of the master for injuries caused by conditions which he was not bound to foresee or anticipate.<sup>2</sup> No right of action is established where, taking into consideration the nature of the work assigned to the servant, the master had no reason to expect the contingency of the servant's placing himself in such a position as to incur the danger with regard to which it is alleged that he should have been instructed.3 Nor is he guilty of negligence in failing to warn a

Atl. 872; Goven v. Bush (1896) 22 C. it to the jury to say whether a master C. A. 196, 40 U. S. App. 349, 76 Fed. should have warned his servants how 349. The master may not wilfully expose his servant to danger of loss or without danger, where no evidence has injury in the course of his employment, been offered tending to show that any the risk of which is known to him. but such method was either known to him, notice of which is wrongfully withheld. or generally known and practiced by Guirney v. St. Paul, M. & M. R. Co. other employers. Richmond Locomol (1890) 43 Minn. 496, 46 N. W. 78. tive & Mach. Works v. Ford (1897) 94 Kliegel v. Aitken (1896) 94 Wis. 432, Va. 627, 27 S. E. 509. In Melchert v. 35 L. R. A. 249, 69 N. W. 67 (servant Smith Brewing Co. (1891) 140 Pa. 448, exposed to infectious disease); Hysell 21 Atl. 755, the plaintiff's proposition v. Swift (1899) 78 Mo. App. 39 (servants without notice into a on a actual, latent danger which was the sight if brought into contact with the eye). It is a master's duty not to send his servants without notice into a place which he knows to be dangerous. Gent. The court said: "It will be seen Clark v. Liston (1894) 54 III. App. at once, from the above review of the for (1900) 188 III. 584, 59 N. E. 254, defendant of this alleged danger, since Affirming 91 III. App. 15. A complaint is not demurrable which alleges in substance that the master, knowing that the cher (1900) 188 III. 584, 59 N. E. 254, defendant of this alleged danger, since Affirming 91 III. App. 36; Ellis v. Northern P. R. Co. (1900) 103 Fed. 416.
Where plaintiff, an inexperienced workman, was injured while removing shavings from beneath a planer, evidence that the blower pipe intended to remove the shavings was defective, and that 2000 (1804) 175 Hun, 437, 27 N. Y. Supp. 356; Ellis v. Northern P. R. Co. (1900) 103 Fed. 416.
Where plaintiff, an inexperienced workman, was injured while removing shavings from beneath a planer, evidence that the blower pipe intended to remove the shavings was defective admissible, since it tended to show conditions likely to lead the plaintiff to put himself in a position in which he would be likely to suffer injury, and a covery of a fire. Gilmore v. Mittiresultant duty on the defendant's part neague Paper Co. (1897) 169 Mass. to warn him against the danger incident to clearing the blower pipe.

On the other hand, it is error to leave The meague Paper Co. (1897) 169 Mass. 15, and \$240, note 7, infra.

In Neff v. Broom (1883) 70 Ga. 256,

servant of a special danger which could not have arisen without negligence on the part of the plaintiff's fellow servants.4

237. No duty of instruction predicable where the danger in question was actually known to the servant. - The second fact which, as stated in § 235, supra, must be established in order to justify the conclusion that the master was negligent, is that the dangers with regard to which there is alleged to have been a duty of instruction were not known, either actually or constructively, to the servant. The absence of any obligation to instruct a servant who is proved by direct evidence actually to have had as complete knowledge of the danger and of the appropriate means of avoiding it as the master could have imparted to him is too obvious to admit of controversy. Manifestly it cannot be "the duty of the master to admonish his servant to be careful, when the servant well knows his danger and the importance of using care to avoid it. It is the duty of the servant to exercise care proportionate to the danger of his situation as he understands it, and if he fails to do so the fault is his, and not his master's."

an omission to instruct was held not to hours for work; that those whose duty and one of the women, returning out of than be delayed; that she voluntarily working hours, had gone to the back went into this unlighted part of the part of the room to get some paper, and room, and, by her own negligence, octhere fallen into a reservoir of lye. The casioned her injuries; that she was paid court expressed its agreement with the by the quantity of work she did, and, position of defendants' counsel that negligence could not be predicated of the mere omission to inclose the reservoir, only her own, but their duties."

but said that this contention did not exactly meet the complaint, which Div. 68, 45 N. Y. Supp. 1100. Plaintiff charged that defendants were negligent and his fellow workmen had constructing keeping the reservoir in a part of the ed in an elevator sheft a scaffoll so in keeping the reservoir in a part of the room too dark for the plaintiff to discover it herself, and in failing to notify recognize their obligation to provide her with a perfectly safe place for the performance of the duties in which she was

be culpable where the defendants had it was to furnish her with the paper, of employed women to work at one end of which she was in search, were away, a room 72 feet in length, to wrap soap and their absence known to her; that in papers which were brought to them, she chose to wait upon herself rather and one of the women, returning out of than be delayed; that she voluntarily

ed in an elevator shaft a scaffold so placed that, if the clevator were raised, the loop of the rope suspended from the her of its existence. The liability of cage caught in it. Defendant's vice printhe defendants from this standpoint cipal had been requested not to lower was then discussed as follows: "We the cage, but had not been told about the danger from the rope if it should be raised.

<sup>1</sup> Ciriack v. Merchants' Woolen Co. engaged; and if, for any proper pur-pose, she was expected or required to 23 N. W. 829. Failure of a corporation expose herself to the danger of falling to give warning to the master machinist and the state of the danger of the state of t into their reservoir, it was their duty to ist employed in its establishment that have notified her of its existence that there was danger that the wall or walls she might have guarded against it. It of the gas room would fall in case fire is shown by the proof, beyond question, occurred, where he was not ignorant of as it looks to us, that there was neither the danger or of the causes which pronecessity for, nor expectation of, her duced it, does not make it criminally going near the danger; that the acciliable for his death, caused by the fall dent occurred out of the accustomed of such walls, while breaking down the

It will be shown in a later chapter (volume 2, chapter xLv.) that, according to many of the authorities, the servant, for the purpose of negativing his assumption of the risk and his contributory negligence. must always allege his ignorance of that risk. The analogue of this doctrine in the present connection is that a servant who relies on a breach of the duty of instruction must introduce a specific averment that he did not know of the danger from which his injury resulted.2 But the rule of pleading would doubtless be less strict in some jurisdictions. See the chapter just referred to.

The possession of the knowledge which will negative the existence of the duty of instruction may be inferred from the testimony of the plaintiff himself,3 or from specific testimony which establishes beyond

door of the gas room during the fire, Wis. 488, 86 N. W. 178. Where the under instructions from the superin- only evidence in the case, including that tendent. Allen v. Augusta Factory of the plaintiff bimself, is to the effect (1888) 82 Ga. 76, 8 S. E. 68. See also, that he had complete knowledge of the to the same effect, Goodnow v. Walpole danger which caused his injury, it is the to the same effect, Goodnow v. Walpole Emery Mills (1888) 146 Mass. 261, 15
N. E. 576; Perry v. Old Colony R. Co. return a verdict for the defendant; and (1895) 164 Mass. 296, 41 N. E. 289; a charge setting forth the character of Hathaway v. Illinois C. R. Co. (1894)
92 Iowa, 337, 60 N. W. 651; Junior v. the plaintiff is erroneous and mislead-Missouri Electric Light & P. Co. (1895)
127 Mo. 79, 29 S. W. 988; Yeager v. the facts of the case. Cincinnati, N. O. Burlington, C. R. & N. R. Co. (1894)
93 Iowa, 1, 61 N. W. 215; King v. Morgan (1901) 48 C. C. A. 507, 109 Fed. A verdict is rightly directed for the defendant; and charge find the obligation of the master to instruct the plaintiff is erroneous and mislead-ing, inasmuch as it has no relevancy to 1.2 Morgan (1901) 48 C. C. A. 507, 109 Fed. A verdict is rightly directed for the defendant; and charge find the court to direct the jury to duty of the court to direct the jury to verture a verdict for the defendant; and charge setting forth the character of the obligation of the master to instruct the plaintiff is erroneous and mislead-ing, inasmuch as it has no relevancy to 4. C. R. Co. V. Mealer (1892) 1 C. C. A. 633, 6 U. S. App. 86, 50 Fed. 725. Gan (1901) 48 C. C. A. 507, 109 Fed. A verdict is rightly directed for the defendant; and acharge setting forth the court to direct the jury to verture a verdict for the defendant; and charge setting forth the court to direct the jury to verture a verdict for the defendant; and charge setting forth the court to direct the jury to verture a verdict for the defendant; and charge setting forth the court to direct the jury to verture a verdict for the defendant; and charge setting forth the character of the duty of the court to direct the jury to the duty of the court to direct the jury to the duty of the court to direct the jury to the duty of the court to direct the jury to the plantary of the obligation of the master to instruct of the obligation of the master to instruct of the obligation of the master to instruct of the

Vt. 359, 45 Atl. 758.

ger the full extent of which he did not <sup>2</sup> Brainard v. Van Dyke (1899) 71 comprehend, where it appears from his own testimony that he was over twenty <sup>3</sup> A court may declare, as a matter of years of age, that he was not wanting law, that there has been no breach of in the average intelligence of his age, the duty to instruct a boy of twelve that his duties were explained to him and a half years as to the danger of when he entered on his employment, coming into contact with uncovered and that he understood the very danger . cogs, where he testifies on cross-exam- into which he fell (an unblocked frog), ination that he knew if anyone got his and had in mind the purpose to avoid it. fingers between the cogs his fingers McGinnis v. Canada Southern Bridge would be smashed, and that he knew Co. (1882) 49 Mich. 466, 13 N. W. 819. would be smashed, and that he knew could be smashed, and that he knew the could appreciate a danger which a servant injured by having her hand caught while operating a mangle testifies that she was doing the work in a proper manner at the time of the injury, and that she knew that she would be injured if her fingers were caught, it finding that the defendant was guilty is error to submit the issue of the failis error to submit the issue of the fail- of an omission of duty in failing to ure of the mastar to instruct the serv- warn the plaintiff as to the danger, is ant. Groth v. Thomann (1901) 110 erroneous and a ground for ordering a

all reasonable doubt that he had received adequate information as to the danger from a notification proceeding directly from the master himself, 4 or from some extrinsic source. 5

new trial, even though the court may is nevertheless thereafter injured, the also have charged the jury that it was negligence of the master is not the unnecessary to instruct the plaintiff if proximate cause of the injury." Trunhe knew the conditions and the danger tle v. North Star Woolen-Mill Co. which was likely to result therefrom. (1894) 57 Minn. 52, 58 N. W. 832. Koehler v. Syracuse Specialty Mfg. Co. Compare also the statement that, if the (1896) 12 App. Div. 50, 42 N. Y. Supp. servant had already obtained, at the 182, 1105. See also Roth v. Northern time his injury was received, the infor-182, 1105. See also Roth v. Northern time his injury was received, the infor-P. Lumbering Co. (1889) 18 Or. 205, mation which it is alleged the master 22 Pac. 842: Missouri P. R. Co. v. Call-should have given, it cannot be said breath (1886) 66 Tex. 526. 1 S. W. that the injury was the result of the 622; Mannion v. Hagan (1896) 9 App. failure of the master to impart the in-Div. 98, 41 N. Y. Supp. 86; Galveston, formation. Bessemer Land & Improv. H. & S. A. R. Co. v. Garrett (1889) 73 Co. v. Dubose (1899) 125 Ala. 442, 28 Tex. 262, 13 S. W. 62; Wolski v. So. 380 (servant himself admitted that Knapp-Stout & Co. Co. (1895) 90 Wis. he had been told that the mule which 178, 63 N. W. 87; Ogley v. Milcs (1893) kicked him was vicious). A servant 139 N. Y. 458, 34 N. E. 1059; American cannot recover if he has been sufficient-Strawboard Co. v. Foust (1895) 12 Ind. lv notified and cautioned by a coerroart

N. W. 1125 (no recovery where plain- where, before his own injury was retiff's decedent came into contact with ceived, he had seen an accident in which formed); Simmons v. Chicago & T. R. applying a compound to a belt when-

sons or from his own observation, and charge has been held correct: "If the

Strawboard Co. v. Foust (1895) 12 Ind. ly notified and cautioned by a coservant.

App. 421, 39 N. E. 891; Verdelli v. Alabama C. Coal & Coke Co. v. Pitts

Gray's Harbor Commercial Co. (1897) (1893) 98 Ala. 285, 13 So. 135. A servante Co. (1897) 47 Pac. 364.

Davis v. Port Huron Engine & ing to instruct him as to the danger of Thresher Co. (1901) 126 Mich. 429, 85

N. W. 1155 (no. recovery where the control of the control o a live electric wire, of the dangerous one of the workmen had very narrowly character of which he had been in-escaped injury while a wheel was beescaped injury while a wheel was being moved in this manner, and his own Co. (1884) 110 Ill. 340 (servant had testimony is to the effect that his felbeen cautioned as to the danger that a low servants had told him that this bank which he was excavating might method of doing the work was dangerfall); Cantwell v. Brennan (1900) 125 ous, and that this was also his own Mich. 349, 84 N. W. 299 (servant had opinion. Richmond Locomotive & Mach. been instructed as to the method of Works v. Ford (1897) 94 Va. 627, 27 S. E. 509. The plaintiff is not entiever it slipped; and while he was in tled to a charge that "the duty of cauthe performance of this duty the com-tioning a boy of the plaintiff's age pound broke, and he was caught on the [fourteen years], and giving him full belt and pulley). A motorman of an notice of the risks attending the work, electric car, twenty-four years of age, is a responsibility from which the comand of ordinary intelligence, after be-pany cannot free itself by delegating ing instructed for eight days in his it to a foreman or to a second hand." duties, and told that it is a motorman's Such an instruction would create the duty to clean the "commutator" at the erroneous impression that, even if the end of every alternate trip of his car, plaintiff had full instructions, it would and seeing it cleaned on at least two have been of no avail, if they proceeded occasions, assumes the risk of cleaning from the defendant's forman or secsuch commutator. Burnell v. West Side ond hand. The master cannot escape R. Co. (1894) 87 Wis. 387, 58 N. W. the responsibility, if there be one upon 2. him, of notifying the servant of the "Even if a master is negligent in not risks of the work by merely delegating giving his servant instructions and it to one of the servants, but if the duty cautions as to the dangers of his employment, yet if the servant receives vant had all the notice requisite for his the same information and cautions from safety. Sullivan v. India Mfg. Co. other sources, whether from other per- (1873) 113 Mass. 396. The following

238. No duty to instruct a servant as to dangers, of which knowledge is imputable to him. — The juridical consequences of constructive knowledge being the same as those of actual knowledge, it follows that no duty to instruct a servant can be predicated in a case in which the instruction will not add to the knowledge which, under the circumstances, is attributed to him. In other words, the master is not required to point out dangers which are readily ascertainable by the servant himself if he makes an ordinarily careful use of such knowl-

plaintiff [servant] had such instruction, by stumbling over a ground switch, it would enable him, with a reasonable that he had been warned by a certain exercise of care on his part, to do his work with safety to himself, the defendant was not liable, and that it made no switch. The reason assigned was that difference whether he derived it [such it was not shown that the person warnknowledge] from the defendant's officers, from a second hand in another part fendant, whose duty it was to give such of the room, from a stranger, or from his own perceptions and intelligence." Ibid. (minor servant was injured here.) In Tagg v. McGeorge (1893) 155 Pa. 368, 26 Atl. 671, plaintiff re-quested the court to charge that, if the jury found the boy to be young and inexperienced, it was the duty of defendants to explain to him the danger. The answer was: "I affirm that point, . . . also, with the qualification, perhaps, that, if he had that experience from any other source, then it would not be necessary." In the general charge the court explicitly in-structed the jury that, if the boy had knowledge of the dangerous character of the machine by information from others or by experience, he could not recover. Held, that the use of the word "perhaps" was not, under the circumstances, sufficient ground for reversing the judgment in favor of the plaintiff. Other cases recognizing the doctrine that the disability of the servant to recover on the ground of his previous acquaintance with the conditions is alto-E. 1002; De Souza v. Stafford Mills (1892) 155 Mass. 476, 30 N. E. 81); hardly reconcilable with a recent rule employer to warn his employee to avoid ing that, where a switchman was indangers which ordinary prudence ought jured while endeavoring to couple cars to make him avoid without warning in defendant's yard in the nighttime, The mere fact that he cannot tell the

ing him was an officer or agent of dewarning. Galveston, H. & S. A. R. Co. v. English (1900; Tex. Civ. App.) 59 S. W. 626, Rehearing denied in 59 S.

W. 912. See also § 254, post.

<sup>1</sup>Rooney v. Sewall & D. Cordage Co.
(1894) 161 Mass. 153, 36 N. E. 789. "Not only must he (the master) provide suitable implements and means with which to carry on the business which he sets them to do, but he must warn them of all the dangers to which they will be exposed in the course of their employment, except those which the employee may be deemed to have foreseen as necessarily incidental to the employment in which he engages, or which may be open and obvious to a person of his experience and understanding." Wagner v. H. W. Jayne Chemical Co. (1892) 147 Pa. 475, 478. 23 Atl. 772.

Whether a master is negligent in failing to notify a servant of a danger de-, pends upon whether the peril involved was "such as could be seen and known by ordinary care and prudence, . . such as was obscured and could not be gether independent of the source from seen or appreciated." Holland v. Tennes-which he has derived his information see Cool, I. & R. Co. (1890) 91 Ala. 444, are: Downey v. Sawyer (1892) 157 12 L. R. A. 232, 8 So. 524. In the early Mass. 418, 32 N. E. 654 (Citing Pratt cases the doctrine [as to instruction] v. Prouty (1891) 153 Mass. 333, 26 N. was applied in favor of boys. In favor of adults it should be applied with great caution. Where the elements of the Emma Cotton Secd Oil Co. v. Hale danger are obvious to a person of av-(1892) 56 Ark. 232, 19 S. W. 600. The erage intelligence using due care, it principle of the above cited cases seems would be unreasonable to require an edge, experience, and judgment as he possesses.2 The failure to give instruction, therefore, is not culpable where the servant might, by the exercise of ordinary care and attention, have known of the danger,3 or, as the rule is also expressed, where he had all the means necessary for ascertaining the actual conditions, and there was no concealed danger which could not be discovered.4

<sup>2</sup> Chicayo & A. R. Co. v. Pettigrew (1898) 82 Ill. App. 33.

\* ('unningham v. Bath Iron Works (1899) 92 Me. 501, 43 Atl. 106.

\*Gleason v. Smith (1898) 172 Mass. 50, 51 N. E. 460 (guard of molding machine too narrow).

The classes of danger which fall within the scope of the rule thus laid down are indicated by the words and phrases collected in the following paragraphs:

Dangers which the servant "can at a glace observe for himself." Simms v. South Carolina R. Co. (1886) 26 S. C. 490, 2 S. E. 486.

Elements of the danger so obvious to a careful person of average intelligence that ordinary prudence should make him avoid them without warning. Bibjian v. Woonsocket Rubber Co. (1895) 164 Mass. 214, 41 N. E. 265.

Danger "so simple that it can as well be ascertained at a single view as at many." Hathaway v. Michigan C. R. Co. (1883) 51 Mich. 253, 47 Am. Rep. 569, 16 N. W. 634.

Dangers which the servant "may see and guard against as well as could the and guard against as wen as count the master himself, if present, or anyone else" deputed by him. Houston & T. C. R. Co. v. Strycharski (1894) 6 Tex. Civ. App. 555, 26 S. W. 253, 642. "Obvious" dangers. Connors v. Morton (1894) 160 Mass. 333, 35 N. E. 860;

Ciriack v. Merchants' Woolen Co. rison Wire Co. (1883) 14 Mo. App. 592; (1890) 151 Mass. 152, 6 L. R. A. 733, Campbell v. Mullen (1895) 60 Ill. App. 23 N. E. 829; Hoyle v. Excelsior Steam 497. Laundry Co. (1894) 95 Ga. 34, 21 S. E. 1001; Gibson v. Oregon Short Line R. Co. (1893) 23 Or. 493, 32 Pac. 295; Bohn v. Havemeyer (1889) 114 N. Y.

exact degree of the danger, if the nature 296, 21 N. E. 402; Brady v. Ludlow and character of it can easily be seen, Mfg. Co. (1891) 154 Mass. 468, 28 N. is not enough to require warning and E. 901; Rooney v. Sewall & D. Cordage is not enough to require warning and E. 901; Rooney v. Sevall & D. Cordage instruction to a man of full age and Co. (1894) 161 Mass. 153, 36 N. E. average intelligence. Something may 789; Costello v. Judson (1880) 21 Hun, properly be left to the instinct of self-396; Mississippi River Logging Co. v. preservation, and to the exercise of the Schneider (1896) 20 C. C. A. 390, 34 ordinary faculties which every man U. S. App. 743, 74 Fed. 195; Collins v. should use when his safety is known to Laconia Car Co. (1894) 68 N. H. 196, be involved." Stuart v. West End Street 38 Atl. 1047; Findlay v. Russel Wheel R. Co. (1895) 163 Mass. 391, 40 N. E. & Foundry Co. (1896) 108 Mich. 286, 180.

2 Chicago & A. R. Co. v. Pettigrew ton Mills (1901) 106 Tenn. 236, 61 S. The state of the s 416, 48 N. E. 757.

Dangers "obvious even to a casual observer." Findlay v. Russel Wheel & Foundry Co. (1896) 108 Mich. 286, 66 N. W. 50.

Dangers "obvious to anyone of ordnary capacity." Connolly v. Eldredge (1894) 160 Mass. 566, 36 N. E. 469.

Dangers "so open and obvious as that by the exercise of care he [the servant] would know of them." Yeager v. Burlington, C. R. & N. R. Co. (1894) 93 Iowa, 1, 61 N. W. 215.

Dangers "open and apparent to casobservers." Hogele v. Wilson (1892) 5 Wash. 160, 31 Pac. 469.

Dangers "open and obvious to the senses." Railsback v. Wayne County Turnp. Co. (1894) 10 Ind. App. 622, 38 N. E. 221.

Dangers "plain and open to observation." Dougherty v. West Superior Iron & Steel Co. (1894) 88 Wis. 343, 60 N. E. 274.

Dangers "open to the ordinary observation of any person using reasonable care and prudence." East Tennessee, V. d G. R. Co. v. Turvaville (1893) 97 Ala. 122, 12 So. 63.

"Apparent" dangers. Wolter v. Har-

Dangers "plainly apparent." Illinois C. R. Co. v. Price (1895) 72 Miss. 862, 18 So. 415.

Dangers "apparent to ordinary ob-

The principle upon which the absence of any obligation to instruct is thus predicated is applicable whether the risk in question arises from the intrinsic qualities of the material substances by which the safety of the servant may be affected while he is engaged in the performance of his duties, or those which are due to using or arranging those substances in some way which renders them more than ordinarily dangerous for a longer or shorter period, or those which result from the operation of natural laws upon those substances, or those which depend upon the selection of one or other of two or more available methods of performing a given piece of work by means of or in

servation." Kean v. Detroit Copper & Brass Rolling Mills (1887) 66 Mich. are cited in the notes to chapter XXI. 277, 33 N. W. 395. post. See especially §§ 394, 396, 399.

Dangers which the servant could only

Dangers "apparent to the servant and deadwoods).

Dangers "apparent from brief observation and experience." De Souza v. Stafford Mills (1892) 155 Mass. 476, 30 N. E. 81.

Manifest dangers. Casey v. Pennsylvania Asphalt Paving Co. (1901) 198 Pa. 348, 47 Atl. 1128.

Pa. 348, 47 Atl. 1128.

Patent dangers. Standard Oif Co. v. Eiler (1901) 22 Ky. L. Rep. 1641, 61 S. W. 8; Fones v. Phillips (1882) 39 Ark. 17, 43 Am. Rep. 264; Holland v. Tennessee Coal, I. & R. Co. (1890) 91 Ala. 444, 12 L. R. A. 232, 8 So. 524.

Dangers which are not latent. Cunningham v. Ft. Pitt Bridge Works (1901) 197 Pa. 625, 47 Atl. 846.

The master is not required in order

ningham v. Ft. Pitt Bridge Works (1901) 197 Pa. 625, 47 Atl. 846.

The master is not required, in order to relieve himself of liability, to show that the attention of the servant was called to the special risk from which an injury resulted, if the general dangers of the situation were apparent. Goodridge v. Washington Mills Co. (1893) 160 Mass. 234, 35 N. E. 484. (1893) 160 Mass. 234, 35 N. E. 484. (1893) 160 Mass. 234, 35 N. E. 484. (20. (1901) 126 Mich. 659, 86 N. W. 133 Where employees of a railroad company (no duty to instruct a man hired to know that the road runs through pasture land, and that the road is not fenced, it is not the duty of the company to notify them at what particular place cattle may be expected to be encountered. Patton v. Central Iowa R. from moving so as to clear the saw Go. (1887) 73 Iowa, 306, 35 N. W. 149. Co. (1887) 73 Iowa, 306, 35 N. W. 149. properly).

Numerous cases to the same effect

<sup>5</sup> Hoard v. Blackstone Mfg. Co. (1900) have failed to know by a want of "or-dinary care and observation." Camp-visible conditions); Michigan C. R. bell v. Mullen (1895) 60 Ill. App. 497. Co. v. Smithson (1881) 45 Mich. 212, Dangers "apparent on mere casual 7 N. W. 791 (no duty to instruct a observation." Vilas v. Vanderbilt switchman as to the danger caused by (1897) 20 Misc. 51, 44 N. Y. Supp. 267. receiving a foreign car with double

Dangers "apparent to the servance and within his comprehension." Bohn v. <sup>6</sup> The failure of the superintendent of Haveneyer (1887) 46 Hun, 557, Af- a factory to notify an employee that firmed in (1889) 114 N. Y. 296, 21 N. soda ash had been used for cleaning purposes is not such negligence as will are action against the company for personal injuries sustained by the employee, who slipped from a beam that had been so cleaned, as he was about to step to a ladder to descend into a vat, when the place was light, the use of soda ash was common, and it does not appear but that plaintiff might have stepped to the ladder at once and avoided the beam. Thompson v. Norman Paper Co. (1897) 169 Mass. 416, 48 N. E. 757. There is no obligation to warn a brakeman sent to couple cars in broad daylight, as to the danger created by the projection of pieces of timber over

the neighborhood of those substances.8 The cases illustrating these various predicaments will be more fully discussed in chapter xx1.,

As the servant is ordinarily deemed to accept such risks as may arise from the existence of defects which it is his special duty to remove (compare § 29, ante, and § 268, post), there is no obligation to instruct him as to those defects.9 On the other hand an employer is not, as a matter of law, relieved of the duty of warning an employee who has been ordered to repair a specific part of the mechanism of a given machine, with regard to a danger which is not apparent and is due to the improper working of some part of the machine distinct from that which he has been asked to repair.<sup>10</sup>

A charge to the jury is correct or incorrect according as it takes due account of or disregards the general principle reviewed in this section.11

\*It is not negligent to omit to in- which he knew were old and decayed, struct an adult servant of average in- the fact that his foreman did not intelligence as to the manner in which he form him of one defective pole in parshould use a wrench in screwing nuts ticular, which fell and injured him on a rod so as to avoid falling in case while he was at the top thereof removthe wrench should break. Garnett v. ing a wire, will not render the company Phæniw Bridge Co. (1899) 98 Fed. 192. liable for his injuries. Sawton v. North-The proper method of piling ties in a western Teleph. Exch. Co. (1899) 81 box car so that they will not fall does Minn. 314, 84 N. W. 109. not involve any risk which demands instruction. Brown v. Oregon Lumber Co. (1896) 166 Mass. 4, 43 N. E. 513.

Co. (1893) 24 Or. 315, 33 Pac. 557.

An employer is not liable to his packnot error to refuse to charge that the

ployees to take down telephone poles gether, it was held that the jury should

ing and shipping clerk—a man twenty-plaintiff should have been cautioned. four years old—for injuries sustained Ferguson v. Phænix Cotton Mills by him in falling from the unguarded (1901) 106 Tenn. 236, 61 S. W. 53. A side of a platform, in endeavoring to charge to the effect that the master owed save himself from injury by being run the duty of instruction as to all dangers upon by a barrel weighing 400 pounds, reasonably to be anticipated, no excep-which he was assisting in unloading tion of patent dangers being suggested, from a car by means of a skid 18 inches is erroneous. Fones v. Phillips (1882) which he was assisting in unloading tion of patent dangers being suggested, from a car by means of a skid 18 inches long and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide, with a fall of 10 and 2 feet wide with a fall of 10 and 2 feet wide with a fall of 10 and 2 feet warm an inexperience demploye ordered into an inexperience demploye ordered into an inexperience an inexperience an phone company was assisting other em- that the deadwoods came very close to-

The question whether the servant should have been instructed is for the jury, whenever there is evidence tending to show that it was a proper case for such instruction, and different conclusions may reasonably be drawn from that evidence. 12 But where the facts are clear and only susceptible of one construction, this question is for the court.13

239. Master is prima facie under no obligation to give instruction as to normal or ordinary risks.— One frequent application of the general principle enunciated in the preceding section results from the theory that persons who hire themselves out to do a particular kind of work are supposed to understand the ordinary dangers which pertain to it,1 or, in another point of view, are supposed to accept those dangers as a part of the incidents of their contract.<sup>2</sup> See chapter xvii., B, post. The master, it is held, is always warranted in acting on the presumption that the servant understands any danger which belongs to this category, unless he has notice that the person he is hiring is inexperienced or of less than average intelligence, the most frequent illustrations of this limitation being furnished by the decisions which deal with minors. See subd. B, infra. All instruc-

have been instructed as to the effect of

pagne Lumber Co. (1899) 33 C. C. A. jecting over the ends. When, therefore, 269, 63 U. S. App. 519, 90 Fed. 774; he is ordered to take certain cars out of Albertz v. Bache (1890) 32 N. Y. S. R. a side track, he must be on his watch 390. post, as to the general principle be standing there, and is not entitled that the question whether the servant to be warned as to their presence. Jackcomprehended a given risk is primarily son v. Missouri P. R. Co. (1891) 104 one for the jury.

Mo. 448, 16 S. W. 413. There is no duty one for the jury.

(1874) 75 Ill. 106.

The rule that an employer who places the servant's knowledge of the risk, a young and inexperienced person in a Way v. Illinois C. R. Co. (1875) 40 dangerous situation is bound to warn Iowa, 341. Where the evidence points him of the danger has no application to to the conclusion that the servant ought a case where an adult servant is into have known of the hazard from which jured in the performance of the ordi-his injury resulted, a charge which nary duties which he has deliberately merely tells the jury of the duty of undertaken, owing to his own failure to knowing and informing the servant of make such use of his senses as is rethat hazard, and does not advert to the quired from a person of average intelliexistence of a correlative duty on the gence, when he has the option of doing servant's part, is erroneous. McArthur something in one of two or more ways Bros. Co. v. Nordstrom (1899) 87 Ill. involving various degrees of danger. App. 554.

Union P. R. Co. v. Estes (1887) 37 Kan. App. 554.

\*\*Inion P. R. Co. v. Estes (1887) 37 Kan.

\*\*Prichardson v. Swift & Co. (1899) 715, 16 Pac. 131. A brakeman is bound 37 C. C. A. 557, 96 Fed. 699; New Orto know that, among the cars for the leans Ice Co. v. O'Malley (1899) 34 C. storage of which a side track may be C. A. 233, 92 Fed. 108; Nyback v. Chamused, may be some loaded with iron pro-1014, 10 N. Y. Supp. 639. See also § for any cars of the description that may 13 Manley v. Minneapolis Paint Co. to instruct a brakeman as to the danger (1899) 76 Minn. 169, 78 N. E. 1050. caused by low overhead bridges. Bay-See also § 390, post. lor v. Delaware, L. & W. R. Co. (1878)

1 Consolidated Coal Co. v. Scheller 40 N. J. L. 24, 29 Am. Rep. 208. A (1892) 42 Ill. App. 619.

\*\*Property of N. W. R. Co. v. Donahue\*\* Donahue danger incident to coupling cars with brakeman need not be warned as to the drawbars of different heights.

"The defendant was not switch at a station is farther from a called on to make preliminary measure- cattle guard than another does not conments, and to warn the plaintiff of the stitute an unusual danger against which possible difference before setting him to a brakeman is entitled to a special work. The possibility was obvious in a warning when he is ordered to make a car coming from a different road." Ells-coupling. Robinson v. Chicago, R. I. bury v. New York, N. H. & H. R. Co. & P. R. Co. (1887) 71 Iowa, 102, 32 N. (1898) 172 Mass. 130, 51 N. E. 415. A W. 193. Any adult of ordinary intelliswitchman need not be warned as to gence, even though inexperienced, is prethe dangers arising from the handling of sumed to understand the danger that a foreign cars with coupling appliances track walker may be caught by a train different from those on the cars of his on a trestle, and the readiest way of own employers. Michigan C. R. Co. v. reaching a place of safety, viz., by get-Smithson (1881) 45 Mich. 212, 7 N. E. ting on one of the bent caps at either 791. The court said: "The business side of the track, both obvious. Gibson of the road was of itself a notification v. Oregon Short Line R. Co. (1893) 23 that many differences requiring atten- Or. 493, 32 Pac. 295. The failure to tion in coupling were to be encountered instruct a man employed to paint a hot by the switchmen and brakemen. The boiler with coal tar, that there is a Michigan Central is a great common danger of some of the tar popping and way for the cars of all the railroad comlighting on his person, is not negligence, panies of the country, and every man as the danger is not one which requires in the employ of the defendant, if he special precautions to avoid. San Anhas ordinary intelligence, is perfectly tonio Gas Co. v. Robertson (1900) 93 cognizant of the fact. He knows, too, Tex. 503, 56 S. W. 323 (1899) Reversing that the cars of the several railroad 55 S. W. 347. In Mississippi R. Logard transportation companies differ and ging Co. v. Schneider (1896) 20 C. C. and transportation companies differ, and ging Co. v. Schneider (1896) 20 C. C. that at one time or another all these A. 390, 54 U. S. App. 743, 74 Fed. 195, differences may appear in the cars he a servant while supplying wood to the may be called upon to couple or un- man in charge or a circular saw was incouple. Every train is likely to have jured by being struck by a piece which several kinds, and he cannot assume, was caught in it. Discussing one phase as he passes from one to another, that of the plaintiff's case the court rethe two will be alike; much less that marked: "It is said, however, that the the whole train will be. To notify him servant could not anticipate that the specially of the differences would not operator at the edger would not remove only be troublesome and expensive, and one piece of lumber before another comoftentimes, as above explained, confus- ing over the live rollers would strike ing, but it would be a work of superero- it, force it over the space of dead rollers gation; for any man capable intelli- between the alley and the slab saw, nor gently of performing the duty would that it would be swerved from its nat-be no wiser after the notice than before; ural course by the direction given to it, and a man who would not heed the in- either by the impinging force or by the formation the very nature and course of operator in striving to secure it. That the business would impart to him would is true, and is equally true with respect be protected by no notice." To the same to the master. The possibility was as effect see Simms v. South Carolina R. palpable to the understanding of the one effect see Simms v. South Carolina R. palpable to the understanding of the one Co. (1886) 26 S. C. 490, 2 S. E. 486. as to the other. The mill had been op-That the drawhead of a loaded car which erated for some ten or eleven years withan experienced switchman was required out that safeguard and without accident to couple to another car was out of or- from that cause. In marshalling the der does not render the company liable dangers that ordinary care would seek for his death while making the coupling, to guard against, it could hardly be anwhere the car had a card posted thereon ticipated that the piece of lumber would marked "bad order," in accordance with be projected such a distance over dead its usual method of notifying employees rollers, and would also be so swerved of defects, and he was told of its dan- from its course, that it would strike gerous condition before the injury, and the slab saw, 22 feet away from the end it was the custom of the company to of the line of live rollers, and north of remove defective cars for the purpose of the line of dead rollers extended westunloading them. Gulf, C. & S. F. R. erly upon a direct line from the live Co. v. Mayo (1896) 14 Tex. Civ. App. rollers. Nor can it be said that the 253, 37 S. W. 659. The fact that one danger was a concealed one, growing

tions which are inconsistent with this principle are deemed to be erroneous.4

240. Master is prima facie bound to give instructions as to all abnormal or extraordinary risks.— The doctrine which may be regarded as representing the converse of the propositions discussed in the preceding sections is that a master is prima facie bound to instruct a servant as to all risks which are abnormal or extraordinary and at the same time of such a kind that the servant cannot be held chargeable with an adequate comprehension of their nature and extent, or of the proper means by which to safeguard himself.<sup>1</sup> The presumption

out of any defective machinery. It playment. It was not the duty of aparose from the manner of operation, not pellant to instruct him respecting the ness." See also cases cited in §§ 264-

269, post.

\*It is error to instruct a jury that "it is the duty of the master to inform his servants of all danger in and about "Railroad employees, as all the books lay down the doctrine, assumed the ordinary risks and hazards of the employployee understands the nature and danthe danger in the manner of its performance. It is impossible that the law can that is what this instruction in substance asserts as a legal requirement." In Missouri P. R. Co. v. Watts (1885) instructed the jury that, if the appellee was inexperienced as to the opera-tion of the business upon the repair tracks, it was then the duty of appel-

because of defective machinery; and rules, regulations, and usages by which therefore was a risk incident to the busi- the service was governed, unless asked for such information, unless the employee was known to be an inexperienced person in the business, and in its transaction subject to danger not open to his observation, known to the employer." the premises where they are required, by his authority, to perform labor." Adams (1886) 105 Ind. 165, 5 N. E. Chicago, R. I. & P. R. Co. v. Clark 187. For cases in which the rule in (1883) 108 Ill. 118. The court said: the text was applied or recognized see— Western U. Teleg. Co. v. McMullen (1895) 58 N. J. L. 155, 32 L. R. A. 351, 33 Atl. 384; Hightower v. Bamberg Cotment. The presumption is that the em- ton Mills (1896) 48 S. C. 190, 26 S. E. 222; Salem Stone & Lime Co. v. Griffin ployee understands the nature and dangers of the employment when he engages in the service, and, if not, that Williams v. Walton & W. Co. (1892) he will inform himself. It would be wholly impracticable for railroads and manufacturers to employ men of experience to inform each of the hands that any particular act he is required to perform is dangerous. It would be ruinous R. Mach. Co. (1896) 194 Wis. 432, company every brakeman and other employees to inform them of danger in the contracted infectious disease). Haven't ployees to inform them of danger in the contracted infectious disease); Hysell v. performance of every act of duty, or of Swift (1899) 78 Mo. App. 39 (servant's eye destroyed by bacteria generated by decayed flesh); Norfolk Beet-Sugar Co. ever impose such requirements,—and v. Hight (1898) 56 Neb. 162, 76 N. W. 566. A master is bound to notify his servant of risks which the latter has no reason to believe, from the nature of his 63 Tex. 549, the trial judge in substance employment, he will have to encounter, and which arise from hidden causes or such as would reasonably escape his observation. Wood v. Heiges (1896) 83 Md. 257, 34 Atl. 872. One who contracts lant to instruct him as to the rules and to perform labor for another takes upon regulations respecting the same. This himself such risks only as are necesinstruction the supreme court held to sarily and usually incident to the embe incorrect, saying: "By seeking and ployment. If the employer has knowlaccepting the service the appellee as edge that the particular employment is, sumed all the risks incident to the em- from extraneous causes, hazardous or

is that all risks which belong to this category are not known to the servant. Hence, the question whether the servant should have been warned is always for the jury where the evidence is fairly susceptible of the construction that the peril to which his injury was due was one of this description, and there is no positive evidence tending to charge him with actual or constructive knowledge of that peril. This prin ciple is equally applicable whether the risks in question existed at the time when the servant commenced the performance of his contract,<sup>2</sup> or were afterwards created by some material change in the

944. A master who fails to inform a servant employed to remove the latch all times worked properly, is liable for 151. injuries sustained by the servant while in the exercise of due care, and because

dangerous to a degree beyond what it servation. Boyd v. Harris (1896) 176 fairly imports or is understood by the Pa. 484, 35 Atl. 222. A request for a servant to be, he is bound to inform charge to the effect that the perils of the servant of the fact. Baxter v. Rob- the work were obvious, and that the erts (1872) 44 Cal. 187, 13 Am. Rep. master was therefore under no obliga-160. Similar language is used in tion to instruct the servant, should not Thompson v. Chicago, M. & St. P. R. be granted where the servant's duty was Co. (1883) 4 McCrary, 629, 14 Fed. to dig under a bank which was not ex566. Employers "are bound to see that pected to fall by the action of gravitatheir employees have reasonable notice tion, and which had, up to the time of of any hidden danger known to the em-ployer, but of which the employees ing over the top when an excavation of might be ignorant without blame." Dow- a sufficient depth had been made at the ling v. Allen (1878) 6 Mo. App. 195. bottom. Lynch v. Allyn (1893) 160 It is culpable negligence in the master Mass. 248, 35 N. E. 550, distinguishing to fail to notify the servant of risks the cases where a man is set to work to fail to notify the servant of risks the cases where a man is set to work which are not patent, and of which he to undermine a bank which is expected is not cognizant from the nature of his employment. Consolidated Coal Co. v. he is required to look out for himself. Wombacher (1890) 134 III. 57, 24 N. E. See § 394, note 1, subd. (aa), and § 396. 627. Since the obligation of the master is to place the servant on the same should be given where a servant is set footing as himself in respect to knowledge of the dangers of the work it folcar past a bank which at one place lows that the duty of instruction arises comes so close to the track that he will when the master possesses what the courts term "superior means" of knowledge. Louisville & N. R. Co. v. Shivell Co. (1891) 80 Wis. 428, 50 N. W. 404 (1892) 13 Ky. L. Rep. 902, 18 S. W. The duty of warning has been said to 944. A master who fails to inform a be especially imperative where the servbe especially imperative where the servant is required to handle dangerous exholding the lever of a movable car, plosives. Decatur Cereal Mill Co. v whereby its contents of molten slag are Boland (1900) 95 Ill. App. 601; Spel dumped, that the appliance has not at man v. Fisher Iron Co. (1870) 56 Barb Compare § 395, note 2, subd. aa.

<sup>2</sup> As, where malt was fumigated with of such latent defect. Fowler v. Buf- sulphur and salt in the kiln room of a falo Furnace Co. (1899) 41 App. Div. malting house, from which the fumes es-84, 58 N. Y. Supp. 223, Appeal Discaped through crevices, and overcame a missed in (1899) 160 N. Y. 665, 55 N. workman on another floor, so that he E. 1095. If any structure near a line fell into machinery there and was inof railway is so located as to involve jured. Deisenrieter v. Kraus-Merkel unusual danger to employees operating Malting Co. (1896) 92 Wis. 164, 66 N. the road, it is the duty of the company W. 112. Or where a part of a trestle to advise such employees as are exposed just beyond the place to which engingers. to danger by such location, or to afford eers were constantly obliged to take them an opportunity to know the chartheir engines was dangerously weak. acter and extent of that danger by ob- Paulmier v. Erie R. Co. (1870) 34 N. intrinsic condition or relative arrangement of the instrumentalities by which the work was being done, or of the substances which the injured person or his coemployees were required to handle.3 More particu-

J. L. 151. Or where a machine was li- knowledge and withhold it from the emable to spasmodic movements. United ployee, and the latter afterwards be in-Laundry Co. v. Schilling (1900) 21 Ky. jured in consequence thereof, the em-L. Rep. 1798, 56 S. W. 425. Or where ployer is liable to him in damages there-a laborer is set to work under a bank for." Baxter v. Roberts (1872) 44 Cal. which is so cracked and seamed as to 188, 13 Am. Rep. 160. be liable to fall at any amount. Elledge In O'Connor v. Adams (1876) 120 v. National City & O. R. Co. (1893) Mass. 427, it was laid down that the 100 Cal. 282, 34 Pac. 720. Or where a case is for the jury where there is evithe fact of such danger, is not affected (1858) 10 Ind. 554. by the fact that the danger known to the employer arose from the tortious (1893) 6 C. C. A. 636, 12 U. S. App. or felonious purposes or designs of third 688, 57 Fed. 915 (where the employer cies beyond his control. The employee duty of the master to notify the servant is as clearly entitled to information of of any change in the condition of his such known danger of that character as apparatus by which the dangers of of any other, the existence of which is handling it are augmented, unless the of any other, the existence of which is handling it are augmented, unless the known to the employer. The employer, circumstances themselves constitute a if he knew or was informed of a threat-sufficient notification. Craver v. Chrisened danger of that character, was tian (1887) 36 Minn. 413, 31 N. W. bound to communicate the information 457. The duty of instruction was held to his employee about to be exposed to to exist under the following circumit in the course of his employment and stances: Where a servant was set to in ignorance of its existence. The nawork under a bank into which wedges ture or character of the agency or means had been driven the evening before with through which the danger of injury to out his knowledge the danger being also through which the danger of injury to out his knowledge, the danger being also the employee is to be apprehended can increased by a fall of rain during the make no difference in the rule, for the night (Thomas v. Ross [1896] 21 C. C. employee is entitled in all cases to such A. 444, 41 U. S. App. 574, 75 Fed. information upon the subject as the em- 552); where a miner was injured by the ployer may possess, and this with a caving of a shaft at a place where there view to enable him to determine for him- had been a fissure in the earth before self if at the proffered compensation he the accident (Struhlendorf v. Rosenthal be willing to assume the risk and incur [1872] 30 Wis. 674); where a wall be-the hazards of the business; and if the came ruinous and dangerous while a employer have such information or servant was working near it (Vaughan

railway agent, believing that a station dence tending to show that the defendwas about to be burglarized, secured ant's agents put the plaintiff in a place to be builded by mistake. Lipshim how to avoid them. This princicomb v. Houston & T. C. R. Co. (1901; ple was applied in a later case, where a Tex.) 55 L. R. A. 869, 64 S. W. 923, servant, while engaged in taking down Modifying Judgment in (1901; Tex. Civ. an old building, was injured by the col-App.) 62 S. W. 954. In a case where lapse of a wall which the defendant a carpenter hired to erect a fence on a knew to be unsafe owing to a fissure in lot was held not to assume the risk of it. Ryan v. Tarbox (1883) 135 Mass. being shot by a person in adverse possession, unless the employer had noting the rulings which, without any spefied him beforehand that forcible recific reference to the duty of warning, sistence might be corrected the court declarate the relief of th sistance might be expected, the court declare that it is negligence to allow a said: "The general principle which for-servant to use a defective instrumentalbids the employer to expose the employee ity the condition of which is known to to unusual risks in the course of his the master, and not known to the servemployment, and to conceal from him ant. Indianapolis & C. R. Co. v. Love

persons acting in hostility to the inter- began to tear down a trestle under which ests of the employer and through agen- the plaintiff was at work). It is the

larly is a jury warranted in finding that the omission to warn was a culpable neglect of duty, where the servant was thrown off his guard

spare-wheel, which in its ordinary concondition of a machine was changed another shift had previously discharged several blasts and left one missed hole (Shannon v. Consolidated Tiger & Poorman Min. Co. [1901] 24 Wash. 119, 64 Pac. 169); where a piece of machinery had been disconnected and left in such a position that it was liable to fall (Aithen v. Newport Co. Q. B. D. [1887] 3 Times L. R. 527); where a machine became so clogged by the materials upon which it operated that it was dangerous to a new employee: accumulation of App. 578 (said with reference to a build-motes in a "linter" caused breast-board ing which was being torn down); Mcto jump up and press the servant's hands Dougall v. Ashland Sulphite-Fibre Co. against the saws (Hillsboro Oil Co. v. (1897) 97 Wis. 382, 73 N. W. 327.

v. Cork & Y. R. Co. [1860] 12 Ir. C. L. White [1899; Tex. Civ. App.] 54 S. W. Rep. 297, per Pigot, C. B., arguendo); 432); where spikes had been removed where a plaintiff was injured owing to from a ladder since the servant had last the existence of a crack in the wall of used it, and it had thus been made more a pit in which he was working (Colo-liable to slip on the floor when he rado City v. Liafe [1901; Colo.] 65 Pac. climbed it (ODonnell v. Sargent [1897] 630); where the day crew of an under- 69 Conn. 476, 38 Atl. 216); where there cutting machine were allowed to go to was a change in a dangerous machine, work without any warning as to the amounting to more than an "ordinary dangerous condition of the face of the adaptation" such as a skilled mechanic coal where they were to work (Consoli- should anticipate (Ryan v. Chelsea Padated Coal Co. v. Gruber [1900] 188 Ill. per Mfg. Co. [1897] 69 Conn. 454, 37 584, 59 N. E. 254, 91 Til. App. 15); Atl. 1062); where an elevator was out where the form of a dump pile was of repair. (Dervin v. Herrman [1890] changed by removals so that the slope 26 Jones & S. 193, 9 N. Y. Supp. 722); changed by removals so that the slope 26 Jones & S. 193, 9 N. Y. Supp. 722); became much steeper during the day-time, and one of the night shift was consequently injured (Iroquois Furnace Co. Co. v. Laack [1892] 143 III. 242, 18 L. v. McCrea [1900] 91 III. App. 337); R. A. 215, 32 N. E. 285); where new where all the ballast between the ties and unusual machinery the use of which at a certain switch is removed, thus involves an unexpected and unanticausing a brakeman to lose his footing pated danger is adopted (O'Neil v. St. (Louisville & N. R. Co. v. Bowcock Louis, I. M. & S. R. Co. [1881] 3 Mc-[1899] 21 Ky. L. Rep. 383, 51 S. W. 580, Crary, 423, 9 Fed. 337); where a new Rehearing Denied in 21 Ky. L. Rep. switch was reasonably safe and prop-896, 53 S. W. 262); where a railway erly constructed, but was operated in a switch was reopened for use after a long different manner (Cincinnati, N. O. & abandonment (Town v. Michigan C. R. T. P. R. Co. v. Gray [1900] 50 L. R. A. abandonment (Town v. Michigan C. R. T. P. R. Co. v. Gray [1900] 50 L. R. A. Co. [1890] 84 Mich. 214, 47 N. W. 665); 47, 41 C. C. A. 535, 101 Fed. 623). In where a master of the steamer caused a the last cited case it was laid down that the considerations which demand dition rested loosely and unfastened that the master shall furnish for his upon the drum of the steamwheel, to employees reasonably safe appliances be lashed so that it would necessarily necessarily extend to the requirement rotate with the drum, thereby render that when appliances wholly or partialing the apparatus dangerous to anyone ly new, and, so far as they differ and engaged in cleaning it (Withcofsky v. the particular work is concerned, un-Wier [1887] 32 Fed. 301); where the known and untried, are substituted for old ones, he shall give full and plain in-(Hawkins v. Johnson [1886] 105 Ind. structions to employees as to the parts 29, 55 Am. Rep. 169, 4 N. E. 172); of such appliances which are new in opwhere a member of one of several shifts cration, in order that they may have a went to work in a shaft in a mine where fair opportunity to understand the nature of any differences which might, if they were unknown, produce danger. There is also an obligation to instruct a servant where unfit fellow servants

are unavoidably employed. Chicago, St. L. & P. R. Co. v. Champion (1894) 9 Ind. App. 510, 36 N. E. 221, 37 N. E.

See also, as recognizing the general rule—Walsh v. Chicago (1901) 94 Ill. App. 311; Clark v. Liston (1894) 54 Ill. by the assurance of the employer that there were no abnormally unsafe conditions.4 See chapter xxiv., post.

So far as the essential fact of an increase of danger is concerned, it is obvious that this situation may be brought about by the transfer of the servant to a new environment, or by the imposition of new duties in the old environment, no less than by a change in the inherent quality or in the arrangement of the instrumentalities themselves, or of the materials handled. It follows, therefore, that, when the servant is thus required to work amidst new surroundings or to undertake new duties, the master becomes at once chargeable with the obligation of giving him instructions in any case where there is a real augmentation of the risks, owing to the fact that the servant has not sufficient experience or intelligence to enable him to safeguard himself.<sup>5</sup> Where the injury was received by the servant while doing

Gowen v. Push (1896) 22 C. C. A. Banks v. Effingham (1896) 63 Ill. App. 196, 40 U. S. App. 349, 76 Fed. 349.

Brennan v. Gordon (1890) 118 N. ditch where there were deposits of Y. 489, 8 L. R. A. 818, 23 N. E. 810 quicksand). See also, as affirming exfined to instruct common laborer before he is put in charge of danstruction under these circumstances, the (master bound to instruct common laborer before he is put in charge of dangerous machinery—here an elevator—with which he is not acquainted); d. M. Lumber & Mfg. Co. (1896) 100 James v. Rapides Lumber Co. (1898) Iowa, 441, 69 N. W. 743: Pattner v. 50 La. Ann. 717, 44 L. R. A. 33, 23 So. Michigan C. R. Co. (1891) 87 Mich. 469 (minor nineteen years of age suddenly called on to work with a trimmer in a sawmill); Camp v. Hall Leary v. Boston & A. R. Co. (1885) 139 (1897) 39 Fla. 535, 22 So. 792 (boy fourteen years of age was employed to 1put together vegetable crates, and trans. 17 Wall. 553, 21 L. ed. 739; Gavigan v. ferred to the work of pushing cars on Lake Shore & M. S. R. Co. (1896) 110 a side track); Texarkana & Ft. S. R. Mich. 71, 67 N. W. 1097; Walker v. Co. v. Preacher (1900; Tex. Civ. App.) Lake Shore & M. S. R. Co. (1895) 104 59 S. W. 593 (minor employed as a Mich. 606, 62 N. W. 1032; Camp v. messenger in a railway office, directed to couple cars); Felton v. Girardy Mary Lee Coal & R. Co. v. Chambliss (1900) 43 C. C. A. 439, 104 Fed. 127 (1893) 97 Ala. 171, 11 So. 897; Gulf, (helper in repair shop of railway company was directed to go into the fire 1900; Tex. Giv. App.) 64 S. W. 790; Quinn box of a locomotive which had steam up, and tighten the plug in a leaking flue (7. More) of the boiler, and, not knowing that the 191 of the boiler, and, not knowing that the 191 of the boiler, and, not knowing that the 191 of the boiler, and, not knowing that the 191 of the boiler, and not knowing that the 191 of the boiler, and not knowing that the 191 of the boiler, and not knowing that the 191 of the boiler, and not knowing that the 191 of the boiler, and not knowing that the 191 of the firm and a crane used to move machinery); Lofrano v. New York & Mt. duty of the engineer, and the firmed: "If the fireman, although emsteam to escape); Michael v. Roanoke ployed only for a fireman, was placed Mach. Works (1894) 90 Va. 492, 19 S. under the orders of the engineer, and thinger from a crane used to move machinery); Lofr work outside the scope of his employment, it often becomes a material question whether he was acting under proper authority, for it is clear, upon general principles, that negligence cannot be predicated of the master's omission to instruct a servant as to work which he was neither expected nor ordered to do.<sup>6</sup> The absence of any specific order from

or otherwise, and the number of men comprehend obvious dangers. orders, and that they be not ordered the master to perform such work. tendent, when about to order an extra-tions, chapter xxv., post. hazardous piece of work to be done, is

engaged to do, is thus discussed in a to repair machinery, when it was his recent case: "The master may not law-duty merely to report to a machinist fully expose his servant to greater risks when the necessity for repairs arose). than those pertaining to the particular when the necessity for repairs arose). than those pertaining to the particular service for which he has engaged, and who was employed to load cars, to fix against which the servant, through want of skill, or by reason of tender age or as well as he could, this order cannot physical inability, could not presumably defend himself, if unapprised of the danger, or to go to any part of the ger. He is bound to warn the servant mill, or to saw a piece of scantling on of the danger if it be not obvious, and any saw he might select. The rights of to instruct him how it may be avoided. the parties must, in such a case, be defined to the parties must, in such a case, be designed to the parties must, in such a tase, be designed to the parties must, in such a case, be designed to the parties must, in such a case, be designed to the parties must, in such a case, be designed to the parties must, in such a case, be designed to the parties must, in such a case, be designed to the parties must, in such a case, be designed to the parties must.

ture and magnitude of the master's years and of ordinary intelligence and work, whether it be that of construction experience, he is presumed to know and engaged in its execution, are such that case the master is not liable for injury the exercise of ordinary care for the happening to the servant in the persafety and protection of the workmen formance of dangerous work without the from unusual and unnecessary dangers scope of his engagement for service, requires that they be given reasonable merely because he has been directed by from one part of the work to another, the servant is possessed of knowledge without warning, into places of unusual and experience sufficient to comprehend danger and risks, which are not obvious the danger, and without objection unto the senses and known to them, but which might be ascertained by the master is not liable for injury received by the servant ter by a proper inspection, the absolute of the master to give such reasonable orders. . . A workman, the master in cases of injury to the when ordered from one part of the work to another, cannot be allowed to stop, ment outside of that for which he had examine, and experiment for himself, in order to ascertain if the place assigned to him is a safe one; and therefore, in obeying the order, while he assumes obvious and ordinary risks, he work, but from failure to give proper has a right to rely upon a faithful discharge of the master's duty to use ordinary care to warn and protect him or where the servant is of immature to the senses and known to them, but dertakes the service, the master is not nary care to warn and protect him or where the servant is of immature against unusual dangers." Carlson v. years, or unable to comprehend the dan-Northwestern Teleph. Exch. Co. (1896) ger." Reed v. Stockmeyer (1896) 20 63 Minn. 433, 65 N. W. 914. A charge C. C. A. 381, 34 U. S. App. 727, 74 Fed. to the effect that a foundry superin- 186. See, generally, as to such situa-

<sup>6</sup> Leistritz v. American Zylonite Co. under no obligation to warn workmen (1891) 154 Mass. 382, 28 N. E. 294; not then present, but whose duties may Gillen v. Rowley (1890) 134 Pa. 209, call them to the place at any moment, 19 Atl. 504; Hinckley v. Horazdowsky is rightly refused. Girard v. St. Louis (1890) 133 Ill. 359, 8 L. R. A. 490, 24 Car-Wheel Co. (1891) 46 Mo. App. 79. N. E. 421; Stewart v. Patrick (1892)
The situation which results when the 5 Ind. App. 50, 30 N. E. 814; McCue v. servant is ordered by the master to per-National Starch Mfg. Co. (1894) 142 form temporary service beyond and N. Y. 106, 36 N. E. 809 (no liability without the scope of that which he has where servant undertook proprio motu

If, however, the servant be of mature termined by the rule that the master

the master does not, however, operate as a conclusive bar to the servant's action under such circumstances. He may still rely on the duty of the master to instruct him, if the employer knew that he had engaged, or was likely to engage, in the work from which his injury resulted.7 For a further discussion of the right of a servant to recover for injuries received in doing work outside the scope of his employment, see chapter xxv., post. Compare also the cases cited in § 395, post.

240a. Servant's comprehension of the risk, and not merely of the conditions, is the material point to be determined. — In considering whether the servant's action is barred on the ground of knowledge, the material question is not whether he was aware of the conditions which produced the danger, but whether he understood the danger itself.1 But in a large number of instances the conclusion that knowledge of the conditions cannot be imputed without also imputing knowledge of the attendant risks is so clearly unavoidable that, for practical purposes, the investigation is concerned only with the question whether the servant possessed the former kind of knowledge.2

Mich. 254, 32 N. W. 421.

\*Leistritz v. American Zylonite Co. it); McGowan v. LaPlata Min. & Smelt-(1891) 154 Mass. 382, 28 N. E. 294. ing Co. (1882) 3 McCrary, 393, 9 Fed. In Donahoe v. Old Colony R. Co. (1891) 861; George Matthews Co. v. Bouchard 153 Mass. 356, 26 N. E. 868, the de-(1897) 8 Rap. Jud. Quebec B. R. 550. broken drawbar.

is under no duty of specially guarding 380; Coombs v. New Bedford Cordage dangerous machinery, or of giving spe Co. (1869) 102 Mass. 573, 3 Am. Rep. cial warning as to the dangers arising 506 (machinery which caused the intherefrom, as respects persons who, jury was open to view, and probably it without authority, go into places where was seen by the party injured; but the such machinery is in operation. Lind-danger of the position was not exstrand v. Delta Lumber Co. (1887) 65 plained, as was necessary for the promich. 254, 32 N. W. 427.

fendant contended that a conductor who <sup>2</sup> A conductor of a train on an inleft his train before the accident hap-clined railway, with seventeen years' expened was not negligent in omitting to perience, who knows that, under certain tell the plaintiff of a broken drawbar, conditions of weather, the several secbecause the movements of the train and tions are stopped at a certain shed near the coupling and uncoupling of cars the head of the incline, and coupled to-were wholly under his direction, and a gether for the purpose of proceeding to brakeman was not expected to uncouple points beyond, cannot hold the owners cars without his orders. The court, of the railway liable for the failure of however, said that, when the conductor its superintendent to warn him, while permitted it to proceed without him, it he is in control of the rear section, that might properly be inferred by the jury he must guard himself against the danthat he expected and permitted such ger of a collision with the preceding secthings to be done as were necessary in tions. Moules v. Delaware & H. Canal the management of the train until he Co. (1891) 141 Pa. 632, 21 Atl. 733. should rejoin it, without a specific order Where a servant knows the general danfrom himself for each particular act; ger of being caught by a revolving shaft, and, if so, that it might properly be a master is not bound to proceed on the found to have been negligence on his assumption that the servant in stepping part to omit to tell the plaintiff of the over it will avoid it by so narrow a margin as to encounter the special dan-McDonald v. Chicago, St. P. M. & O. ger of a slightly projecting spline-key.— R. Co. (1889) 41 Minn. 439, 43 N. W. a danger which, if not comprehended

For other cases in which the distinction between the servant's knowledge of the conditions and his knowledge of the attendant dangers is recognized, see §§ 279a, 296, 319, 372, 395, 398, 399, post. That an appreciation of the risk is frequently, if not usually, inferred when a knowledge of the conditions is established, is indicated by the authorities collected in §§ 279b, 297, 320, post, and a large number of those the effect of which is stated in chapter xxx., post.

241. Master's knowledge of the servant's ignorance of the danger; necessity for showing.—The third prerequisite to recovery by the servant results from a particular application of the principle which makes knowledge an essential element of negligence, to a case in which the special question to be resolved is whether, in view of the material conditions which produced the injury, and the personal characteristics of a certain servant, the master should have seen that such servant was probably incapable of understanding the perils of the situation. An investigation under this head ranges over much the same area of facts as that which is explored in ascertaining whether the third prerequisite to the maintenance of the action exists. (See infra.) The only difference is that the problem for the solution of which the data are used is propounded in another form determined by the theory on which the plaintiff relies, and that the testimony which, in one case, is directed to the establishment of a breach of a positive duty, is directed in the other case to the support of a plea which is virtually one of confession and avoidance.

instruct an experienced lineman as to the danger of handling live electric fixed pulley); Owings v. Moneynick Oil wires without gloves made of some nonconducting material. Junior v. Missouri Electric Light & P. Co. (1895) veyed electricity to a mill, and that this 127 Mo. 79, 29 S. W. 988. See also the following cases: Baylor v. Delaware, injured); Cmielewski v. Mollenhauer L. & W. R. Co. (1878) 40 N. J. L. 24, Sugar Ref. Co. (1896) 11 App. Div. 29 Am. Rep. 208 (low overhead bridge 111, 42 N. Y. Supp. 936 (no duty to on a railway); Boland v. Louisville & instruct as to the danger of stepping N. R. Co. (1894) 106 Ala. 641, 18 So. 99 (car couplers of different patterns); moving machinery, where the servant Demers v. Marshall (1901) 178 Mass. knows the openings are large enough to 9, 59 N. E. 454 (set screw on shaft); let his feet through).

within the general danger, is at least Wilson v. Massachusetts Cotton Mills so closely connected therewith as not (1897) 169 Mass. 67, 47 N. E. 506 (exto demand particular consideration. posed cogwheels); Cunningham v. Bath Andersen v. Berlin Mills Co. (1898) 32 Iron Works (1899) 92 Me. 501, 43 Atl. C. C. A. 143, 50 U. S. App. 413, 88 Fed. 106 (exposed cogwheels); Buttle v. 944. There is no duty to warn a servant of full age as to the dangers arising Mass. 318, 56 N. E. 583 (moving saw); from a revolving shaft which extends Cushman v. Cushman (1901) 179 Mass. across a doorway, 4 feet above the floor. 601, 61 N. E. 262 (position of collar and Lemoine v. Aldrich (1900) 177 Mass. set screw on shaft known to servant who 89, 58 N. E. 178. There is no duty to was injured by a belt catching on the instruct an experienced lineman as to collar as he was removing it from the the danger of handling live electric fixed pulley); Owings v. Moneymick Oil

The general principle to be extracted from the decisions in which this aspect of the duty of instruction is adverted to would seem to be this: That, on the one hand, the master may properly be found guilty of negligence whenever instruction was not given under circumstances which were of such a nature that he was not justified in acting on the assumption that the servant appreciated the risk involved; and that, on the other hand, culpability cannot be predicated of the omission to give instruction if the master had good grounds for supposing that the servant understood that risk.1 Before an employer can be held liable for a failure to warn, there must be something to suggest to him that a warning is necessary.2 Unless this necessity was or ought to have been known to him, he is considered to be justified in acting upon the assumption that the servant understood the dangers to which he was exposed, and would take appropriate precautions to safeguard himself.

The mere statement of this principle indicates that there can be very few, if any, situations in which the existence or absence of a

<sup>1</sup> See the following cases: Stuart v. fendants informed of this fact? (3) If West End Street R. Co. (1895) 163 defendants were so informed, did they Mass. 391. 40 N. E. 180; Ciriack v. Merneglect to give him notice of the locachants' Woolen Co. (1890) 151 Mass. tion of the set screw, and to instruct 152, 6 L. R. A. 733, 23 N. E. 829; Pratt him in the manner of running the mave. Prouty (1891) 153 Mass. 333, 26 N. chine, so as to guard him against the 182, 6 L. R. A. 133, 23 N. E. 828; Fratt than in the manner of running the mark Prouty (1891) 153 Mass. 333, 26 N. chine, so as to guard him against the E. 1602; Robinska v. Mills (1899) 174 injury which he received?

Mass. 432, 54 N. E. 873; Beique v. Hosmer (1897) 169 Mass. 541, 48 N. E. (1890) 135 U. S. 569, 34 L. ed. 235, 338; Yeager v. Burlington, C. R. & N. E. (1890) 135 U. S. 569, 34 L. ed. 235, 338; Yeager v. Burlington, C. R. & N. U. 1050; May v. relation to the effect that, Manley v. Minneapolis Paint Co. (1899) if the servant's course of conduct in 76 Mian. 169, 78 N. W. 1050; May v. relation to the duty undertaken by him Smith (1893) 92 Ga. 95, 18 S. E. 360; was such as to induce the defendant or King v. Morgan (1901) 48 C. C. A. its officers to believe that he had the 507, 109 Fed. 446; Crowley v. Pacific requisite skill for the performance of Mills (1889) 148 Mass. 228, 19 N. E. that duty, or that he had willingly as 344; Mannion v. Hagan (1896) 9 App. sumed that duty, the defendant was not Div. 98, 41 N. Y. Supp. 86; Arizona in default for not having instructed him Lumber & Timber Co. v. Mooney (1893, as to any danger incident to the opera-Ariz.) 33 Pac. 590; Missouri P. R. Co. tion. In a Delaware case the jury was v. King (1893) 2 Tex. Civ. App. 122, charged that the servant is not entitled 20 S. W. 1014, 23 S. W. 917; Missouri to rely on the want of proper instruc-P. R. Co. v. Sasse (1893; Tex. Civ. tion, "unless the defendant was not jus-App.) 22 S. W. 187; Ft. Smith Oil Co. tified in believing that he had done his v. Slover (1893) 58 Ark. 168, 24 S. W. duty by him. If he did all that most 106; Connor v. Saunders (1894) 9 Tex. would have done that is enough? Eos. 106; Connor v. Saunders (1894) 9 Tex. other men, under like circumstances, Civ. App. 56, 29 S. W. 1140. In Inger-would have done, that is enough." Fosman v. Moore (1891) 90 Cal. 410, 27 ter v. Pusey (1888) 8 Houst. (Del.) Pac. 306, a case where the plaintiff was 168, 14 Atl. 545. caught upon a set screw in a revolving shaft, it was remarked that, in passing to determine: (1) Was plaintiff in fact in discussing a verdict which did not inexperienced in the work in which he find the servant to have been ignorant). was engaged? and, if so (2), were de-Vol. I. M. & S.—35.

<sup>2</sup> Georgia R. & Bkg. Co. v. Miller (1892) 90 Ga. 571, 16 S. E. 939; upon the question of defendant's alleged Stadky v. Marinette Lumber Co. (1900) negligence, it was necessary for the jury 107 Wis. 250, 83 N. W. 514 (arguendo,

duty to instruct, as affirmed or denied on this ground, would not depend upon virtually the same considerations as are controlling when the issue to be decided is whether the servant was chargeable with the possession of sufficient knowledge to enable him to avoid being injured. Hence, we find that judgments which refer to the fact that the dangers were, or were not, such as the servant might fairly be supposed to understand always associate the language in which this conception is embodied with expressions which show that the dangers contemplated were such as the servant was or was not bound to comprehend.3

The cases in which the principle is most commonly adverted to as a test of liability or nonliability are those in which the distinction between adults and minors, and between experienced and inexperienced workmen, is the material element. For the purpose of applying that distinction the courts start with the fundamental hypothesis that, by entering an employment in any capacity, an adult holds himself out as being competent to perform the duties of the position;4 or, as the rule is also expressed, that the acceptance of any given employment is a representation that the servant understands the nature of the service.<sup>5</sup> In the absence of notice to the contrary, therefore, the master may assume that such a servant has the knowledge, discretion, and experience of the average servant of his age and intelligence, and that he possesses the knowledge which is acquired by common experience.7 More generally still, it is laid down that, unless

\*See, for example, Stuart v. West End on account of his request, or that the Street R. Co. (1895) 163 Mass. 391, 40 request had anything to do with the de-N. E. 180; Lemoine v. Aldrich (1900) fendant's action in the premises.

177 Mass. 89. 58 N. E. 178; Ciriack v. \*Chielinsky v. Hoopes & T. Co. Merchants' Woolen Co. (1890) 151 (1894) 1 Marv. (Del.) 273, 40 Atl. Mass. 152, 6 L. R. A. 733, 23 N. E. 829; 1127; Adams v. Clymer (1893) 1 Marv. Dowling v. Allen (1878) 6 Mo. App. (Del.) 80, 36 Atl. 1104. "If the youth 195; Manley v. Minneapolis Paint Co. or known inexperience of the employee (1899) 76 Minn. 169, 78 N. W. 1050. is such as to put the master upon no-\*McDermott v. Atchison. T. & S. F. tice that the employee may not realize

63 Tex. 549. In Guinard v. Knapp-Stout & Co. Co. (1895) 90 Wis. 123, 62 he thereby represented himself as competent for the position and assumed all the risks, the special ground assigned being that there was no lidence or finding that he was retained in his position

(1899) 76 Minn. 169, 78 N. W. 1050.

\*McDermott v. Atchison, T. & S. F. tice that the employee may not realize R. Co. (1896) 56 Kan. 319, 43 Pac. 248; the risk he is called upon to encounter, International & G. N. R. Co. v. Hester the master must, of course, see to it (1885) 64 Tex. 401.

\*Missouri P. R. Co. v. Watts (1885) not understand it to be the law that, in the content of the case of an adult employee, about to undertake work which he is subject in N. W. 625, however, the court declined the line of his duty to be called on to to hold that, because the plaintiff, some do, the master must assume that he is time after he was employed as an oiler, ignorant of ordinary dangers that may applied to be retained in that capacity, attend the work." Georgia R. & Bkg. Co. v. Miller (1892) 90 Ga. 571, 16 S. E. 939. Compare § 239, infra.

<sup>7</sup> Ruchinsky v. French (1897) 168 Mass. 68, 46 N. E. 417.

he has actual knowledge to the contrary, the master may assume, without a critical examination, that a person who seeks employment in a particular capacity is possessed of sufficient ability and experience, and is of such an age as qualifies him to discharge the duties incident to the service applied for, and that he is competent to apprehend and avoid all the apparent and obvious hazards of the service.8

In cases where there is specific evidence tending to show that the master, having knowledge of the servant's inexperience, employed him in hazardous work which required the exercise of peculiar skill, the failure to give him adequate instructions may properly be found to be negligent.9 On the other hand, unless the defendant knew, or ought to have known, of some occasion for instruction, his omission to give it cannot be regarded as the proximate cause of an injury which

<sup>6</sup>Where plaintiff had testified before S. E. R. Co. v. Valirius (1877) 56 Ind. the jury, there was no impropriety in 511. permitting a witness to testify as to In Illinois C. R. Co. v. Price (1895) plaintiff's appearance as to age at the 72 Miss. 862, 18 So. 415, the court results in the court results & C. R. Co. v. Frawley (1886) 110 Ind. manding caution and more than usual 18, 9 N. E. 594, referring to Pittsburgh, c. & St. L. R. Co. v. Adams (1886) 105 and proper instruction as to the method of executing the service required, and a foundation for imputing fault to an employer merely by reason of the servant's minority, the latter must adduce evidence showing that the employer had knowledge of the minority, or, because An employer has no right to an instruction is age. This rule is important find that the plaintiff was a man of manin cases where the servant is approaching his majority, and has the stature for the defendant, because the defendant and appearance of an adult. See Youll and a right to assume that the plaintiff was a sum that the plaintiff was a sum that the plaintiff would protect himself by whatever Iowa, 346, 23 N. W. 736. Thus, it has precautions were necessary." The duty been laid down that, if a servant was of instruction exists in all cases where believed to be twenty-one years old when it is reasonably required by the youth. helieved to be twenty-one years old when it is reasonably required by the youth, he was hired, the master is not liable or inexperience, or want of capacity of by reason of his minority, even if the the servant, and is not confined to cases employment was without the consent of where the servant is "a man of manifest employment was without the consent of the servant, and is not confined to cases this parents. Goff v. Norfolk & W. R. (1888) 36 Fed. 299. That the master is not bound to examine an adult applicant for a position as to his fitness or knowledge of its dangers is also laid down in O'Neal v. Chicago & I. Coal R. (1892) 132 Ind. 110, 31 N. E. 669. der the servant the right of recovery unco. (1892) 132 Ind. 110, 31 N. E. 669. der the special circumstances in Russell Reynolds v. Boston & M. R. Co. v. Tillotson (1885) 140 Mass. 201, 4 (1891) 64 Vt. 66, 24 Atl. 134; Louis Reynolds v. R. Co. v. Miller (1900) 43 C. C. A. 436, 104 Fed. 124; St. Louis &

time of the trial, as compared with his marked: "Every servant undertakes to appearance in that respect immediately assume the known and obvious and orbefore he was hurt; or that in appear-dinary risks incident to his employment; ance the plaintiff was not older than but if the employer requires the servhe really was at the time he entered the ant to undertake the performance of a defendant's service. Louisville, N. A. dangerous or extra hazardous work de-& C. R. Co. v. Frawley (1886) 110 Ind. manding caution and more than usual

the plaintiff received owing to the want of such instruction. The mere fact that he was injured because he was inexperienced and ignorant of the danger and hazard will not suffice to charge the defendant.10 The question whether the master at the time of engaging the servant, or afterwards, ought to have inquired whether he was experienced or not, or should have taken notice, under all the facts. of the probability that he was not, nothing being said on the subject by either party, is a question for the jury.11

The decisions with respect to the effect of declarations by the servant himself, which tend to mislead the master as to his fitness for the position sought by him, are conflicting. In one it is laid down that the express statement of an employee, at the time of the contract of employment, that he is accustomed to the work, will excuse the employer from explaining to him peculiar dangers ordinarily incident to such work.<sup>12</sup> In another, recovery was denied where the servant deliberately made a false representation as to his familiarity with the work, in order that he might obtain employment. 13 Similarly, it has been held that no action lies where a master was misled by an employee to believe he was of age when he was in fact a minor, and his age contributed to the injury.<sup>14</sup> On the other hand, the position has lately been taken that the fact that an inexperienced servant, when he solicited the employment, represented himself to be competent, will not charge him with an assumption even of the ordinary risks of that

 <sup>10</sup> Klochinski v. Shores Lumber Co. & West R. Co. v. Sims (1888) 80 Ga. (1896) 93 Wis. 417, 67 N. W. 934 807, 6 S. E. 595.
 (holding that a special verdict was de <sup>11</sup> May v. Smith (1893) 92 Ga. 95, 18 fective because there was no finding of the employer's knowledge of the need of instruction). "It is not negligence to man v. Minneapolis & St. L. R. Co. (1889) 78 Iowa, 509, 43 N. W. 303 represented himself as having had (man twenty-two years of age hired as brakeman). Where a father hires out his son for the purpose of piling lumber, Co. (1896) 108 Mich. 284, 66 N. W. 51. with which business the son is somewhat familiar, having assisted his father frequently in such work, the employer of the Michigan court, was enough of may assume that the father has given his son all instructions necessary to enable him to do the work in safety to able him to do the work in safety to himself, and is under no obligations to warn him of danger, where no danger is apparent, and the work is not extraor-dinarily hazardous and dangerous. East

807, 6 S. E. 595.

11 May v. Smith (1893) 92 Ga. 95, 18 S. E. 360.

<sup>12</sup> Steen v. St. Paul & D. R. Co. (1887) 37 Minn. 310, 34 N. W. 113. instruction). "It is not negligence to (1887) 37 Minn. 310, 34 N. W. 113. employ one who is physically and menally qualified for the business, merely another case, where it was denied that because he has not yet had experience. a railway company was negligent in fail-It is only by instructing the inexpering to warn a brakeman of danger in ened that the necessary supply of excoupling cars having double deadwoods, perienced help can be secured." Gorthe evidence being that on seeking emman v. Minneapolis & St. L. R. Co. ployment from such company he had (1889) 78 Iowa, 509, 43 N. W. 303 represented himself as having had (man twenty-two years of age hired as twenty-seven days' experience in such brakeman). Where a father hires out work. Perlon y Polluth S. S. & R.

<sup>13</sup> Stanley v. Chicago & W. M. R. Co. (1894) 101 Mich. 202, 59 N. W. 393. 14 McDermott v. Iowa Falls & S. C. R. Co. (1891; Iowa) 47 N. W. 1037. employment, with regard to which he has not been instructed, unless they are so obvious that an inexperienced man would escape them by the exercise of ordinary care. 15 In line with this decision is another to the effect that the representation of the servant that he has had experience in the work for which he was hired does not operate as an estoppel, but is merely a circumstance to be considered as bearing upon the question of negligence vel non.16 The point is a nice one; but the view adopted in the two cases last cited seems to the present writer to be preferable to the other. There are manifest and cogent objections to the theory that, because the servant has made false statements which it is advantageous for the master to believe, the latter is entitled to shut his eyes deliberately to obvious facts which indicate that the former is not telling the truth. It seems impossible to argue, with any show of reason, that the master is absolved altogether, by anything which the servant may say, from the duty of using proper care; and this is virtually the effect of the decisions in which it is laid down that the inability to maintain the action is deducible, as a conclusion of law, whenever it appears that the servant had made express representations as to his competency.

In cases where the question is whether the master should or should not have seen the necessity for instruction the servant is supposed to be a person in complete control of his mental faculties. No duty to warn him can be predicated, when in fact he was in no danger except from unanticipated possible consequences of sudden fright.<sup>17</sup>

The fact that an employee asked for no instruction, and gave no sign that he was not familiar with the method by which an order could properly be obeyed, will sometimes strengthen the inference that there was no culpability on the master's part in omitting instructions. 18 But it seems clear that the omission of the servant to request information cannot be, of itself, a differentiating factor in any case where the circumstances otherwise indicate that he ought to have been instructed.19

15 Louisville & N. R. Co. v. Miller and to be inexperienced. Missouri P. R. (1900) 43 C. C. A. 436, 104 Fed. 124. Co. v. Watts (1885) 63 Tex. 549. In 10 Felton v. Girardy (1900) 43 C. C. the same case, in (1885) 64 Tex. 568, however, an instruction was approved which made the master liable if he knew Mass. 57, 58 N. E. 179. that the servant was inexperienced and uniformed as to the rules,—a very different proposition. The gaywarts of the servant was inexperienced. Missouri P. R. 1900 (1900) 10 Text 19 35 N. E. 648.

different proposition. The servant's

1º In Texas it has been held not to be duty to seek for information was dethe duty of the master to instruct a nied. More recently the court of apservant respecting the rules, regulations, peals has laid down that the knowledge and usages by which the service is gov- of a railroad company that one emerned, unless he is asked for such inployed as a switchman is inexperienced formation, or unless he knew the serv- requires it to give him warning as to

Many of the statements of the circumstances under which a master is held liable on the ground of a failure to instruct do not take account of the necessary element of his knowledge of the need of instruction, and to this extent are imperfect as formal enunciations of the rule. But the omission is evidently merely accidental, due to the fact that the court was emphasizing one particular aspect of the duty.20

242. Relation of the duty of instruction to the defenses of assumption of risks and contributory negligence.— The third of the facts enumerated in § 235, ante, as representing the evidential prerequisites to the maintenance of the servant's action, indicates what is, for practical purposes, the most important point to be remembered in connection with these actions, viz., that any case which is submitted on the theory of a breach of the duty to instruct must involve an examination into the legal effect of evidence which is equally competent upon the question whether the servant shall, as a result of his knowing the conditions under which he is working, be charged with the legal consequences of an assumption of the risks, or of contributory negligence. In one point of view it may be said that the object of imparting information to the servant is to put him on the same

servant of facts within his knowledge the rule is quite broadly laid down affecting the safety of the servant in the that, if persons engaged in danger-service to be performed, when the lat- ous occupations are not informed of the ter is ignorant of such facts. McGowan accompanying dangers by the promoters v. La Plata Min. & Smelting Co. (1882) thereof, or by the employers of laborers 3 McCrary, 393, 9 Fed. 861. A master thereon, and such laborers remain in igformation as is necessary to enable him consequence, the employers will also be to provide for his own safety does so chargeable for the injuries sustained. at his own peril. George H. Hammond

the particular dangers of his employment, though he does not seek it. Galveston, II. & S. A. R. Co. v. Hughes (1899) 22 Tex. Civ. App. 134, 54 S. W. III. 614, 35 N. E. 162, one of these defective statements is found; but by the charge of the servant's inexperience lowing may be referred to: If the master knows of danger which the servant In Mather v. Rillston (1895) 156 U. S. does not, it is clearly the duty of the master to communicate his knowledge the ignorance of the plaintiff was estabol the danger to the servant. Griftles v. London & St. K. Docks Co. (1884) L. R. 12 Q. B. Div. 495. A workman must know the dangers of his employment by actual experience in the the jarring of machinery or from the ployment by actual experience in the the jarring of machinery or from the employment, or by the instructions of overheating of a room is one which the his employer, before he can be held to employer is bound to know not to be have assumed them. Rummel v. Dil- within the comprehension of a man worth (1890) 131 Pa. 509, 19 Atl. 345, hired merely to run machinery, unless 346. A master is bound to inform his he has been specially instructed. But who withholds from his servant such in- norance of the dangers and suffer in

footing as a servant who, in consequence of his possessing certain knowledge, is held to have undertaken the responsibility of protecting himself against the risks to which such knowledge relates. It would manifestly be unjust to charge the servant with an assumption of a risk which the master's own breach of duty kept him from having an opportunity to assume or escape from. The servant takes the hazard

<sup>1</sup> Northwestern Fuel Co. v. Danielson a 'servant generally assumes only those (1893) 6 C. C. A. 636, 12 U. S. App. risks of which he has expressed or im688, 57 Fed. 915. A similar conception is apparent in the following statements: that notice of them will be presumed. Where an employee engages in work where an employee engages in work it, and if he is not acquainted with the explained to him, that he may, so far tas is consistent with a proper performance of it, avoid them. In such case he is not presumed to know whether his employer has furnished appliances which are reasonably safe and in ordinary use, and he is not chargeable with an assumption of the risks involved in the perior is bound to know whatever may failure to provide them." Bannon v. [1893] 158 Pa. 166, 27 Atl. 890. Ployee in the discharge of the duties of "He [the servant] does not assume latis employment, of which he has expressed or implications in the proper person of the employer is not presumed. Where there are special risks in an employment, of which the employment, of which the employment, of which the employer to notify him of such risks, and on failure of such notice, if he is hurt by exposure to such risks, he is entitled to recover from the employer." United States Rolling Stock Co. v. Wilder solves Rolling Stock Co. v. Wilder and the is not chargeable with an assumption of the risks involved in the perior is bound to know whatever may endanger the person or life of an emLutz (1893) 158 Pa. 166, 27 Atl. 890. Ployee in the discharge of the duties of "He [the servant] does not assume laties the very large statements:

The truth of the miss are so obvious that notice of them will be presumed. Where there are special risks are so obvious that notice of them will be presumed. Where there are special risks are so obvious that notice of them will be presumed. Where there are special risks in an employment, of which the employee is not, it is the duty of the employee in the employer. To notify him of such risks, and on failure of such notice, States Rolling Stock Co. v. Wilder of the miss and presumed.

The tre (1893) 6 C. C. A. 636, 12 U. S. App. risks of which he has expressed or imone of his capacity and experience would not have known by the use of ordinary care. It is the duty of the master to orleans R. Co. (1898) 50 La. Ann. 188, notify the servant of such dangers."

Bohn Mfg. Co. v. Erickson (1893) 5 C.
C. A. 341, 12 U. S. App. 260, 55 Fed. ice, and of such dangers as are obvious 943. The question, indeed, on this branch of the case, is not of due care on the part of the plaintiff, but whether the cause of the injury was one of which he sonable care, he might know, beforeknowingly assumed the risk, or one of which, by reason of his incapacity to understand and appreciate its dangerous character, or the neglect of the defendants to take due precautions to effectually inform him thereof, the defendants were bound to indemnify him against the consequences." Coombs v. New Bedford Cordage Co. (1869) 102 Mass. 572, 3 Am. Rep. 506. The rule that the master is not required to inform his the servant of dangers which are absoluted in the convention of the capacity which he is exposed by reason of his emission to dangers which are absoluted in the capacity is held to the larger of the hazard or risk, and willingly exposes himself to it. Stucke v. Orleans R. Co. (1898) 50 La. Ann. 188, 23 So. 342. The rule that the employee implies as a sum of such dangers sa are obvious and open to ordinary observation, does not embrace such risks as the employee knows, or which, by the exercise of reasonable care, he might know, beforeknowingly assumed the risk of the servant of, or such as the employee, without experience, cannot appreciate or avoid without instruction or warning. Louisville, N. A. Were bound to indemnify him against & C. R. Co. v. Frawley (1886) 110 Ind. the servant to understand the perils to which he is exposed by reason of his emission of his employment. A servent is held to the larger of the heat of the cape. one of his capacity and experience would existence of the hazard or risk, and willservant of dangers pertaining to his du-ties "is true as to dangers which are ob-vious, and which the servant would nec-the risk of such dangers as are known essarily see. . . . It is also true of and understood. Ciriack v. Merchants' the ordinary dangers pertaining to a Woolen Co. (1888) 146 Mass. 182, 15 N. particular service, and which all persons E. 579. The master's duty to provide who engage in it are presumed to know. a suitable place for work may be modi-But the statement is far from being fied by a sufficient warning of danger, universally true. The true rule on this so that, after it, an employee will be subject is well stated in Wharton on held to assume the risks of which he Negligence, § 206. It is there said that knows and to which his attention has

of the employment. But if the employer creates, without notice to the employee, some new and unusual conditions involving an unexpected or unanticipated danger, and the servant, while using proper care and diligence, meets with an accident as a result of the changed conditions, it is only reasonable that he should be indemnified.2 "The employer in such a case is in this dilemma: Either it was reasonably practicable for him to use appliances by which the accident would have been avoided,—in which case he should have done so; or, if it was not, sufficient warning should have been given to those endangered to enable them to escape the danger."3

The evidential correlation between the duty of instruction and the defenses based on the servant's knowledge of the risk is so intimate that, in many of the reported cases, it seems to have been a mere matter of accident that they were tried on the theory of a breach of the duty, rather than on the theory that the defenses were available. Ordinarily it makes no difference which of these theories is relied upon, but to this rule there are some exceptions.

In the first place, a servant who seeks to recover damages under a

been directed. Honlahan v. New Amerated that a servant upon entering the ican File Co. (1890) 17 R. I. 141, 20 employment received from the master a Atl. 268. In Rumnel v. Dilworth specific promise that instructions would (1890) 131 Pa. 520, 19 Atl. 345, 346, be given is sufficient to negative the inthe defendant's counsel had questioned ference of an assumption of the risk. the correctness of the following passage McCormick Harvesting Mach. Co. v. from the opinion on the former appeal Burandt (1891) 136 Ill. 170, 26 N. E. of the case (1886) 111 Pa. 343, 2 Atl. 588.

355: "The plaintiff cannot be supposed 20'Neil v. St. Louis, I. M. & S. R. Co. or assumed to have accepted in advance a peril which he could not estimate, and the extent of which, for lack of experience, he could not have known." The court explained its meaning: "It was

(1881) 3 McCrary, 423.

<sup>8</sup> Smith v. Baker [1891] 8 A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392. "If the master knew, or under the cirnot meant to assert that the dangerous cumstances ought to have known, that a not meant to assert that the dangerous cumstances ought to have known, that a character of a piece of machinery, a machine in use was out of repair and bridge, or an effort to cross a railroad dangerous, it was his duty to see that track in front of a moving train, should it was put in proper repair, or to warn be determined by the result of an expertinent in each case, but that a workman ignorant of it." Rice v. King Philip must know the dangers of his employment of it. Wills (1887) 144 Mass. 229, 59 Am. ment by actual experience in the employment, or by the instructions of his employment, or by the instructions of his emission of the courts have recognized as implies a conception of the existence of ployer, before he can be held to have assimilar conception of the existence of sumed them. In other words, it is not two alternative duties, one or other of just to the employee to hold him to have which the master is bound to discharge, just to the employee to hold him to have which the master is bound to discharge, assumed dangers of which he has no see—Vaughan v. Cork & Y. R. Co. knowledge by experience in the business, (1860) 12 Ir. C. L. Rep. 297; George or by the warning and instruction of his II. Hammond & Co. v. Schweitzer employer. Such risks cannot be estimated, because they are not known to Louisville, N. A. & C. R. Co. v. exist, or because their real character and Bates (1897) 146 Ind. 564, 45 N. E. extent can only be known by familiarity 108; Louisville & N. R. Co. v. Binion with the business, or information from (1894) 107 Ala. 645, 18 So. 75; Alton one who has such familiarity." The Lime & Cement Co. v. Calvey (1893) 47 complaint of which the gravamen is a breach of the duty to communicate certain facts will often place himself in a less advantageous position than if he had relied generally upon the existence of the conditions indicated by these facts as charging the master with a want of care in the furnishing or maintenance of the instrumentalities. Manifestly, the breach of a duty to instruct is at once negatived by proof of the servant's knowledge, actual or constructive, of the risk; while if the master has elected to rely upon the defense of contributory negligence, such proof will not necessarily and under all circumstances preclude the servant from recovering in the action.

In the second place it is to be observed that proof of the nonperformance of the duty of instruction may sometimes cut short the case, in the servant's favor, at a stage which will preclude the master from relying on the defense of common employment, which involves an irrebuttable presumption as to the acceptance of a risk. (See chapters xxvi., xxvii., post.) Such a case arises where the injury was caused by the negligence of a coservant, but the plaintiff was in an unfamiliar environment, where he did not understand the character of the risks to which he would be exposed by such negligence.4

243. Relation of the duty of instruction to the duty of employing competent servants.— In most cases the injury which is inflicted by breach of the duty to instruct was received by the servant who ought to have been instructed. But it is clear that, if the injury was due to the fact that a fellow servant was not fit for his position, owing to the want of proper instruction, the master may be held responsible.<sup>1</sup> See chapter XIII., ante. On the other hand, a servant cannot maintain an action for an injury caused by the negligence of a coemployee who has received sufficient instruction to qualify him for his duties.2

## B. Duty of instruction considered with reference to the ex-PERIENCE OR INEXPERIENCE OF THE SERVANT.

# 244. Generally.— In many cases the only question to be considered

Ill. App. 343; Denver, T. & Ft. IV. R.
Co. v. Smock (1897) 23 Colo. 456, 48
Pac. 681; Carlson v. Oregon Short Line
& U. N. R. Co. (1892) 21 Or. 450, 28
Pac. 497.

'See Stucke v. Orleans R. Co. (1898)
50 La. Ann. 188, 23 So. 342, where a servant ordered on the spur of the monnent to repair a car was injured by another which ran through an open switch.

'Recovery has been allowed where a servant was injured by the unskilful jured while he was leaning against a

is the existence or nonexistence of culpability, as determined with reference to the broad principle that a legal obligation to instruct a servant respecting a danger is predicable or not according as a man of full age and ordinary intelligence, in the exercise of ordinary care, was or was not capable of seeing and comprehending it. But it frequently happens that the evidence indicates either that the servant was not a person of the normal capacity contemplated by this principle, or that the risk to be encountered was of such a nature that even the possession of a normal capacity would not enable him to appreciate it without special training for, or a practical acquaintance with, the work to which it was incident. The presence of one or both of these elements will frequently render it impossible to say, as a matter of law, that the duty of instruction was not owed to the servant, when, if they were abstracted from the case, the plaintiff would not be allowed to retain a verdict in his favor rendered on the theory that such a duty existed. The qualifying effect of these elements, when considered with reference to the general principle adverted to above, is indicated by the statement that the duty of instruction "does not extend to dangers open to ordinary observation, except in cases of youth, inexperience, ignorance, or want of capacity of the servant."2 The same elements, when considered as giving rise to a positive obligation, suggest such language as that used in the following extract from a Massachusetts decision:

"Where an employer knows the danger to which his servant will be exposed in the performance of any labor to which he assigns him, and does not give him sufficient and reasonable notice thereof, its dangers not being obvious, and the servant, without negligence on his own part, through inexperience, or through reliance on the directions given, fails to perceive or understand the risk, and is injured, the employer is responsible. The dangers of a particular position or mode of doing work are often apparent to a person of capacity or knowledge of the subject, while others, from youth, inexperience, or want of capacity, may fail to appreciate them; and a servant, even with his own consent, is not to be exposed to such dangers, unless with instruc-

beam of the elevator tying his shoe, in of the statement in the text, see John-consequence of the sudden starting of son v. Ashland Water Co. (1890) 77 the car by a new employee whom he had previously instructed as to the manner nia Car Co. (1894) 68 N. H. 196, 38 of starting and stopping the elevator. Atl. 1047. See, generally, cases cited in Sullivan v. Lally (1896) 166 Mass. 265, \$ 394, post.

44 N. E. 221.

<sup>1</sup> For examples of language suggestive N. H. 196, 38 Atl. 1047.

tions and cautions sufficient to enable him to comprehend them, and to do his work safely with proper care on his own part."3

Immature age is apt to be accompanied by inexperience, and these two factors often appear in the same case; but as they involve distinct conceptions, it will be necessary to consider them separately.

245. Servant's experience; deductions from.—(See also § 250, infra.) —An obvious corollary of the general principle stated in § 238, supra, is that a master is not bound to give instructions to a servant who has acquired sufficient special knowledge to enable him to appreciate the perils of the employment which he has undertaken. Such knowledge may be the product either of a technical education, or of actual participation in practical work; but, for reasons which are obvious, it is usually derived from the latter source by those subordinate servants who constitute the majority of the sufferers in employers' liability cases. In this point of view, therefore, the investigation is almost invariably concerned with the question whether the period during which the injured person had been engaged in duties similar to those which he was discharging at the time of the accident was of such a length that he ought to have comprehended the risks to which he was exposed. How long a period must have thus elapsed before this obligatory comprehension will be attributed to him, as a matter of law, depends upon the nature of the employment and the other circumstances involved. Where the appliance which caused the injury was a simple one, and the phenomena indicative of danger are readily intelligible, it will be presumed that the very briefest acquaintance with the conditions should have conveyed the necessary information to the servant. But in the case of most industrial occupations, that information, and the capacity for self-protection which accompanies it, can

<sup>3</sup> Leary v. Boston & A. R. Co. (1885) rience in the use of the tools or machin-139 Mass. 580, 52 Am. Rep. 733, 2 N. E. ery they are to handle, it is his duty to 115. See also the following passages: see that they are instructed in these parto enable him to comprehend them, and Woolen Co. (1890) 151 Mass. 152, 6 L. to do his work safely, with proper care R. A. 733, 23 N. E. 829; Consolidated on his own part. Sullivan v. India Mfg. Coal Co. v. Haenni (1893) 146 Ill. 614, Co. (1873) 113 Mass. 396. "If they 35 N. E. 162, Affirming (1891) 48 Ill. [employees] are young, or without expe-

115. See also the following passages: see that they are instructed in these par-"It may frequently happen that the dan-ticulars and warned of such dangers as gers of a particular position for, or mode are peculiar to the use and care of the gers of a particular position for, or mode are peculiar to the use and care of the of doing, work, are great, and apparent machinery with which their labor brings to persons of capacity and knowledge of them into contact." Ross v. Walker the subject, and yet a party, from (1891) 139 Pa. 48, 21 Atl. 157, 159. youth, inexperience, ignorance, or genciate them. It would be a breach of phraseology is found in Hughes v. Chiduty on the part of a master to expose cago, M. & St. P. R. Co. (1891) 79 Wis. a servant of this character, even with 264, 48 N. W. 259; Rooney v. Sewall & bis own consent to such dangers unless D. Cordane Co. (1894) 161 Mass. 153. his own consent, to such dangers, unless D. Cordage Co. (1894) 161 Mass. 153, with instructions or cautions sufficient 36 N. E. 789; Ciriack v. Merchants'

be acquired only by a more or less protracted experience in the daily routine of the business; and this fact receives due recognition when the existence or absence of the duty of instruction is being determined. As a general rule, it may be said that, if the case was one in which some experience at all events was requisite to enable the servant to understand the danger which caused the injury, a court will very seldom deem itself warranted in declaring the action not to be maintainable, where it appears that the servant had been engaged upon the work in question only for a few days before the accident. The particular circumstances under which a servant's right of recovery has been affirmed or denied on the ground of his experience or lack of experience are indicated by the cases cited in §§ 394-397, post.

246. Servant's inexperience; deductions from.— (See also § 238, supra.)—The mere fact that a servant was inexperienced does not entitle him to recover on the ground that he ought to have been instructed as to the dangers of his work.<sup>1</sup> But it is well settled that a case in which an inexperienced servant is required to use a dangerous instrumentality stands on a different footing from one in which the same instrumentality is handled by a practised and skilful workman.<sup>2</sup> One deduction drawn from the difference thus recognized is that a complaint is not subject to demurrer if the substance of the averments is that the instrumentality that caused the injury was a dangerous one, and that the injured servant was inexperienced and had received no instruction as to its dangerous quality.<sup>3</sup> Another is that the master cannot be pronounced, as a matter of law, free from negli-

<sup>2</sup>Wheeler v. Wason Mfg. Co. (1883) <sup>8</sup> Greenberg v. Whitcomb Lumber Co. 135 Mass. 294. "If the business is one (1895) 90 Wis. 225, 28 L. R. A. 439, 63 with which he (the servant) is not fa-N. W. 93 (saw alleged to be defectively miliar, he has a right to expect that its and insecurely fastened to its shaft). dangers will be pointed out to him, and A complaint is not demurrable which althat he will be instructed in those leges that the servant-a common laborthat he will be instructed in those leges that the servant—a common laborations necessary for him to know in order to his own safety." Rummel v. Dilto to the dangers incident to wiping the worth (1890) 131 Pa. 519, 19 Atl. 345, water from a moving belt with a gunny 346. A master who has knowledge of sack. Norfolk Beet-Sugar Co. v. Hight the risks and dangers, not discernible, (1898) 56 Neb. 162, 76 N. W. 566. which are incident to the work to be

A charge is erroneous which in effect performed by a servant of whose inexdeclares that, given an uninstructed, inperienced employee, not comprehending the danger, but using ordinary care, and an injury to such an employee on the latter's part, on the ground that caused by that danger, a recovery must the servant failed to exercise the same follow; for, under such an instruction, degree of skill to avoid injury as the the employee would be able to recover more experienced workmen, where no ineven though the danger was one which formation as to the precautions and care he ought to have appreciated. Craven necessary for him to take was given. v. Smith (1894) 89 Wis. 119, 61 N. W. Anderson v. Daly Min. Co. (1897) 15 17.

\*\*Chapter of the Co. (1898) 15 Ctah, 22, 49 Pac. 126.

gence, where the testimony fairly warrants the inference that the work in question was abnormally dangerous to an inexperienced employee, and that he had received no instructions as to the particular perils to be avoided and the proper means of avoiding them.4 The essential import of this rule, in a purely logical point of view, is, manifestly, that the plaintiff is allowed to recover, on the ground of inexperience, in many states of the evidence which, if this element were absent, would be deemed to negative the existence of any obligation to instruct, for the reason that the servant would be conclusively presumed to have understood the dangers involved. Under such circumstances the fact that the person injured was of mature years is not decisive, but is merely a matter for the careful consideration of the jury in determining whether he fully understood and appreciated the dangers of his position.5

As the decisions in which it has been held warrantable for a jury to find that the servant ought to have been instructed because he was inexperienced, and the decisions in which it has been denied, for the same reason, that the action was barred by one or other of the defenses based upon the imputed knowledge of the injured person, are based upon grounds which are essentially identical, it has been deemed inadvisable to separate these two classes of cases. They are accordingly tabulated together in the chapter in which the servant's constructive knowledge of various risks is discussed at length. See § 394,

The rule which thus defines the respective provinces of the court and the jury in cases where the inexperience of the servant is a factor is deemed to be subject to two exceptions. In the first place, it is plain that the inexperience of the servant ceases to be material if the evidence shows directly and conclusively that he fully understood the danger in question.6 Secondly, it is held that if the danger

410, 27 Pac. 306.

\*It has been laid down that where a servant testifies that he had no experience in the management of the machine by which he was injured, and received no instruction or warning as to the dangers incident to its use, it will not be gers incident to its use, it will not be fault on the part of the defendant, held, as a matter of law, that he appreciated those dangers. Thompson v. Edward P. Allis Co. (1895) 89 Wis. 523, supreme court declared to be inapplicable under the circumstances, saying:

\*\*Interval a mong others:
That he, being immature and inexperienced, was sent by defendant into danger the full extent of which he did not comprehend, and that this was culpable fault on the part of the defendant, which should render it liable for all injurious consequences. This theory the supreme court declared to be inapplicable under the circumstances, saying: ble under the circumstances, saying:

Ingerman v. Moore (1891) 90 Cal. "The first ground was shown to be untenable by the plaintiff's own evidence."

In McGinnis v. Canada Southern <sup>6</sup> In McGinnis v. Canada Southern He was past twenty years of age, was Bridge Co. (1882) 49 Mich. 466, 13 N. not shown to be wanting in average in W. 819, where the plaintiff was injured telligence of those of his age, and his duby an unblocked frog, he attempted to ties were explained to him when he en-

is one which comes under the description of "obvious," "apparent," "manifest," etc., instruction is not obligatory merely because the work is new to the servant. This doctrine, that culpability cannot be predicated of the omission to instruct an inexperienced employee as to a danger observable by anyone of ordinary intelligence, has sometimes been referred to the consideration that the servant, knowing there was such a danger, may be expected to proceed with great caution until he becomes familiar by experience with the forces with which he has to deal.8 But such a conception, even if it be conceded to rest on a sound basis of logic and fact,—which is by no means clear,—seems to be quite supererogatory in this connection.

### C. Duty of instruction considered with reference to the SERVANT'S MINORITY.

247. Generally.—The considerations which actually determine the nature and extent of the obligation to instruct a minor are sufficiently obvious. When a master takes such a person into his service, he is bound to take notice of the probability that both the natural and the acquired capacity of the employee for appreciating the dangers of the work and the proper means of avoiding them will be smaller than in the case of an adult.1

(1895) 163 Mass. 391, 40 N. E. 180.

<sup>1</sup> In some formal statements of the duty of instructing minors, both these half, it is the duty of the employer to elements of an inferiority of intelligence so instruct such employees concerning and a more limited experience are ex- the dangers connected with their empressly adverted to. "If the youth, in- ployment, which from their youth and that he is not aware of, or does not appreciate, the ordinary risks of his employment, it is his duty to notify him (1889) 46 Ohio St. 283, 3 L. R. A. 385, of them, and instruct him how to avoid 20 N. E. 466. There exception was takthem." Bohn Mfg. Co. v. Erickson en by the defendant to the following in-

tered upon the employment. He, be- (1893) 5 C. C. A. 341, 12 U. S. App. sides, understood the very danger into 260, 55 Fed. 943. "It may be safely which he fell, and had in mind the purlaid down as a general rule, supported pose to avoid it. It was thus made to by authority, that persons who employ appear by his own examination that he children to work with or about dangerwas not sent into unknown dangers, and ous machinery, or in dangerous places, that he was not exposed to risks which should anticipate that they will exercise that he was not exposed to lisks which should anticipate that they will exercise the, through immaturity, or for any only such judgment, discretion, and care other reason, failed to comprehend." as are usual among children of the same "Newbury v. Getchel & M. Lumber & age, under similar circumstances, and Mfg. Co. (1896) 100 Iowa, 441, 69 N. are bound to use due care, having re-W. 743. See, generally, cases cited in § gard to their age and inexperience, to protect them from the dangers incident s Stuart v. West End Street R. Co. to the situation in which they are placed; and as a reasonable precaution, in the exercise of such care in that beexperience, and incapacity of a minor inexperience they may not appreciate or who is employed in a hazardous occupa- comprehend, that they may, by the exertion are such that a master of ordinary cise of such care as ought reasonably to intelligence and prudence would know be expected of them, guard against and

In view of this probability, it is clearly not an unreasonable inference that the master fails to fulfil the duty incumbent on him as a prudent man, if he allows the servant to commence the performance of his contract without examining into his actual qualifications. this examination discloses, or would, if made with reasonable care, have disclosed, the fact that the servant did not comprehend the risks

which he did not know to be likely to in- E. 401; Steiler v. Hart (1887) 65 Mich. jure him, and he had not been properly 644, 32 N. W. 875. advised and instructed in regard there. A jury may properly be instructed to," he cannot recover. But the su-that they may "consider the appearance advised and instructed in regard thereto his injury, was likely to injure him, Henry Luther Co. (1895) 90 Wis. 635, and that this want of knowledge was 64 N. W. 425. owing to his age and lack of judgment conclusion, that such employee, who has App.) 59 S. W. 593. not been so instructed, and who, while stands it, suffers an injury in conse-eral language, see § 244, supraquence of the employer's negligence, In other cases the probable to the judgment and knowledge he possessed, which contributed to the injury, but which he did not know and was not advised would be likely to injure him."

said to be particularly incumbent on a (1877) 56 Ind. 511. "If, however, the master who "employs, for a hazardous servant, by reason of his youth and inand dangerous work, a child, young per-experience, is not aware of or does not son, or other person without experience appreciate the danger incident to the and of immature judgment." Pitts- work he is employed to do, or to the burgh, C. & St. L. R. Co. v. Adams place he is engaged to occupy, he does (1886) 105 Ind. 165, 5 N. E. 187. See not assume the risks of his employment

struction: If the plaintiff was injured also Jones v. Florence Min. Co. (1886) in consequence of the defendant's negli- 66 Wis. 268, 57 Am. Rep. 269, 28 N. W. gence, and he, "by reason of his youth 207. In other cases, stress is laid on and want of judgment as to the perils of more limited natural capacity of young his position, did some act in the dis-servants for appreciating the perils of charge of his duty, as he understood it, their environment. Rock v. Indian Orwhich also contributed to his injury, but chard Mills (1886) 142 Mass. 522. 8 N.

preme court said: "The instruction of the plaintiff [a minor employee] as negatives any inference of negligence; he has been exhibited before them on the for, according to it, to enable the plain- witness stand, in determining the questiff to recover, it was necessary for the tion of his intelligence and capacity to jury to find that he did not know that apprehend and avoid the dangers incithe act which he did, that contributed dent to his employment." Disotell v.

The testimony of witnesses in an acand the failure of the defendant to proption by a minor employee against a erly instruct him, and that the act so railroad company for injuries, in speakdone by him was in the discharge of his ing of him as a boy, taken in connection duty as he understood it. If . . . with a youthful appearance, is sufficient it is the duty of persons employing chilto show that the company knew that he dren in dangerous situations, to proper- was a minor at the time he was emly instruct them concerning the dangers ployed, and hence was negligent in failwhich on account of their youth and in- ing to instruct him as to the dangers of experience they may not understand, it the employment. Texarkana & Ft. S. would seem to follow, as a necessary R. Co. v. Preacher (1900; Tex. Civ.

For other cases in which the duty of in the discharge of his duty as he under- instructing minors is enumerated in gen-

In other cases the probable inexpemay maintain an action against his em- rience of such servants is the circumployer therefor, notwithstanding that, stance to which attention is chiefly di-by reason of his youth and inexperience, rected. Youth is an evidence of inex-and the failure of the employer to prop-erly instruct him, he did some act, in application of the rule as to the necesthe performance of his duty according sity of instruction should be required in the employment of minors than in the employment of servants of mature years, even when employed by and with lvised would be likely to injure him." the consent of the parent or guartin. The duty to disclose latent dangers is St. Louis & S. E. R. Co. v. Valirius id to be particularly incumbent on a (1877) 56 Ind. 511. "If, however, the to which he would be exposed, the obligation to enlighten him at once arises, as a result of the general principle adverted to in § 235, supra.<sup>2</sup>

In a Wisconsin case it was considered that of the various reasons assigned by the courts for imposing on the master the duty of instructing a minor servant the most satisfactory were these:

"(1) That the master owes a duty towards an employee who is directed to perform a hazardous and dangerous work, or to perform his work in a dangerous place, when the employee, from want of age, experience, or general capacity, does not comprehend the dangers, to point out to him the dangers incident to the employment, and thus enable him to comprehend, and so avoid them, and that neglect to discharge such duty is gross negligence on the part of the employer; (2) that such an employee does not assume the risk of the dangers incident to such hazardous employment, because he does not comprehend them, and the law will not, therefore, presume that he contracted

until the master apprises him of the Ann. 717, 44 L. R. A. 33, 23 So. 469; until the master apprises him of the Ann. 717, 44 L. R. A. 33, 23 So. 409; dangers. It would be a breach of duty Whitelaw v. Memphis & C. R. Co. on the part of the master to expose a (1886) 16 Lea, 391, 1 S. W. 37; Meservant of this character, even with his Carty v. Davidson Mfg. Co. (1899) consent, to such dangers, without first giving him such instructions and caution as would, in the judgment of men of ordinary minds, understanding, and prudence, be sufficient to enable him to ception, and lay it down that a master appreciate the dangers and the necessis liable to an infant who has been inproper care on his part. Emma Cotton count of his youth and want of expeSeed Oil Co. v. Hale (1892) 56 Ark. 232, rience, he did not fully understand and
19 S. W. 600. "When a master engages appreciate. See, for example, Omaha
an inexperienced servant, especially if Bottling Co. v. Theiler (1899) 59 Neb.
of tender years and presumed ignorance, 257, 80 N. W. 821. and places him in a place of latent or In Connors v. Grilley (1892) 155 obscure danger, it is the duty of the Mass. 575, 30 N. E. 218, a girl seventcen is liable for injuries occasioned by fail-

appreciate the dangers and the neces- is liable to an infant who has been in-sity for the exercise of due care and jured in his service in consequence of caution, and to do the work safely, with being exposed to a danger which, on ac-

master to instruct the servant how to do years old was set to work in the afterthe work, and at the same time to be on noon by her employer, without instruchis guard against the danger;" and he tions, on a machine for skiving leather, is liable for injuries occasioned by failure to give such instructions. Thall v. operator had done. It was not unusual Carnie (1889) 1 Silv. Sup. Ct. 401, 5 for the machine to be stopped by the N. Y. Supp. 244, cited with approval in leather catching in it, and the rule was New Albany Forge & Rolling Mill v. that a workman should then be called. Cooper (1892) 131 Ind. 363, 30 N. E. She called this workman the next day, 294. Compare the language used in and he relieved the machine. A few Glover v. Dwight Mfg. Co. (1888) 148 minutes later she called him again, and, Mass. 22, 18 N. E. 597; Northern P. R. upon his relieving the machine, he swore Co. v. Blake (1894) 11 C. C. A. 93, 27 at her in her employer's hearing, and U. S. App. 190, 63 Fed. 45; Hayes v. told her, "If this machine gets stuck Colchester Mills (1894) 69 Vt. 1, 37 again, fix it yourself." She was going Ati. 269; Dowling v. Allen (1881) 74 to ask a few questions of her employer, Mo. 13, 41 Am. Rep. 298 (1890) 102 Mo. but he shook his head and hands, and 213, 14 S. W. 751; Levy v. Clark refused to listen, saying, "No, no, no, if (1899) 90 Md. 146, 44 Atl. 990; James you do not work fast, I will send you v. Rapides Lumber Co. (1898) 50 La. home." This frightened her and she and she undertook to run it as another

to assume them." These reasons do not go to the root of the matter; but, taking them for what they are worth, it would be more correct to say that the second of these reasons merely states the legal result of the first. The proper standpoint, as already indicated, is rather that which permits us to view the more extended duty of instruction which is predicated in regard to minors as a special application of the general principle that the degree of care which is obligatory upon a person who owes a duty to another varies with the circumstances to be provided for. A servant who possesses less than the average amount of intelligence is clearly more likely to be injured, in any given case, than one whose intelligence comes up to that standard. That the intelligence of a minor usually fails to come up to this standard is, as has been pointed out, a fact of which the master is bound to take notice. The knowledge thus imputed may properly be deemed a sufficient warning to him that a minor servant will be exposed to greater danger than an adult, unless he takes some additional precautions with a view to diminishing the risks of injury. Clearly, the additional precaution which is most readily suggested by the situation is that the presumably inadequate and defective information of the young servant should be supplemented by imparting to him that amount of knowledge which will, as respects the work to be done, place him in the same position as a servant of mature years. Or, to put the same thought in a somewhat different form, it may be said that the essential basis of the rule is that the master is not justified in exposing a servant to any extraordinary risks, and that a servant who cannot, by the exercise of his own unaided intelligence, comprehend the dangers incident to his environment, must necessarily be exposed to such risks, relatively to servants who are capable of comprehending the same dangers. That the duty of instructing minors is really referable to this consideration is strongly indicated by the language used in the earliest cases in which the liability of a master to servants of tender years was discussed. The significance of these cases in the present connection is due to the fact that, when they were decided, the theory that there was a positive duty of instruction had not found a footing in the courts.4

as she had seen the others do, and was injured. In an action against the eminth exercise of due care, were proper ployer for such injuries, the evidence ly submitted to the jury.

\*\*The defendant was negligible in this set in the exercise of due care, were proper was that she was a very dull girl, and a solution of the defendant was negligible in this set in the exercise of due care, were proper was that she was a very dull girl, and a solution of the defendant was negligible in this set in the exercise of due care, were proper was that she was a very dull girl, and a solution of the defendant was negligible in this set in the exercise of due care, were proper was that she was a very dull girl, and a solution of the defendant was negligible in this set in the defendant was negligible in this set in the defendant was negligible in this set in the defendant was negligible the other girls; and she was cross-ex- 207. amined at great length before the jury. \*In Bartonshill Coal Co. v. McGuire

worked faster, and when the machine It was held that the questions whether was stuck again she tried to relieve it, the defendant was negligent in thus set-

was slow in her work as compared with 66 Wis. 268, 57 Am. Rep. 269, 26 N. W.

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The prerequisites to the establishment of a prima facie liability on the master's part are the same whether the action is brought by the minor himself or by the minor's father.<sup>5</sup>

248. No duty to instruct minors as to risks which they presumably comprehend .- The rule actually applied by the courts is merely this: The master is liable for failure to instruct a minor, "unless both the danger and the means of avoiding it are apparent and within the comprehension of the servant."1

Ordinarily it is within the function of the jury to say whether a minor servant comprehended a work in such a sense as to absolve the employer from the obligation to instruct him. It is only when the proper inference from the testimony is so clear as to be free from doubt that it becomes a matter of law for the court.<sup>2</sup> But unquestionably the situations in which the inference of a breach of that obliga-

(1858) 3 Macq. H. L. Cas. 311, the tion of the order without apprehension Lord Chancellor, referring to the of danger, owing to his having relied, as Scotch case of O'Byrne v. Burn (1854) he was justified in doing, on the judg-16 Sc. Sess. Cas. 2d Series, 1025, where ment of his superior. a young girl was injured while attemptcontracted to keep her out of harm's S. W. 80. way in assigning to her any work to be performed." Compare also the followans (1886) 105 Ind. 165, 5 N. E. 187. ing Scotch cases founded on the increase of obligations which the minority of a servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment, see Coffee v. Phillips (1897) 21 servant entails upon the master. Gemment entails upon the Cas. 2d Series, 425; M'Millan v. M'Mil-Darby v. Duncan (1861) 23 Sc. Sess. dence as to whether a minor has received cas. 2d Series, 529. The same conclusion may be drawn from the remark ence or in any other way, acquired a made, arguendo, in Union P. R. Co. v. knowledge of the danger incident to the Fort (1873) 17 Wall. 553, 21 L. ed. 739, appliances he is handling. Tagg v. Mcthat the plaintiff being a mere youth, without experience, and not familiar with machinery, could not be expected to know the peril of the new work which he was ordered to do, and might be supposed to have entered upon the execuposed to have entered upon the execu-

<sup>5</sup> A complaint in an action by the miing, in obedience to an order of the denor's father must show one of three fendant's foreman, to remove some waste things: (1) That the child was too clay from the moving rollers in a clay-young to be put to the service he was mill, said: "It was hardly possible to apply the principle of the servant have he nor the plaintiff had notice or knowling undertaken the service with a knowl- edge of the augmented danger caused by edge of the risks incident to it. She the master's neglect; or (3) that the edge of the risks incident to it. She the master's neglect; or (3) that the was an inexperienced girl employed in a master, knowing the age and inexperihazardous manufactory, placed under ence of the child, neglected to give him the control, and, it may be added, the the necessary warning and instruction. protection of an overseer, who was appointed by the defendant and intrusted life in the statement of the master's obligations did not be the statement of the master's obligations did not be statement of the master's obligations and interest shift the master force (1807) 16 Tear City App. 68, 41. helpless and ignorant child, the master Evans (1897) 16 Tex. Civ. App. 68, 41

(1895) 90 Wis. 178, 63 N. W. 87. The lan, 23 Sc. Sess. Cas. 2d Series, 1082; finding of the jury is of course conclu-Trull v. Smith (1873) 11 Macph. 888; sive, whenever there is a conflict of evi-Darby v. Duncan (1861) 23 Sc. Sess. dence as to whether a minor has received

tion would be deemed unwarrantable in the case of a minor servant are much less numerous than those in which a similar inference would be regarded as improper if recovery was sought solely upon the ground of the servant's inexperience. The precise extent of this enlargement of the master's responsibility virtually depends, in the last analysis, upon a court's opinion as to justifiability of allowing the jury to determine the question of the servant's constructive knowledge of the given risk. As might be expected, the result of referring the existence or nonexistence of the duty of instruction to this extremely nebulous standard has been the rendition of not a few antagonistic judgments in respect to essentially similar facts. See, generally, § 399, note 1, post.

In some cases the doctrine seems to be affirmed that whenever the work assigned to a young servant is in its nature hazardous an absolute duty immediately arises to give him such instructions as will enable him to comprehend the perils which it involves.3 The differentiating test thus suggested is manifestly inconsistent with the general principle stated in § 238, supra, which indicates that, from a logical standpoint, the comparative safety or unusually hazardous nature of the work is a wholly immaterial element, and that, in cases where a breach of the duty to instruct is relied upon as the ground of action, the only essential question is whether the injured person appreciated, or ought to have appreciated, the risk to which his injury was traceable. That principle involves the corollary that, with respect to risks which a young and inexperienced employee is competent to appreciate, he stands upon the same footing as an experienced adult.4

\*Smith v. Irwin (1889) 51 N. J. L. born v. Atchison, T. & S. F. R. Co. 507, 18 Atl. 852, approving of a charge (1886) 35 Kan. 292, 10 Pac. 860; Levey to that effect. Compare the language v. Bigelow (1893) 6 Ind. App. 677, 34 used in Jones v. Florence Min. Co. N. E. 128. (1886) 66 Wis. 268, 57 Am. Rep. 269, "No duty rests upon a master to notify even a minor of the ordinary risks todal v. Tecumseh Mills (1890) and dangers of his occupation, which the latter actually knows and appreciates, and the company of the company that the company of the company

151 Mass. 85, 23 N. E. 131; Goff v. Nor- latter actually knows and appreciates, folk & W. R. Co. (1888) 36 Fed. 299; or which are so open and apparent that De Graff v. New York C. & H. R. R. Co. one of his age and capacity would, un- (1879) 76 N. Y. 125; Crown v. Orr der like circumstances, by the exercise (1893) 140 N. Y. 450, 35 N. E. 648; of ordinary care, know and appreciate." Jones v. Roberts (1894) 57 Ill. App. Truntle v. North Star Woolen-Mill Co. 56; White v. Wittemann Lithographic (1894) 57 Minn. 52, 58 N. W. 832. 56; White v. Wittemann Lithographic (1894) 57 Minn. 52, 58 N. W. 832.

Co. (1892) 131 N. Y. 631, 30 N. E. 236; It has been held, under the Alabama Hayden v. Smithville Mfg. Co. (1861) employers' liability act (see Volume II., 29 Conn. 548; Herdman-Harrison Mill. chapter xxxvII.), that a boy sixteen Co. v. Spehr (1893) 145 Ill. 329, 33 N. years old, employed at work which does E. 994; Probert v. Phipps (1889) 149 not ordinarily endanger a person, who Mass. 258, 21 N. E. 370; Gilbert v. was sent by his employer to perform Guild (1887) 144 Mass. 601, 12 N. E. dangerous work which he was able and

368: Lucbke v. Berlin Mach. Works knew perfectly well how to do, and with (1894) 88 Vis. 442, 60 N, W, 711; San-the dangers of which he was acquainted,

The question whether a minor is chargeable with that complete comprehension of his environment which is sufficient to relieve the master of the duty of explaining to him the peril of the work must obviously be resolved by considering (1) the presumable extent of his intelligence and capacity, as inferable simply from his age; (2) the actual extent, observed or observable, of his individual intelligence and capacity, exceeding or falling short of the average; (3) the extent of his opportunities for ascertaining by experience the nature of the hazard incurred by him in entering and continuing in the employment. Of these three factors in the problem, the first and the third are much the most important. But the second has, though rarely, been taken into account, in connection with the others, as corroborating the conclusion that the master should or should not have instructed an infant. Possibly it may be said that a court will be more disposed to lay stress upon this factor when the evidence tends to show the possession of a measure of intelligence less than the average, and the inference will therefore be rather in the plaintiff's favor, than when it would have the effect of prejudicing him by making the superiority of his faculties a ground for ascribing to him a knowledge disabling him from maintaining an action.5

Under appropriate circumstances, presumptions as to the intelligence of a minor may be allowed to run backwards.6

See Connors v. Grilley (1892) 155 which are given in § 249, note 6, infra, Mass. 575, 30 N. E. 218, § 247, note 2, the right to maintain the action was infra. In Leistritz v. American Zylo- held to be for the jury, as there was evinite Co. (1891) 154 Mass. 382, 28 N. E. dence tending to show that the boy had the plaintiff—a boy eighteen years and sons of his age. eight months old-was above or below been properly excluded. The court ceived by a boy fourteen years old is said they did not go to the extent brought upon the theory that he was put of showing that he was manifestly in- to work in a dangerous place without or snowing that he was manifestly interpretary in a dangerous place without capable of understanding the risk without instruction, so that the defendant knew, or from his appearance ought to was examined through an interpreter, have known, that cautions and instructions were necessary. Ciriack v. Merand had to be told once or twice before chants' Woolen Co. (1890) 151 Mass. he understood, and that, if he was asked 152, 6 L. R, A, 733, 23 N, E. 829. It a question he would answer "something

may not recover for injuries caused in added that the case did not call for any received no instruction from his emshown in the case of a young child, or ployer. Worthington v. Goforth (1899) under other circumstances. It was 124 Ala. 656, 26 So. 531.

That it is immaterial, for the purposes of this rule, from what source the tiff's age, and of his long examination. cases cited in § 238, infra, some of the questions were of no material sig-which, as there noted, relate to minors. nificance. In the case cited, the facts of 294, two witnesses were asked whether less than the average intelligence of per-

<sup>6</sup> A boy who is dull at fifteen was the average intelligence of a boy of his probably dull at fourteen. Hence, age. The questions were held to have where an action for personal injuries re-

249. Instruction of minors, considered with reference to their age merely.—In Pennsylvania the position has been taken that the age when an infant shall be presumed to have the capacity for appreciating danger is for the court, not for the jury. That age has been fixed, upon the analogy of the familiar doctrine of criminal law, at fourteen years. In this state, therefore, it is always a question for the jury when a minor under that age should have been instructed.2 The employer is held not to be liable if the young person had experience from which knowledge of the danger might reasonably be presumed.3 Nor is the fact that an eniployee was young, and that a possible injury might arise from unexpected causes, without negligence established, deemed to be a sufficient ground for holding the master responsible for the injury received. An infant more than fourteen years old is presumed to have sufficient capacity to be sensible of danger and to have the power to avoid it; and this presumption will stand until overthrown by clear proof of the absence of such discretion as is usual with infants of that age.5

But the theory that, at the age of fourteen years, the stage reached in the development of the child's faculties is so definite that the burden of proving his nonappreciation of the risks of the service is shifted, is contradicted by the weight of authority, and does not seem to rest upon any adequate logical basis.6

Laplante v. Warren Cotton Mills (1896) 165 Mass. 487, 43 N. E. 294.

<sup>2</sup> See Strawbridge v. Bradford (1889) 128 Pa. 200, 18 Atl. 346; Neilson v. Hillside Coal & I. Co. (1895) 168 Pa. 256, 31 Atl. 1091. <sup>3</sup> Tagg v. McGeorge (1893) 155 Pa. 368, 26 Atl. 671, where the case was held

denied for an injury received by a boy wig v. Pillsbury (1886) 35 Minn. 256, of twelve whose person came into con- 28 N. W. 505, it was held that a boy of

else," is admissible, although the wit- tact with exposed gearing. The position nesses only knew him after the accident. taken was that, in the absence of anything to show the contrary, the boy must be assumed to have the intelligence and <sup>1</sup> Nagle v. Allegheny Valley R. Co. understanding usual with boys of that (1879) 88 Pa. 35, 32 Am. Rep. 413. age, and that this assumption involved the further one that he was well aware of the danger which caused the injury, and that no instruction could have been given him which would have imparted larger measure of knowledge than that 368, 26 Atl. 671, where the case was held with which he was chargeable. In to be for the jury, the evidence being Buckley v. Gutta Percha & Rubber Mfg. conflicting as to whether the child had Co. (1898) 113 N. Y. 540, 21 N. E. 717, been instructed, or had gained, by exit was held that a child of twelve who, perience or otherwise, knowledge of the danger.

\*Ash v. Verlenden Bros. (1893) 154 ing to put a cylinder in place, and in Pa. 246, 26 Atl. 374 (machine started from some unexplained cause while child of thirteen was cleaning it).

\*Nagle v. Alleghery, Valley, P. Co. bed, received no instruction as to the could not recover on the ground that he 'Nagle v. Allegheny Valley R. Co. had received no instruction as to the (1879) 88 Pa. 35, 32 Am. Rep. 413. danger. In White v. Wittemann Litho
'In Ciriack v. Merchants' Woolen Co. graphic Co. (1892) 131 N. Y. 631, 30 (1888) 146 Mass. 182, 15 N. E. 579; N. E. 236, it was assumed that a boy of second appeal (1890) 151 Mass. 152, 6 thirteen understood the danger of get
L. R. A. 733, 23 N. E. 829, recovery was ting his hand caught in cogs. In Ludeniad for an injury received by a boy wing y Fillshury (1886) 35 Minn. 256

That part of the Pennsylvania doctrine which relates to the constructive knowledge of minor servants over fourteen years of age is identical with that of all the other courts; that is to say, there is no presumption of law that a minor more than fourteen years of age who applies for a position involving dangerous service is aware of the danger and needs no instruction.7

As regards the earlier portion of the period between the fourteenth and the twenty-first years, there is no disposition on the part of the courts to formulate any definite rule of law upon the basis merely of the servant's age.<sup>8</sup> But there is some authority for the proposition that, in respect to his presumed comprehension of risks, a person who is very near his majority should be placed upon the same footing as an adult.9 See, however, § 291, post.

The above summary indicates that, whatever view is taken of the obligation of a master to instruct an infant, that duty is not an absolute one as regards the entire period of minority.<sup>10</sup> Passages like those quoted in the note below would, if taken literally, point to a different conclusion. But they are to be construed with reference to the facts under discussion.11

thirteen must have understood the danence, or taken notice of the probability ger of allowing any part of his person that he was so inexperienced as to rento extend outside the railing of an electron derived it proper to give him warning." vator. That a child of twelve who vol- May v. Smith (1893) 92 Ga. 95, 18 S. untarily goes about a factory and expos- E. 360. es himself to dangerous machinery canacter, was laid down in the charge to the jury in Evans v. American Iron & Tube Co. (1890) 42 Fed. 519. In Hinckley v. Horazdovsky (1890) 133 Ill. 359, them. Vincennes v. Citizens' Gaslight 8 L. R. A. 490, 24 N. E. 421, the court Co. (1892) 132 Ind. 114, 16 L. R. A. 485, uses some rather sweeping language 31 N. E. 573.

about the inability of a child of twelve "An instruction which, in effect, reyears to comprehend the dangers created by revolving wheels, belts, and pulleys. But the effect of what was said is to be estimated with due reference to the fact that the question to be determined was

<sup>9</sup> In Indiana it has been held that a not recover for injuries thus received, if servant of the age of twenty years and he has sufficient knowledge of the ma- four months is not so young as to be chinery to be able to appreciate its char- within the rule that minors must be warned of the danger of the service into which they are taken and properly instructed as to the duties required of

quires the master to caution a minor as to all dangers reasonably to be antici-

pated, is incorrect. Fones v. Phillips (1882) 39 Ark. 17, 43 Am. Rep. 264.

"In the case of young persons, it is the duty of the employer to take notice that the question to be determined was merely the justifiability of a verdict against the master.

Atlanta & W. P. R. Co. v. Smith are cases cited in § 291, post.

"That the plaintiff was not a child, but was seventeen years of age, would not deprive him of the right to be warned, if, as a question of fact, the employers or the man representing them."

"In the case of young persons, it is the duty of the employer to take notice of their age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate and to which they should not be exposed. The duty in such cases to warn but was seventeen years of age, would instruct grows naturally out of the ignorance or inexperience of the employee, and it does not extend to those who are of mature years, and who are ployers, or the man representing them, who are of mature years, and who are ought under all the circumstances to familiar with the employment and its have inquired of him as to his experirisks." Rummel v. Dilworth (1890)

250. Instruction of minors, considered with reference to their experience.—As minority is in itself an independent element which tends to negative the existence of constructive knowledge, it is clear that an action in which a minor seeks to recover damages on the ground that he was not instructed is not necessarily barred by proof that he was experienced in the work in which he was engaged. The evidential significance of that fact is simply this: A minor will sometimes be declared chargeable with knowledge, on the ground of his having had a considerable amount of experience, although the circumstances may have been such that, if the same servant had had a shorter experience, or none at all, the court could not have drawn that inference, as a matter of law. A good many decisions which may perhaps be regarded as exemplifying this situation are cited in § 399, post. But it is seldom possible to gather with exactitude, from the language used in the opinions, whether the servant's experience was viewed as a specific differentiating element, which tended to rebut the conclusion indicated by his minority, or as a corroborative circumstance which furnished an additional reason for holding that he ought to have comprehended the risk in question.

Testimony to the effect that a minor was inexperienced introduces a second element which, like the fact of minority itself, points to the conclusion that his ignorance of the risk was excusable. Theoretically, therefore, such testimony should often turn the scale in the plaintiff's favor. But its precise weight in the cases into which it may be supposed to enter as a determinative factor (see § 399, post) is as difficult to estimate as that of evidence showing that a minor was experienced.

251. Position of minor servants after being properly instructed .--The duty of instructing minors being predicated from the fact that, without such instruction, they would be exposed to avoidable dangers

131 Pa. 509, 19 Atl. 345, 346. In Fisher Cooper (1892) 131 Ind. 363, 30 N. E. v. Delaware & H. Canal Co. (1893) 153 294; Taylor v. Wootan (1890) 1 Ind. Pa. 379, 26 Atl. 18, the following in-App. 188, 27 N. E. 502, 504. See also structions of the trial judge were afthe charge to the jury in Evans v. firmed: "There is another duty which American Iron & Tube Co. (1890) 42 the employer owes to a child or infant, Fed. 519. and that is to inform him of the dan- 1 A charge is erroneous which would his service, the duty of explaining to enough to make him acquainted with the him fully the hazard and dangers condangers complained of, even if he has nected with the business, and of innever instructed him as to such dangers. structing him how to avoid them." Reisert v. Williams (1892) 51 Mo. App. New Albany Forge & Rolling Mill v. 13.

gers connected with the services in relieve a master of liability for injury which he is employed." It has also been to his apprentice by reason of hidden laid down that "the law imposes upon dangers, on the sole ground that the apthe master, when he takes an infant into prentice has been in the shop long of which they are presumably ignorant, it follows that, after they have been properly instructed, their minority will usually cease to be a material factor in estimating the extent of the employer's liability. In other words, the defenses of assumption of risks and contributory negligence will then be available against them, if, under the same circumstances, these defenses would have been available against adults. Compare §§ 291, 292, 348, infra. That the business might have been carried on in a less dangerous manner is a circumstance which is quite immaterial, where the servant has been sufficiently instructed.2

This rule, however, is subject to one important limitation which has been thus formulated: "If a person is so young that, even after full instructions, he wholly fails to understand them, and does not appreciate the dangers arising from a want of care, then he is too young for such employment, and the employer puts or keeps him at such work at his own risk."3 This principle will enure to the advan-

<sup>1</sup> In the following cases the defense of working the machine, the fact that he is been given: Chicago Anderson Pressed the risks which are patent and incident Brick Co. v. Reinneiger (1892) 140 III. to the employment." Buckley v. Gutta 334, 29 N. E. 1106; Tinkham v. Saw-Percha & Rubber Mfg. Co. (1889) 113 yer (1891) 153 Mass. 485, 27 N. E. 6 N. Y. 540, 21 N. E. 717.

(warning followed by minor's own op-Acase in which a minor's action was 29 Atl. 883; Beckham v. Hillier (1884) 47 N. J. L. 12; Prentiss v. Kent Furniture Mfg. Co. (1886) 63 Mich. 478, 30 room to pass, the court taking the N. W. 109; Emma Cotton Seed Oil Co. ground that, as he had been cautioned v. Hale (1892) 56 Ark. 232, 19 S. W. 600; Fisk v. Central P. R. Co. (1887) 72 Cal. 38, 13 Pac. 144; Daester v. Mechanics' Planing Mill Co. (1882) 11 Mo. App. 593. "There is no rule of law that a minor may not be employed about a dangerous machine; and the simple fact that a machine is dangerous does not make an employer liable for an injury received by a minor employed upon such machine. All the law requires is that the minor should be properly instructed as to the danger to which he is exposed; and if he is injured because he has not received such instruction, then,

asumption of risks was allowed on the a minor does not alter the general rule ground that instructions had previously that the employee takes upon himself

portunities for observation); Jones v. held to be barred, after instructions on Florence Min. Co. (1886) 66 Wis. 268, the ground of contributory negligence, is 57 Am. Rep. 269, 28 N. W. 207; Zurn v. Probert v. Phipps (1889) 149 Mass. 258, Tetlow (1890) 134 Pa. 213, 19 Atl. 504; 21 N. E. 370, where a boy fifteen years Kaufhold v. Arnold (1894) 163 Pa. 269, old was denied recovery for an injury 29 Atl. 883; Beckham v. Hillier (1884) received while walking between the gearings of two machines which just gave as to the danger, he was negligent in not avoiding a danger which he understood perfectly well how to avoid.

<sup>2</sup> Rock v. Indian Orchard Mills (1886)

142 Mass. 522, 8 N. E. 401.

3 Hickey v. Taaffe (1887) 105 N. Y.
26, 12 N. E. 286. Other forms in which
the same principle has been stated are
these: "The giving of proper instructions [at the commencement of the employment] will not relieve an employer from liability to a child, if the work required of him [at the time of the injury] was not within the scope of his employment, and not such as ought to as a general rule, the employer may be have been required of a person of his held responsible. But where the minor capacity." Hayes v. Colchester Mills is familiar with the machine, and its (1894) 69 Vt. 1, 37 Atl. 269. The percharacter and operation are obvious, son employed may be so young, inexand he is aware of and fully appreciates perienced, and immature in judgment the danger to be apprehended from that no kind of warning and instruction tage of the servant, even though the danger in question was one which, in the case of older persons, would be regarded as obvious.4

In determining the question whether an employee understood an instruction and comprehended the danger to which it related, it is proper and necessary to take into consideration, not only his youth and inexperience, but also the nature of the service, and the degree to which his attention while at work would need to be devoted to its performance.5

## D. Sufficiency of the instruction.

252. Generally.—Stated in the most general terms, the extent of the master's obligation in regard to imparting information to a servant is to give him "such instruction as will enable him to avoid injury." If the master relies on the fact that he admonished the servant of the danger which caused the injury, he must show that the warning was timely and explicit.2 Merely going through the form of giving instructions is not sufficient.3 But the master's duty will be held to have been fully performed if the information which he imparted was sufficient, when supplemented by the servant's own personal observation, to enable the latter to appreciate the risks of the employment.4

bility for injuries resulting from putting him at a hazardous and dangerous work. Pittsburgh, C. & St. L. R. Co. v. Adams (1886) 105 Ind. 151, 5 N. E. 187. An employer remains liable for injuries received by an inexperienced boy seventeen years old, to whom work is assigned which can be performed safely only by skilful and careful mechanics, even though such boy has been duly warned and instructed as to the dangers of the work. Missouri P. R. Co. v. Peregoy (1887) 36 Kan. 424, 14 Pac. 7. If it appears that the minor was too young to understand, even with instructions, the dangerous character of a machine, or appreciate the peril of operating it, the master is not shielded from liability merely by the fact that the minor was properly instructed in the use of the maproperly instructed in the use of the machine. Steiler v. Hart (1887) 65 Mich. 644, 32 N. W. 875. In Taylor v. Wootan (1891) 1 Ind. App. 188, 27 N. E. 502, 504, the following statement of the rule in Shearman & Redfield on Negligence was adopted: "And if he (the master) knows, or, in the exercise of ordinary care and sagacity would have known, that the servant has not cancily enough care and sagacity would have known, starting it. Williams v. Hensler that the servant has not capacity enough (1890) 38 Ill. App. 584. See also cases to understand the warning and apprecited in the next section.

would relieve the master from responsi- ciate the danger, he will be liable for any injury which such servant may suf-fer in consequence, if continued at such work."

<sup>4</sup> Williamson v. Sheldon Marble Co. (1893) 66 Vt. 427, 29 Atl. 669.
<sup>5</sup> King v. Ford River Lumber Co. (1892) 93 Mich. 172, 53 N. W. 10. A boy sixteen years old is presumed to boy sixteen years old is presumed to have sufficient intelligence to comprehend instructions as to the danger of crossing a railroad yard by creeping under cars which may be moved at any moment. Chicago, B. & Q. R. Co. v. Eggman (1895) 59 Ill. App. 680.

1 Atlas Engine Works v. Randall (1885) 100 Ind. 293, 50 Am. Rep. 798.

(1887) 100 1nd. 293, 50 Am. Rep. 798.

<sup>2</sup> Powers v. Calcasieu Sugar Co.
(1896) 48 La. Ann. 483, 19 So. 455.

<sup>3</sup> Hickey v. Taaffe (1887) 105 N. Y.
26, 12 N. E. 286.

<sup>4</sup> Fisher v. Delaware & H. Carri, C.

<sup>4</sup> Fisher v. Delaware & H. Canal Co. (1893) 153 Pa. 379, 26 Atl. 18. One ordered to paint a machine, and told that it is being tested, but not that others are still working upon it, where he can see them still at work, must use ordinary care not to be injured by their

In the case of minors the above principles stated are equally applicable in all essential respects, the sole distinction of importance being that, owing to the more restricted capacity of young persons for understanding the perils of their employment, the law implies an obligation to give them detailed and special instructions in many instances in which a general notification would have been an adequate warning to an adult. See next section. It has been said to be impossible to lay down any inflexible rule applicable alike to all cases where minors are employed, as to what warning will be requisite. Much depends upon the nature of the machinery, the age, capacity, intelligence, and experience of the employee, as well as the surrounding facts and circumstances.<sup>5</sup> As in the case of adults, the notice given must be such as to enable a person of the servant's youth and inexperience in the business to appreciate intelligently the nature of the danger attending the performance of the work.<sup>6</sup> Notice of danger is not enough. The child must have sufficient instruction to enable him to avoid danger.7 See next section.

It is merely necessary that notice of danger should be given before the service involving it is required, not that it should be given at the time of the contract of employment; but where no notice was given

King v. Ford River Lumber Co. (1892) 93 Mich. 172, 53 N. W. 10. In New Al-Judge Thompson, in his work on Negligence, vol. 2, pp. 977, 978, was adopted: "The master will not have discharged his duty in this regard unless the instructions and precautions given are so graduated to the youth, ignorance, and inexperience of the servant as to make him fully aware of the danger to him, nim fully aware of the danger to him, and to place him, with reference to it, in substantially the same situation as if he were an adult." Quoted also in Taylor v. Wootan (1890) 1 Ind. App. 188, 27 N. E. 502, 504; Smith v. Irwin (1889) 51 N. J. L. 507, 18 Atl. 852. A youthful employee must be instructed so youthful as a matter of fact he extra fully that, as a matter of fact, he actually understands and appreciates the

<sup>5</sup> Davis v. Augusta Factory (1893) 92 In Honlahan v. New American File Co. a. 712, 18 S. E. 974. (1890) 17 R. I. 141, 20 Atl. 268, the de-Ga. 712, 18 S. E. 974. (1890) 17 R. I. 141, 20 Atl. 268, the de<sup>o</sup> Coombs v. New Bedford Cordage Co. fendant requested the trial judge to in(1869) 102 Mass. 572, 3 Am. Rep. 506. struct the jury that, if the boss told the Almost the same language is used in plaintiff to put his files on a steam pipe to be dried, at another place, and not to get on the tank into which he fell, and bany Forge & Rolling Mill v. Cooper the boy disobeyed the order, by reason (1892) 131 Ind. 363, 30 N. E. 294, the of which the accident happened, the following statement of the rule by jury should find a verdict for the defendant. The judge allowed this request, with the qualification that the warning or direction must have been such as to give notice of the danger. The defendant excepted to the qualification, but the supreme court held that the instruction

as given was correct.

Wharton, Neg. § 216, quoted in Brazil Block Coal Co. v. Young (1889) 117 Ind. 520, 20 N. E. 423; Hinckley v. Horazdovsky (1890) 133 III. 359, 8 L. R. A. 490, 24 N. E. 421. Where a person of immature years is set to work at machinery which in some respects may be termed dangerous, mere formal instrucfully that, as a matter of fact, he actu-fully that, as a matter of fact, he actu-fully understands and appreciates the ployed must be brought to an actual un-danger. Chicago Anderson Pressed derstanding of the dangers, and be made Brick Co. v. Reinneiger (1892) 140 Ill. to appreciate them and the consequence 334, 29 N. E. 1106, holding that the last of want of care. Ogley v. Miles (1889) clause was properly added to a charge. 28 N. Y. S. R. 893, 8 N. Y. Supp. 270.

at any time, a charge declaring that instruction fixing it should have been given at the time of employment is not prejudicial.8

Culpability may be inferred from the giving of erroneous instructions, as well as from the entire omission to give any instruction.9 But if the instruction given was, so far as the evidence shows, perfectly proper, there can, of course, be no recovery. 10

Whether the servant has been adequately instructed is primarily a question for the jury. 11 Their findings cannot be controlled or set aside where the evidence is such as to permit different inferences to be drawn from it.<sup>12</sup> Nor where the evidence is conflicting as to the amount of instruction necessary to enable the servant to do his work safely;13 nor where the testimony offered by the defendant is of an inconclusive character.14

253. What particularity in the instruction is obligatory.—In numerous cases the servant has been allowed to recover for the reason that the court felt itself unable to say, as a matter of law, that the master's culpability might not reasonably be inferred from evidence which indicated that the servant, although he had been warned in general terms as to the danger of the work, had received no special warning in regard to the particular danger to which the injury was due, or no explicit instruction as to the proper manner of avoiding it, and that, under the circumstances, the information which the master had thus failed to communicate was necessary to enable the servant to obtain an intelligent comprehension of the danger. For ob-

Owens v. Ernst (1892) 1 Misc. 388, matter of law, to be adequate.

21 N. Y. Supp. 426. \* 12 Kochman v. Chase (1898) 32 App. 10 Evidence that the proprietor of a piv. 630, 52 N. Y. Supp. 740. 13 Nutzmann v. Germania L. Ins. Co. plied for instructions as to what to do (1901) 82 Minn. 116, 84 N. W. 730; with a misspent charge of dynamite referred him to another workman of large experience in such matters who told 14 Medical Told 15 No. 158. experience in such matters, who told <sup>14</sup> Wolski v. Knapp-Stout & Co. Co. him to thaw the dynamite with hot wa- (1895) 90 Wis. 178, 63 N. W. 87. ter, and that after doing so the employee, without direction, removed the a servant that Paris green is a poison. charge, when it exploded and he was He should also be informed of the preon the part of the employer. Welch v. Grace (1897) 167 Mass. 590, 46 N. E.

327 (method of shifting a belt by means ticular ingredients of the formula used of a stick); Reynolds v. Boston & M. R. in its manufacture. Fox v. Peninsular Co. (1891) 64 Vt. 66, 24 Atl. 134. This White Lead & Color Works (1891) 84 principle, is, of course, assumed to be Mich. 676, 48 N. W. 203. A brakeman

<sup>8</sup> Salem Stone & Lime Co. v. Griffin cases cited under this subtitle, in which (1894) 139 Ind. 141, 38 N. E. 411. the instruction given was held, as a

1 It is not sufficient merely to notify killed,—is insufficient to show negligence cise effects which it may produce in persons engaged in its manufacture, and also of the precautions necessary to be taken for obviating these effects. It is "McDougall v. Ashland Sulphite denied, however, that the master is Fibre Co. (1897) 97 Wis. 382, 73 N. W. bound to inform the servant of the parthe correct rule of procedure in all the placed on a freight train on a road with

vious reasons the courts are less disposed to interfere with a verdict for a minor based upon this ground than where the injured person was an adult.<sup>2</sup> Even the courts which override most freely the verdicts of juries would doubtless refuse, under any conceivable state of facts, to declare the master's nonliability, as a matter of law, where the servant was not only a minor, but was of less than the average intelligence.3 The doctrine that a general warning may properly be found

which he is not familiar must be given be devoted to its performance. The sufficient notice of the danger of low obligation of the defendants would not highway bridges over the road to enable him, by proper attention and dilforming the boy that the employment forming the boy that the employment dangerous to stand erect on the top of danger which would necessarily attend cars, and especially on high cars, when the actual performance of his work." passing under a certain bridge, and that Coombs v. New Bedford Cordage Co. there are no telltales on the bridge, is (1869) 102 Mass. 572, 3 Am. Rep. 506. there are no telltales on the bridge, is a sufficient warning. Gulf, C. & S. F. In Jarvis v. Coes Wrench Co. (1900) R. Co. v. Know (1901; Tex. Civ. App.) 177 Mass. 170, 58 N. E. 587, a boy of 61 S. W. 969. In American Strawboard fifteen was held entitled to go to the Co. v. Foust (1895) 12 Ind. App. 421, jury on evidence showing that he had 39 N. E. 891, the court rejected the conthat he had been frequently warned of squarely against the saw. the dangers of passing the paper up In Taylor v. Wootan (1891) 1 Ind. between the dryers by which it was App. 188, 27 N. E. 502, 504, where the crushed. McQuillan v Willimantic proof was that the servant was but Electric Light Co. (1898) 70 Conn. 715, 40 Atl. 928, held that where a man employed to trim and clean electric lamps used the crossbar as a means of sup-port, and it gave way because of the rotten condition of the top of the pole, the result being that he fell to the ground and was seriously injured, the fact that the coemployee who instructed him as to the performance of his duties did not so support himself did not prevent his recovering, if he was not warned against doing this.

2"In determining this question [i. e., whether the servant understood the risk], it is proper and necessary to take into consideration, not only the plaintiff's youth and inexperience, but also old needed more than ordinary instructhe nature of the service which he was tion, and whether he had been misled in to perform, and the degree to which his this respect by the boy's father, were

igence, to learn where the points of danger are. Louisville & N. R. Co. v. Hall in the building or room in which he was (1888) 87 Ala. 708, 4 L. R. A. 710, 6 set to work, was dangerous. Mere in So. 277. Considering the common use formation in advance that the service of telltales, it cannot be held, as a mater of law, that giving a brakeman a nected with it, was dangerous, might printed book of rules, when he is first give him no adequate notice or underemployed, which advises him that it is standing of the kind and degree of the dangerous to stand erect on the top of danger which would necessarily attend

been told how to do the work, but had tention of the defendant that a general not been cautioned as to the danger verdict for the plaintiff was inconsist- that one of the blocks which he was orent with a special finding to the effect dered to saw by means of a circular saw, that the servant—an adult—had been without a gauge or saw-rest, might that the servant—an adult—had been without a gauge or saw-rest, might warned, just prior to the injury, to be bound back and force his hand under careful, to look out for his hand, and the saw if the block was not pushed

> twelve years of age at the time he was injured by coming in contact with a planer in connection with which he had been hired to work, and that he had worked but two days and a half for the appellant, and was wholly inexperienced in the operation and running of the machinery, the court held that, under these circumstances, it could not be declared, as a matter of law, that the employers absolved themselves from responsibility by simply telling the employee of the dangerous character of the machinery, and warning him to keep away from it while it was in motion.

<sup>3</sup> Whether an employer had reasonable cause to believe that a boy fifteen years attention, while at work, would need to held to be questions for the jury in Lato be inadequate is not applied where the warning given was one sufficient to put the servant on inquiry and observation, and the danger was one which could readily be comprehended by anyone whose attention was directed to it.4 Another exception to the operation of the doctrine is admitted where the dangers to which the general warning related arose from conditions which were constantly changing, and for this reason no previous warning could be conveyed as to the particular danger to be avoided on any given occasion when the duty was to be performed.<sup>5</sup> Compare the similar limitation of the duty of making rules, as explained in § 211, ante. It should also be observed that the doctrine is merely a rule of procedure which defines the limits of the power of a court to draw inferences of fact. justify a trial judge in charging a jury that merely notifying the servant through a coemployee that the instrumentality in question was dangerous would not be sufficient to absolve the defendant unless that coemployee pointed out in what the danger consisted.6

Several cases proceed upon the theory that it is not obligatory to give any special caution where there is no peculiar or secret source of danger, and it is apparent that the servant has derived from the information imparted by the master as complete a knowledge of the risks as is requisite to secure his safety. This theory is deemed to be

though the precise location of the dan-

plante v. Warren Cotton Mills (1896) upon the weight of the evidence. The 165 Mass. 487, 43 N. E. 294. Compare question of negligence is one for the Connors v. Grilley (1892) 155 Mass. jury exclusively, and the law does not 575, 30 N. E. 218, § 247, note 2, supra.

'A person employed as a brakeman manner, a master shall instruct a minor on a section of 4 miles of railroad, and so notified that there were stone piles beside the road, and so near to it that a person on the side of a car passing them might have found, had they been free would be struck, is to be deemed to have so to do under the charge of the court, assumed the risk from that cause, alternative models and the structure of the court, assumed the risk from that cause, alternative models and the side of the court, assumed the risk from that cause, alternative models are the charge of the court, assumed the risk from that cause, alternative models are the charge of the court, assumed the risk from that cause, alternative models are the charge of the court, assumed the risk from that cause, alternative models are the charge of the court, assumed the risk from that cause alternative models are the charge of the court are the charge of the charge of the court are the charge of the char assumed the risk from that cause, al- that no instruction at all was necessary, and, if necessary, that the precautionary ger was not stated to him. Smith v. words of a coemployee were sufficient Winona & St. P. R. Co. (1889) 42 Minn. to apprise the boy of the danger to 87, 43 N. W. 968. Compare § 404, post. which he was then exposing himself, Hathaway v. Michigan C. R. Co. and in consequence of which he ulti- (1883) 51 Mich. 253, 47 Am. Rep. 569, mately suffered injury. Whether such 16 N. W. 634 (coupling cars). (1883) 51 Mich. 253, 47 Am. Rep. 569, mately suffered injury. Whether such 16 N. W. 634 (coupling cars).

In Bibb Mfg. Co. v. Taylor (1894) to a very great degree upon the character of the machinery. If it were excommenting on a charge to this effect, ceedingly intricate, invested with many where there was evidence of the fact that the plaintiff, a boy eight years of age, had been repeatedly advised that the machinery on which he was at work, master to the servant in this case. But consisting in part of rapidly revolving if it were a simple contrivance, easily cogwheels, was dangerous, and that he himself knew it, said: "The vice of this might suffice to satisfy them. At all instruction consists in the expression by events, whenever the jury find that the instruction consists in the expression by events, whenever the jury find that the the court to the jury of an opinion master, with reference to this particuapplicable to minors as well as to adults. But the extreme vagueness of the standard thus invoked has naturally produced some inconsistent decisions.<sup>8</sup> It seems preferable, therefore, to say that the extent to which the master should enter into details in giving the instruction depends wholly upon the presumed capacity of the servant to utilize

quittal." <sup>7</sup> Notice to a brakeman or switchman that a car received by a railroad company from another company, and direct-268, 46 U. S. App. 226, 76 Fed. 443. In the court said: want (a boy of sixteen), who was serving pieces of leather to the cylinders of of rubber in a visa "skiving-machine," would be caught back from a saw). between them and drawn through "The decisions ciagainst the knife. The court said: ries caused by more than the same of the court said. to see and appreciate the danger, all from negligence, where the girl's hand

lar matter, has exercised ordinary and the information and caution that was reasonable care, he is entitled to an ac-needed was given to him by the defendants; and his own evidence shows that he knew and understood the danger. He says that the defendants told him that, if he got his fingers in, he would get hurt, that he must look out about ed to be returned as out of order, as of order, is sufficient, unless the defects his fingers, and, what testimony are not obvious, and involve more than needed to prove, that he knew that, if denear to those employed in he put his fingers where the leather returning the car. Atchison, T. & S. F. went, they would get caught as soon as R. Co. v. Meyers (1896) 22 C. C. A. the leather would. He said, indeed, that he did not realize the danger that Henry v. King Philip Mills (1892) 155 it would draw his whole hand in. He Mass. 361, 29 N. E. 581, it was held may not have realized all the possible that the plaintiff could not recover consequences of the danger, but that he where he testified that he knew the dan- knew and appreciated the danger of beger of cleaning running machinery, but ing hurt by having his fingers caught asserted a right to recover for the rea- between the cylinders is obvious. That son that he had not been cautioned he was inattentive to his work, and careabout the particular spot where his less, was not evidence that he did not hand was caught. In Ciriack v. Mer- know the danger. He was told, and chants' Woolen Co. (1888) 146 Mass. knew, that if he was inattentive and 182, 15 N. E. 579, where a boy was in- careless he was liable to be hurt; and jured while passing moving machinery, there is no evidence that the injury was "Anybody seeing the not the result of his own want of care. machine in motion must soon become There is no evidence of negligence on aware of the danger which would arise the part of the defendants, and no evifrom coming in contact with it. The dence that the plaintiff did not know duty of the defendant would be suffi- and appreciate the danger." For other duty of the defendant would be sufficiently discharged by pointing out to the plaintiff the situation of the massame kind was held to be sufficient, see chire, and the rapid revolution of the massame kind was held to be sufficient, see the chire, and the rapid revolution of the massame kind was held to be sufficient, see the chire, and the rapid revolution of the massame wheels when in operation, and explainting the probable effect of touching them bled on a slippery floor, and fell against under these circumstances." In Pratt the toothed cylinder of a carding many Prouty (1891) 153 Mass. 333, 26 N. chine), and Burke v. Thomson Meter E. 1002, the danger to be guarded Go. (1892) 45 N. Y. S. R. 272, 18 N. against was that the fingers of the servant (a boy of sixteen), who was servipired while attempting to adjust a piece ing pieces of leather to the cylinders of of rubber in a vise without moving it of rubber in a vise without moving it

\* The decisions cited above as to injuries caused by moving machinery are "This was an open and apparent, and not easy to reconcile with the conclusion not a hidden, danger. Not only were that an owner of a paper mill who emthe cylinders and their movements plain ploys an inexperienced girl fourteen to see, but their operation and effect, in years old to take paper from a mangle drawing in against the knife whatever consisting of a large roller heated by came between them, were obvious and steam and three smaller rollers, between were constantly demonstrated in their which and the larger roller the paper use. That the plaintiff was a boy of at passes, without giving her any other least ordinary intelligence is manifest, caution than not to get her hands in the and is not denied; and if he could fail rollers, is not, as matter of law, free

the information which he receives, intelligently and effectively for the purpose of securing his own safety. On the one hand, the obligation of the defendant is not discharged "by informing the servant generally that the service engaged in is dangerous; especially where the servant is a person who neither by experience nor education has, or would be likely to have, any knowledge of the perils of the business, either latent or patent, but . . . in such case the servant should be informed, not only that the service is dangerous, and of the perils of a particular place, but, where extraordinary risks are or may be encountered, if known to the master, or should be known by him, the servant should be warned of these, their character and extent, so far as possible."9 On the other hand, it is not necessary that a servant should be warned of every possible manner in which injury may oc-

not manifest.

ciently warned of the increased danger 64 Vt. 66, 24 Atl. 134.
in coupling cars with such deadwoods, \*Smith v. Peninsular Car Works which sometimes passed over the road, by a caution that railroading was dangerous, and coupling cars specially so, requiring very great care, where he was cases he should not only be instructed than their years. Bohn Mfg. Co. v. that the service is dangerous, but, where Erickson (1893) 5 C. C. A. 341, 12 U. c. traordinary risks are to be encoun- S. App. 260, 55 Fed, 943,

is caught and seriously injured while tered, he should be warned by the masshe is attempting, as she has seen other ter, as far as possible, of their character employees do, to insert a sheet of paper and extent, if known to the master, or which has come out between such roll-should be known to him. But, as we ers. Allen v. Jakel (1898) 115 Mich. have said, this duty is required only as 484, 73 N. W. 555. The court took the to latent dangers or risks, and we know ground that, while it was obvious that of no rule or principle of law that rethere was danger in using the machine, quires the master to give any express the proper way of doing the work was or particular instructions to guard ot manifest.

against such dangers as are manifestly
Two courts have reached diametricalobvious." On the other hand, we find ly opposite conclusions as to such a sim- it laid down, in a case involving similar ple matter as the extent of the duty to facts, that a railroad company which instruct a brakeman with respect to the merely warns a brakeman who is just danger of coupling foreign cars with entering on his duties that the business double deadwoods. On the one hand, it is highly dangerous does not fully dishas been held that a brakeman twenty-charge its duty as to instructing him. six years of age and of average intelli- He should be told in what the hidden gence, who had never seen double dead- dangers consist, and how to avoid them. woods before he was injured, was suffi- Reynolds v. Boston & M. R. Co. (1891)

(1886) 60 Mich. 501, 27 N. W. 662. The notice and instruction should be graduated to the age, intelligence, and experience of the servant. They should line. Louisville & N. R. Co. v. Boland like circumstances, for the purpose of (1893) 96 Ala. 626, 18 L. R. A. 260, 11 enabling the minor not only the court said. So. 667. The court said: "As to latent the dangerous nature of his work, but risks, the duty of the master is not dis-charged when he simply instructs the risks and to avoid its dangers. They servant in a general way that the serv-should be governed, after all, more by should be governed, after all, more by ice engaged in is dangerous; and espe- the experience and capacity of the sercially is this true where the servant is a vant than by his age, because the intelperson who from inexperience or want ligence and experience of men measure of education would not likely have their knowledge and appreciation of the knowledge of such latent risks. In such dangers about them far more accurately cur. He must examine his surroundings and take notice of obvious dangers and operations of familiar laws. 10

According to one case, if the danger to which the servant was exposed in performing the work to which the warning in question related was a serious one and not apparent, it cannot be said, as a matter of law, that the master fully discharged his duty by directing the servant to abstain from a certain course of conduct, although, if the direction had been obeyed, the injury would not have been received.<sup>11</sup> But a doctrine less favorable to the servant has also been applied.<sup>12</sup>

pacity to learn something from observation and experience. . . . Moregers incident to the work extends only master himself, or which are reasonably to be apprehended from the nature of the employment." Benfield v. Vacuum Oil Co. (1894) 75 Hun, 209, 27 N. Y. Supp. 16. An employer who gives such general instructions and cautions as will enable the employee by the use of his intelligence to comprehend the dangers ten metal in the neighborhood of water, which threaten him in his work must be all that is necessary is to instruct him held to have discharged his duty, al-

10 Mississippi River Logging Co. v. was manifestly wrong. Railroad em-Schneider (1896) 20 C. C. A. 390, 34 ployees, as all the books lay down the U. S. App. 743, 74 Fed. 195. See also doctrine, assume the ordinary risks and § 238, supra. An employer is "not required to exercise the highest possible sumption is that the employee underdiligence to instruct the plaintiff in stands the nature and dangers of the every conceivable particular of the circumstances in which he might be placed, service, and, if not, that he will inform or in every possible detail of his conduct in the performance of his duties. The requirement in this respect is only to employ men of experience to inform The requirement in this respect is only to employ men of experience to inform that the master exercise ordinary and each of the hands that any particular reasonable care to see that the servant act he is required to perform is danpossesses a competent knowledge of the gerous. It would be ruinous to such peculiar dangers to which he is exposed bodies to hire a person to accompany in doing his work, and of the precau-every brakeman and other employees, to tions necessary to be taken to guard inform them of danger in the perform-himself against those dangers; and in ance of every act of duty, or of the the exercise of that care the master has danger in the manner of its performthe right to assume that the servant ance. It is impossible that the law can brings to the work ordinary intelligence ever impose such requirements,—and and powers of observation, and the cathat is what this instruction in substance asserts as a legal requirement."

11 A verdict for the plaintiff is warover, the duty to instruct against dan-ranted where a trestle on to which an engineer was required to push a train of to such dangers as are known to the cars frequently was too weak to support the engine, and the only caution he had received was that he was not to run it beyond the edge of the fast land, but nothing was said which indicated the greatness of the danger. Paulmier v. Erie R. Co. (1870) 34 N. J. L. 151.

how to handle it in such a manner as to though he does not anticipate in advance avoid explosion, and to inform him that every possible risk or accident. Thomp- there is danger of explosion if he does every possible risk or accident. Thomp- there is danger of explosion if he does son v. Edward P. Allis Co. (1895) 89 not handle it as instructed. Accord-Wis. 523, 62 N. W. 527. In Chicago, R. ingly, an instruction that it was the I. & P. R. Co. v. Clark (1883) 108 Ill. duty of the master to warn plaintiff that 113, the trial judge gave an instruction an explosion might result from the conto the effect that it was the duty of the tact with water, and of the "nature, master to inform his servants of all force, and probable effect" of such an danger in and about the premises where explosion, is erroneous as imposing on they are required, by his authority, to the master the duty of foretelling the perform labor. The court said: "This precise result of any possible explosion.

The duty of instruction is not adequately performed unless the information respecting the dangerous qualities of the appliances is imparted in words devoid of ambiguity.13

The warning given must be couched in such plain language as to insure the servant's understanding and appreciating it.14 § 216, ante.

As the age of a minor approaches twenty-one years the sufficiency of the instruction is gauged more and more nearly by the same considerations as are controlling in the case of an adult. 15

254. Adequacy of the means by which instruction is conveyed to the servant.— (Compare §§ 213a and 237, note 5, ante.)—A warning which the master or his representative does not take proper steps to have conveyed to the servants whom it concerns is, for juridical purposes, no more effective than if it had not been given at all.<sup>1</sup> As industrial concerns are usually carried on, the most common method of giving a servant the necessary instruction is by word of mouth. But, both on principle and authority, it is clear that the precise method by which instruction is imparted is immaterial, provided it was actually received by him, or the form in which it was given such that, if he had exercised reasonable care, he would have obtained a sufficient comprehension of the facts which it was intended to communicate to him.<sup>2</sup>

82 N. W. 279.

18 Warning that a horse is vicious is not conveyed by the statement that it is "high-lived," since that expression is frequently applied to horses of the very opposite character. Wilson v. Sioux Consol. Min. Co. (1898) 16 Utah, 392, 52 Pac. 626. Telling an inexperienced workman hired to work near a high gravel bank that he was "to keep two eyes on the bank and one on the foreman" is not an adequate warning, as a matter of law. Daly v. Kiel (1901) 106 La. 170, 30 So. 254.

<sup>14</sup> Addicks v. Cristoph (1899) 62 N. J. L. 786, 43 Atl. 196. In Costello v. Judson (1880) 21 Hun, 396, where a boy of fourteen years possessing the average amount of intelligence was injured through allowing his foot to project beyond the platform of an ascending elevator, it was held that it was for the jury to say whether an instruction by the defendant's foreman to the effect that, if the plaintiff went on the elevator, "he must be careful and not fool with it," was sufficiently explicit.

Ribich v. Lake Superior Smelting Co. nearly twenty-one years old at work on (1900) 123 Mich. 401, 48 L. R. A. 649, a circular saw, without other instructions than running through one or two sticks, where the employee states that he has run a circular saw a very little, though he is not an experienced hand, but makes no direct request for further instructions. Wilson v. Steel Edge Stamping & Retinning Co. (1895) 163 Mass. 315, 39 N. E. 1039 (verdict held to have been rightly directed for defendant). Compare § 249, note 9, supra.

A roadmaster who is informed that

a part of the track is defective and cannot be put in repair soon enough to permit the next train on the schedule to pass safely may properly be found cul-pably negligent by a jury if he fails to ascertain that a warning telegram which he has delivered to an operator at a way station to be forwarded to the train despatcher has reached its destination. Alchison, T. & S. F. R. Co. v. Moore (1884) 31 Kan. 197, 1 Pac. 644.

<sup>2</sup> Bulletin boards and placards, printed or posted, are proper methods of giving notice of danger to railroad employees, but not the only methods; and where a party has been expressly noti-

15 An employer may put an employee fied, he cannot complain that no placard

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And it would seem that if a servant who is unable to read enters an employment, knowing that it is customary to convey notice of certain specific dangers through the medium of writing, he must take the consequences if he is injured by reason of his inability to understand an announcement so given.3

or bulletin board was posted. Louis- Fences are not supposed to be built in ville & N. R. Co. v. Hall (1890) 91 Ala. such places for this purpose, and a 112. 8 So. 371. A railroad company brakeman has no right to expect to rehaving had transient cars of other comceive information in such a manner. panies in its use or employment regu-fuller v. Lake Shore & M. S. R. Co. larly inspected, condemned, and ordered (1896) 108 Mich. 690, 66 N. W. 593. to be sent to the shops for repair and The operator of a mine, who, in accordregularly tagged so as to warn employees of that fact, has not fully discharged its obligation of due care towards one engaged in the performance of night service as a car coupler, unless the tags are of such size and character as to bring the condemnation of the cars to his attention, or he is otherwise informed of the fact. Meyers v. Illinois C. R. Co. (1897) 49 La. Ann. 21, 21 So. 120. Whether a railroad company is under the duty of providing machine while operating, as it is dan-means for warning trainmen as to the gerous, did not inform the plaintiff of proximity of low overhead bridges, such as "whipping straps" or cautionary of operating the machine when a certain lights, is a question to be determined by guard was broken, is not improper, as utility and the custom of well-regulated such a notice conveys no information as railroads. Louisville & N. R. Co. v. to anything except the danger to be ap-Hall (1888) 87 Ala. 708, 4 L. R. A. 710, 6 So. 277. See chapter VI., ante. A statement by a yard master to a newly employed brakeman, that a certain 8, 81 Fed. 320. bridge was too low to clear a man standing on a low car, and to look out for it, and by the conductor and a brakeman defective character of a car was given of the train upon which he was em- in the usual way by chalking upon it ployed, that it would not clear a man the words, "out of order," and placing on a high box car, is not such warning it upon a side track for removal. as will prevent a recovery from the railway company for causing the death of secure exemption from such usage or the brakeman, who came into collision custom by contracting against it; that with the bridge in the ordinary dis- his incapacity to understand the nature charge of his duty, standing on a car of and extent of the business he engaged ordinary height, when no cords were to perform was not chargeable to the suspended overhead to give warning of fault of the company; and that it was the bridge, as was the general custom immaterial whether such incapacity the bridge, as was the general custom immaterial whether such incapacity of railroads having low bridges. Ft. arose from a want of sufficient education Worth & R. G. R. Co. v. Kime (1899) to read and understand the purport of 21 Tex. Civ. App. 271, 51 S. W. 558, the usual "out of order," or from want Affirmed in (1899; Tex.) 54 S. W. 240. of skill in the performance of other du-A railroad company owes no duty to a ties pertaining to the employment. In brakeman in its employ to build a fence § 83, note 3, ante, another case relating from a cattle guard to the line fence in to the tagging of condemned cars is order to give him notice of its existence.

such places for this purpose, and a brakeman has no right to expect to reance with a custom in his busiress, places a danger signal in a room of a mine where there is standing gas, is not required in addition to place a man on duty to watch and warn against entrance into such room with a naked light. Cerrillos Coal R. Co. v. Deserant (1897) 9 N. M. 49, 49 Pac. 807. An instruction in an action for injury to an employee, that a card notifying employees to keep their eyes on a certain the increased and extraordinary danger prehended from the machine while it is in good condition. Blumenthal v. Craig (1897) 26 C. C. A. 427, 55 U. S. App.

3 Watson v. Houston & T. C. R. Co. (1883) 58 Tex. 434, where notice of the court held that the servant could only

#### CHAPTER XVII.

#### ASSUMPTION OF RISKS BY THE SERVANT.

- 255. Introductory.
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- A. Assumption of risks considered with reference to the servant's knowledge or ignorance thereof.
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- D. ASSUMPTION OF RISKS BY MINOR SERVANTS.
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The defense of assumption of risks is treated, in chapters xxx.-xxxv., post, with relation to the four special elements indicated by the titles.

The obligation of a servant to quit an employment in which he finds himself exposed to an abnormal risk is discussed in § 302, post.

The obligation of a servant to report to his superiors any abnormal risks which may come to his knowledge is treated in § 303, post.

As to the validity and effect of agreements not to hold a master responsible for his negligence, see the chapter in volume III., which deals with agreements accessory to the contract of hiring.

255. Introductory.—The foregoing chapters contain a statement of the conclusions at which the various courts have arrived in the process of determining the nature and extent of those obligations which a mas-

ter is impliedly deemed to undertake in respect to the persons whom he receives into his employment. Unless a breach of one of these obligations is established, the primary prerequisite to the maintenance of the servant's action is obviously lacking. See chapter XLIII. B, post. The decisions which deal with the circumstances under which recovery is disallowed although the master is proved to have been in fault will now be reviewed.

Four separate defenses are open to the master, viz.:

- (1) That the risk in question had been assumed by the servant.
- (2) That the servant had been guilty of contributory negligence in remaining in the employment which exposed him to the risk in question.
- (3) That the servant had been guilty of contributory negligence in respect to the particular act which was the immediate cause of his injury.
- (4) That the servant had so conducted himself that the action was barred by the operation of the principle embodied in the maxim, Volenti non fit injuria.

Of these defenses, only the first can properly be regarded as dependent upon or arising out of the contract of employment. In its relation to the other three defenses, the contract is material merely for the reason that its existence renders possible the events which constitute the cause of action in each particular instance.

All these defenses presuppose the same essential state of facts, viz., that certain dangerous conditions incident to the work were or ought to have been comprehended by the servant; that, having this comprehension, actual or imputed, he did or refrained from doing something; and that, as a consequence of the conduct thus pursued, he suffered the injury for which indemnity is asked. The result of this identity of elements is that, in a large number of instances, the juridical effect of any specific evidence which justifies the inference that one of the defenses was available under the given circumstances may, merely by a change in the logical point of view and in the terminology employed, be so stated as to show that one or more of the other defenses is also available. The precise extent of this theoretical interchangeability of the defenses has never been investigated, and, as the inquiry is one of merely scholastic interest, it is not worth pursuing. The choice of a defense will always depend upon the view which is entertained as to its superior expediency, regard being had, not only to the conclusions most obviously suggested by the testimony upon which the employer mainly relies, but also to a question which, in view of the chronic antagonism which exists between judges and juries in

employers' liability cases, is of no small practical importance—viz., Under which theory of the evidence is there the strongest probability that the right of recovery will ultimately be treated as a matter for the court to determine? There is no doubt that this advantage is most likely to be obtained by putting forward the first of the defenses enumerated above, and for this reason it should always be selected in any case in which the evidence sustains it, even though the practitioner should deem it advisable to rely upon one or more of the other defenses as well.

In this and the three ensuing chapters all these defenses will be considered under their more general aspects (chapters xvII.—xx.). The circumstances which warrant the inference that the servant had that comprehension of the risk without which none of the defenses can take effect will then be discussed (chapter xxi.). The remaining chapters of the present volume will be devoted to a discussion of certain special elements by which the general rules which determine the applicability of the defenses are more or less qualified (chapters xxII.-xxv.).

256. Proper classification of assumed risks considered.—In some cases the risks assumed are spoken of as being divisible into those which are ordinary, and those which are known to and understood by the servant. But the analysis thus suggested is plainly inaccurate, inasmuch as it ignores the fact that an essential and characteristic attribute of an ordinary risk is that it is appreciated by the servant. See § 257, infra. In fact, it is evident that what is really meant by the courts which have used this language is that the category of obvious or apparent risks includes both those which are generally designated as ordinary, and also those which are extraordinary, provided they are appreciated by the servant.<sup>2</sup>

employment which is hazardous assumes the usual risks of the service, and those which are apparent to ordinary observation." Compare the statements that "an employee does not assume all the "obvious," as well as "ordinary," risks of a service in which he may be are assumed (Huda v. American Glucose Co. [1897] 154 N. Y. 474, 40 L. R. A. 411, 48 N. E. 897); that a servant assumes "ordinary and apparent" risks of the service in which he may be engaged, but he assumes only ordinary, obvious, or known risks" (statement in assumes "ordinary and apparent" risks assumes "Glinary and apparent" risks (Frye v. Bath Gas & Electric Co. [1900] Ill. 351, 53 N. E. 107); that a servant 91 Me. 17, 46 Atl. 804; Dysinger v. Cincoinati, S. & M. R. Co. [1892] 93 Mich. 646, 53 N. W. 825); and "ordinary and ovious" risks of his employment (Croker v. Pu-646, 53 N. W. 825); and "ordinary and sey & J. Co. [1900] 3 Penn. [Del.] 1, 50 known" risks (Louisville & N. R. Co. Atl. 61; Strattner v. Wilmington City v. Orr [1890] 91 Ala. 548, 8 So. 360); Electric Co. [1901] 3 Penn. [Del.] 245, and "ordinary and obvious" risks 50 Atl. 57).

(Reese v. Wheeling & E. G. R. Co.

<sup>1</sup>In Davidson v. Cornell (1892) 132 [1896] 42 W. Va. 333, 26 S. E. 204); N. Y. 234, 30 N. E. 573, it was rethat an employee assumes only the risks marked that "a servant entering into ordinarily incidental to his employer's employment which is hazardous assumes business and to the employer's known

It has also been laid down that a servant assumes the risk of all dangers, however they may arise, against which he may protect himself by the exercise of ordinary observation and care.3 But this form of expression is merely one mode of enunciating the rule that it is not negligence to expose a servant to dangers against which he can protect himself by the exercise of due care. See chapter iv., ante. therefore, as the conception thus conveyed bears upon the question of the proper classification of assumed risks, it simply throws us back upon the fundamental principle stated in § 3, ante, and amounts to nothing more than a denial of the servant's right to recover where culpability, as measured by the particular standard which it indicates, cannot be imputed to the master. For this reason it is unsuitable as a basis for a generic division of risks with reference to their assumption or non-assumption.

For this purpose there are two broad schemes of classification avail-In one of these the central fact which supplies the foundation upon which the structure of the rules developed by the courts is built up is the servant's knowledge or ignorance of the risk in question. In the other that foundation is supplied by the master's negligence or freedom from fault. For the purposes of the commentator the latter scheme appears to be the more convenient, and it has therefore been adopted, in the present treatise, as a basis for stating the effect of the cases. But before entering upon that statement, it will be advisable to indicate in a general way the results of applying the test contemplated by the alternative scheme.

# A. Assumption of risks considered with reference to the serv-ANT'S KNOWLEDGE OR IGNORANCE THEREOF.

257. General principle stated.— In several recent decisions which, although they do not actually determine anything more than the

ing down that risks which are incident to the business must not be confounded with those that are "obvious," proceeded to remark that the latter term "includes such as are manifest to the sense cernible, whether they arise from the nature of the business, the particular York & L. B. R. Co. [1901] 65 N. J. L. manner in which it is conducted, or the use of defective or unsafe appliances." Stager v. Troy Laundry Co. (1901) 38 [1896] 42 W. Va. 703, 26 S. E. 444).

Or. 480, 53 L. R. A. 459, 63 Pac. 645.

\*\*Pittsburgh & C. R. Co. v. Sentmeyer (1879) 92 Pa. 276, 37 Am. Rep. 684.

In a still more recent decision the same Court approved an instruction to the Constant of the Sentence of the same and care. Fricker v. Penn care thinself by ordinary observation and care. Fricker v. Penn Bridge Co. (1900) 197 Pa. 442, 47 Atl. of observation, open and readily discretion and care. Fricker v. Penn Bridge Co. (1900) 197 Pa. 442, 47 Atl. Office V. Durand v. New Jersey (Durand v. New Jersey (Dur

meaning of the maxim, Volenti non fit injuria, seem to involve logically a similar conclusion, in respect to the availability of the defense of an assumption of risks, to that deduced from an implied contract, the English judges have held that a servant's knowledge of a risk caused by the master's negligence will not necessarily, and as a matter of law, require the inference that, by accepting or continuing in the employment to which that risk was incident, he renounces his right to sue for any injury which he may receive in consequence of its existence. See § 280, infra. But if we set aside these decisions, which have never been explicitly declared to affect the doctrine of a contractual assumption of risks, there is no question that the servant's knowledge or ignorance of a risk is regarded by all common-law courts as a differentiating factor, which of itself and without reference to the quality of the master's conduct supplies an adequate test for the determination of the servant's right of action. This conception is frequently recognized under both its positive and its negative aspect, in the language and the rulings of the courts. On the one hand, the inability of the servant to recover is asserted, in the broadest terms, as to all cases in which he knew of the risk which caused his injury.¹ On the other hand, it is well settled that no action can

<sup>1</sup> For example: "An employee as-contrary to the fact, he cannot justify sumes risks which are patent, and latent himself in shutting his eyes to the risks of which he is informed." *Trainor* truth. In short, he cannot be heard to v. Philadelphia & R. R. Co. (1890) 137 say that he relied upon that which he Pa. 148, 20 Atl. 632. A servant "as-did not believe." Chicago & A. R. Co. sumes the perils incident to his service, v. Merriman (1900) 95 Ill. App. 628. of which he is informed, or which ordi-"Assumption of risk is a term of the of which he is informed, or which ordi"Assumption of risk is a term of the nary care would disclose to him." Alcontract of employment, express or imlen v. Boston & M. R. Co. (1898) 69 N. plied from the circumstances of the em-H. 271, 39 Atl. 978. "Recovery cannot ployment, by which the servant agrees be had when one voluntarily exposes that dangers of injury obviously inci-himself to danger of which he knows, dent to the discharge of the servant's or might have known by the exercise of duty shall be at the servant's risk." ordinary care." Cowles v. Chicago, R. Narramore v. Cleveland, C. C. & St. L. I. & P. R. Co. (1897) 102 Iowa, 507, 71 R. Co. (1899) 48 L. R. A. 68, 37 C. C. N. W. 580. "When an employee, after A. 499, 96 Fed. 298. having the opportunity of becoming acquainted with the risks of his situation, cussing the right of a servant to recover accepts them, he cannot complain if he damages from a stranger, Willes, J., is subsequently injured by such exposure." Wharton, Neg. § 214, adopted in ence to certain employers' liability cases St. Louis & S. E. R. Co. v. Britz (1874) which had been cited by defendant's 72 Ill. 256. "If a servant goes on to do counsel: "The cases referred to, as to 72 Ill. 256. "If a servant goes on to do work in manifestly dangerous circumstances, he does so at his own risk." and persons employed in other capaci-Crichton v. Keir (1863) 1 Sc. Sess. Cas. ties in a business or profession which 3rd Series, 407. "All these rules affectneessarily and obviously exposes them ing the relation of master and servant, to danger, . . . also have their spein respect to their duties and obligations toward one another, are founded son so employed is supposed to underupon presumptions; and if the servant take, not only all the ordinary risks of becomes aware that any of them are

be maintained unless it is proved that the servant was ignorant of the risk which caused his injury.<sup>2</sup>

This theory, it will be noticed, fixes the boundary line between the cases in which the master is or is not liable, with reference to precisely the same factors as the theory that it is negligence to expose a servant to any danger, whatever its character, of which he is ignorant, and not negligence to expose him to any danger which he understands. See chapter vii., ante. The practical results of both theories are obviously identical. It is merely the logical standpoint which is different.

If the servant's knowledge or ignorance were made the essential and primary basis of classification, the arrangement of the cases in the ensuing subtitles would not be altered in any material degree. Normal and abnormal risks would still have to be segregated, for the

L. J., remarked that, when proper apthe master and without the knowledge complaint is discussed. of the servant, and that each issue must,

Normal and abnormal risks would still have to be segregated, for the but also all extraordinary risks which he knows of and thinks proper to incur, when he sues the master. That the including those caused by the misconduct of his fellow servants; not, however, including those which can be traced to mere breach of duty on the part of the master." \*Indermaur v.\* is explicitly affirmed in the following, \*Dames\* (1866) L. R. 1 C. P. 274, 35 L. among many other cases: \*Toledo, W. J. C. P. N. S. 184, 12 Jur. N. S. 432, 14 & W. R. Co. v. \*Fredericks\* (1874) 71 L. T. N. S. 484, 14 Week. Rep. 586, 1 Ill. 294; \*Evans v. \*Meredith Shook & Harr. & R. 243. The rule that the employer is bound to use reasonable care to provide safe machinery and a comflective of concentration of a ditch, with the distinct on of a ditch, with the distinct on the exeavation, and that a certain boat with its engines and boilers is to be used in the exeavation, and that a certain boat with its engineer is to have charge and control, and that such employee is to work under such engineer's direction. \*Lebkeuche\* (1897)\* 101 Ky. 212, 40 S. W. 696. A v. \*Bolansen\* (1896)\* 69 Ill. App. 297.

\*\*It is necessary to allege that the servant does not know of the danger, and does the act which may and does cause injury to him, he has nothing an does cause injury to him, he has nothing an does cause injury to him, he has nothing an does cause injury to him, he has nothing an adoes cause injury to him, he has nothing an and of the damage sustained." \*Griffiths v. London & St. K. Docks Co.\*\* (1898) 50 La. Ann. 188, 23 So. to complain of, and cannot bring an and which one was ignorant when enfiths v. London & St. K. Docks Co.\*\* (1898) 50 La. Ann. 188, 23 So. to complain of, and cannot bring an and which one was ignorant when enfiths v. London & St. K. Docks Co.\*\* (1898) 50 La. Ann. 188, 23 So. to complain of, and cannot bring an and which one was ignorant when enfiths v. London & St. K. Docks Co.\*\* (1899) 50 La. Ann. 189, 21 Tex. Civ. \*Lery & Mctal Co.\*\* [1899]

See also chapter xLv., infra, where pliances have been furnished, they may the effect of this doctrine in its rela-well become unsafe to the knowledge of tion to the sufficiency of the servant's

reason that, as explained hereafter (§§ 260a, 273, infra), the former are usually presumed to be comprehended, while there is no such presumption as to the latter.

258. Servant assumes risks resulting from conditions for which he himself is responsible.—But there is one class of cases which, although it is possible to find a place for them under the alternative scheme of classification, would seem to be preferably controlled entirely by the element of the servant's knowledge. The class of cases referred to is that in which recovery is denied on the broad ground that the servant himself deliberately selected the course of action which led to his receiving the injury complained of. Under such circumstances, he must obviously be regarded as having taken upon himself the responsibility for any personal harm which he may suffer as a proximate result of the selection thus made. In these, as in most other cases where the intentional adoption of a certain line of action is proved, the facts will also be suggestive of contributory negligence. But it is both unnecessary and disadvantageous to rely upon a conception which raises a disputable question, if a decisive element is supplied by the clear evidence of a deliberate choice on the servant's part, or the exercise of his own judgment in creating the conditions which occasioned the accident.1

'In Mellor v. Merchants' Mfg. Co. otherwise have maintained against one (1890) 150 Mass. 362, 5 L. R. A. 792, who has furnished his employer with a 23 N. E. 100, it was recognized that defective derrick for hoisting heavy there "might be cases where the plainstone, on the theory that it is an instrutiff would be held to have taken the ment dangerous to human life if not risk, irrespective of any implied term properly constructed, is barred by evinn his contract of service, even if he dence showing that, being placed in full could not properly be said to have been control of the apparatus, he removed, negligent." Upon this principle a verupon his own responsibility, the rope dict for the plaintiff was there set aside.

dict for the plaintiff was there set aside, which had been supplied with the derthe evidence showing that when he was rick, and procured from the owner one injured he had undertaken to make re- of another kind which was a quarter of pairs which it was no part of his reguan inch thicker than he thought suffilar duty to make, and started to do so cient. Davies v. Pelham Hod Elevating of his own free will, upon the suggestion Co. (1892) 65 Hun, 573, 20 N. Y. Supp. of a fellow workman, after asking and 523, Affirmed, without opinion, in (1895) obtaining the mere consent of his own 146 N. Y. 363, 41 N. E. 88. A seaman immediate superior. Under such cirwho constructs for himself a "boatcumstances he was only a volunteer, and swain's chair" (an appliance to support could stand on no better footing than a him wnile painting a mast) cannot restranger would have done who should cover for injuries caused by defects stranger would have done who should cover for injuries caused by defects have offered, and should have been pertherein. Johnson v. Johansen (1898) mitted, to make the same repairs. Even 30 C. C. A. 675, 58 U. S. App. 104, 86 if it was not negligent of him to approach the dangerous spot, he took the proach the dangerous spot, he took the the construction of the place in which, risk of the danger which he necessarily or provide the tools with which, he contemplated as existing when he unverse, and if he does so his master is dertook to remove it.

An action which the servant of a confor injuries to him caused by defects tractor who is erecting a building might therein (charge to jury).

Donovan v.

Harlan & H. Co. (1899) 2 Penn. (Del.) while doing that work, that the position 190, 44 Atl. 619. A miner who props of the machinery and appliances plainly the roof of his working place until he indicated such fact to a person of ordiregards it as safe, and is injured by nary intelligence, and that if the place stones or other materials falling from was, as he asserted, dangerous, he might the roof, in consequence of his mistake have refused to work there. Demers v. in judgment as to its safety, cannot Deering (1899) 93 Me. 272, 44 Atl. 922. maintain an action against the employ- A laborer of ordinary intelligence, farer for such injury. Pittsburgh & W. miliar with the work, who deliberately Coal Co. v. Estiennard (1895) 53 Ohio chose a position where he believed him-Coal Co. v. Estievenard (1895) 53 Ohio chose a position where he believed him-St. 43, 40 N. E. 725. One employed to self to be secure under an overhanging take down a wooden building, who, after knocking out a stud, was injured by ing unsuccessfully to pry down, could falling timbers, cannot recover, where he exercised his own judgment, with full some states of the facts. Nourie v. Theodald (1896) 68 N. H. 564, 41 Atl. 182. A subcontractor's employee who volunday ardmaster who is thrown off the front footboard of an engine by striking against a pile of coal which he has himself permitted the consignee to unload at that particular place cannot maintain an action. Highland Ave. & Belt R. So. 357. Proof that the employer's superintendent asked the employee if he negative in the secure under an overhanging bank which his foreman had been trying to pry down, could not recover where the bank fell on him. Songstad v. Burlington, C. R. & N. R. Co. (1889) 5 Dak. 517, 41 N. W. 755. A subcontractor's employee who voluntarily and without the command of his foreman undertook to work about a terrace cotta cornice not secured by the customary anchors assumed the consequent risk. Winkle Terra Cotta Co. v. Homeractor where the bank fell on him. Songstad v. Burlington, C. R. & N. R. Konowledge of the facts. Nourie v. Theodald (1899) 5 Dak. 517, 41 N. W. 755. A subcontractor's employee who voluntarily and without the command of his foreman had been trying unsuccessfully to pry down, could not recover where the bank fell on him. Songstad v. Burlington, C. R. & N. R. Konowledge of the bank which his foreman had been trying unsuccessfully to pry down, could not recover where the bank fell on him. Songstad v. Burlington, C. R. & N. R. Konowledge of the same tracever where the bank fell on him. Songstad v. Burlington, C. R. & N. R. Konowledge of the bank which his foreman had been trying unsuccessfully to pry down, could and the convergence of the bank which his foreman had been trying unsuccessf St. 43, 40 N. E. 725. One employed to self to be secure under an overhanging So. 357. Proof that the employer's superintendent asked the employee if he mailed on to a chute to facilitate his perwanted the couplings covered, and that formance of his duties cannot recover the employee declined the precaution, for an injury which he receives in conconclusively proves that the employee sequence of his suggestion being folassumed the risk of the omission and lowed. Hart v. Frick Coke Co. (1890) freed the employer from responsibility. 131 Pa. 125, 18 Atl. 1011. An engineer (The trial judge was held to have who directs a repairer of his locomowrongly charged that this was merely one of the circumstances to be considered in determining whether the servant had assumed the risk.) Shaw v. Shelundisclosed defect. Kramer v. Willy don (1886) 103 N. Y. 667, 9 N. E. 183. (1901) 109 Wis. 602, 85 N. W. 499. An A servant of full age and ordinary inemployee on a baling machine, who setelligence cannot recover for an injury lects a joist for use in connection there place intended for workmen to stand in instruct a jury that an employee as-

telligence cannot recover for an injury lects a joist for use in connection there-received through his slipping and fall- with from a pile lying before him, asreceived through his slipping and fall-with from a pile lying before him, asing, while attempting to hang a bag besumes the risk of an injury from the ing filled with cotton taken from a dry-breaking of such joist. Maloney v. er, over spikes driven into a beam so United States Rubber Co. (1897) 169 high above the dryer that he could only Mass. 347, 47 N. E. 1012. A yard-reach it with his finger. Wilson v. Treman assumes the risk of using a mont & S. Mills (1893) 159 Mass. piece of timber found by him in 154, 34 N. E. 90. A railroad company the vicinity as a "push stick," where is not liable for the death of an engino push stick is on the engine, and there neer, caused by his engine running into is no emergency calling for the moving a standing train while he was asleep at of the car in such manner. Garrison v. his post, and the failure of the flagman McCullough (1898) 28 App. Div. 467, of the train to perform his duty, al- 51 N. Y. Supp. 128. A switchman whose though such engineer had been in such duty it is to supply himself with proper continuous service that he could no coupling pins for different drawheads longer endure it without sleep, where on cars which he is to couple, from the he was privileged to refuse to go upon pins scattered about in the yard, as-the trip, but went for the sake of extra sumes the risk of using a pin too large Nattress v. Philadelphia & R. R. for the drawhead of a car, which he Co. (1892) 150 Pa. 527, 24 Atl. 753. finds lying thereon when he attempts to No recovery can be had for injuries sus- make a coupling. Missouri, K. & T. R. tained in a sawmill, where it appears Co. v. Hauer (Tex. Civ. App.; 1896), that the servant was not standing in the 33 S. W. 1010. It is not improper to

### B. Assumption of ordinary risks.

259. Ordinary risks presumed to have been undertaken by a servant.— In 1837 it was laid down in the leading case of Priestley v. Fowler<sup>1</sup> that a servant assumes all the ordinary risks which are incidental to his employment; and this doctrine has ever since been applied by the courts of all the countries in which the common law is the prevailing system of jurisprudence.<sup>2</sup> The inability to maintain an action is a peremptory conclusion of law, if it is apparent that the injury resulted from a risk of this description, unless the plaintiff can adduce evidence which fairly tends to show that the injured person, by reason of his want of experience or his tender years, was not chargeable with that comprehension of the risk which, in the absence of such evidence, he is presumed to have possessed. See § 260, infra.

The resulting situation, when considered from the standpoint of the master's duty, is that he is under no obligation to provide against the ordinary risks incident to the performance of the contract of service<sup>2a</sup> (compare § 239, ante), the rule under this form also being qualified in the case of inexperienced persons and minors (compare §§ 19, 20, and 244–251, ante). Accordingly, if the risk to which the injury was due was an ordinary one, the employer is not liable even if the employee did use ordinary care.3 The obligation of the servant to

sumes the danger incident to a machine the phrase, risks created by the master's of which he has the optional use. In-negligence being excepted from those unternational & G. N. R. Co. v. McCarthy dertaken. Compare §§ 1, 2, ante. (1885) 64 Tex. 632.

The servant's inability to maintain an action for injuries caused by a coemployee's selection of an appliance is dis-

<sup>2</sup> "The servant, when he undertakes to as a part of his conventional obligations, the ordinary perils which in the nature of things are incident to such service." Harrison v. Central R. Co. (1865) 31 N. J. L. 293. See also the cases cited passim in the notes to the present subtitle. In an early Irish case it was somewhat inaccurately observed that a servant "is supposed to undertake the

<sup>2</sup>a Murphy v. Greeley (1888) 146 Mass.

196, 15 N. E. 654.

<sup>3</sup> Northern C. R. Co. v. Husson (1882) 101 Pa. 1, 47 Am. Rep. 690; Baltimore To the special of all appliance is discoursed in chapter XXXII., post.

decoussed in chapter XXXII., post.

decoussed in chapter XXXII., post.

decoussed in chapter XXXIII., post.

decoussed in chapter XXIII., post.

decoussed in cha App. 281. A jury is properly instructed perform any particular service, assumes, that a servant who uses an implement, knowing of defects therein, assumes the risks thereof, although the defects may be such that a man of ordinary prudence might take the risks. Missouri, K. & T. R. Co. v. Wood (1896; Tex. Civ. App.) 35 S. W. 879. The principle stated in the text is singularly inconsistent with the statement in a later decision by the same court which forservant "is supposed to undertake the duty for which he is paid, subject to all mulated that principle. In Boyd v. Harris (1896) 176 Pa. 484, 35 Atl. 222, the risks which may occur during its continuance." Potts v. Plunkett (1859) the reservice upon a railroad know of the context how. 9 Ir. C. L. Rep. 290. The context, how- that it is a service which exposes them ever, shows that it was not intended to to many dangers necessarily incident to charge the servant with an assumption the employment. The risk of these dan-of "all the risks" in the literal sense of gers they assume when they accept the use proper care is obviously quite immaterial when the applicability of the doctrine as to assumption of risks is in question.4

260. Rationale of the doctrine of the assumption of ordinary risks.— The doctrine stated in the preceding section may be regarded as one which rests upon two presumptions: First, that, under normal circumstances, a person who enters any given employment appreciates all the risks which are normally incident to that employment; and, secondly, that the fact of his accepting the employment with this appreciation of the risks which it normally involves warrants the inference that he agrees by implication to relieve the master of all responsibility for such injuries as he may receive as a result of their existence, the consideration for this implied agreement being the stipulated compensation, which is supposed to be sufficient to indemnify him for the ever present possibility that one or the other of the risks thus undertaken may eventuate in some disaster.

a. Presumption that ordinary risks are comprehended by a servant. —In support of the first branch of the above statement some explicit language of the courts may be cited. More frequently, however, the

v. Duluth & W. R. Co. (1891) 46 Minn. was too dark to see the freight cars on 384, 49 N. W. 187, where it was held the track, they were running at the rate stopped by the way, and spent the even- that they were not running with proper ing in social pleasure at neighboring caution under the circumstances." It saloons, and wrongfully delayed his is submitted that the defendants, on the freight cars which had in the meantime ever to protect the plaintiff from the obbeen left by the railway company stand- structions in question, and that the acing on the track, he voluntarily took the tion should have been dismissed on this risk of running his car in the darkness, ground, the existence or absence of due The reasoning of the court is as folcare on the plaintiff's part being wholly lows: "It is true, these persons in immaterial under the circumstances. As charge of the hand car were bound to to the confusion between the defenses of return with the hand car, and in so do- assumption of risks and contributory ing must use the track; but they cannot negligence, see the discussion in chapter complain of obstructions or cars on the XVIII. B, post. complain of obstructions or cars on the XIII. B, post.

track, placed there in the ordinary
course of the business of the company, understood the ordinary hazards attendwhich they did not discover because of ing his employment, and therefore to
the darkness, if, through their own folly
and breach of duty to the defendant, hazard when he entered into the defendtheir return was delayed till after it ants' service." Hayden v. Smithville
became too dark to proceed with safety, Mfg. Co. (1861) 29 Conn. 548. "An

employment. As between themselves and whereby they disabled themselves from their employer, they undertake to exer- discovering any obstructions they might cise the measure of attention and care otherwise have avoided. Having thus necessary to protect themselves from placed themselves in the wrong, they such dangers, and if they fail in this took the risk of the darkness, and were respect, and suffer injury in conse-quence, they are remediless." bound to proceed with such caution as might be necessary to secure their safemight be necessary to secure their safe-\*This consideration seems to have also ty. They had only a little over a mile escaped the notice of the court in Sliney to run; but, though they claim that it that, where an employee in charge of a of at least 7 miles an hour when the hand car on a railway track, whose duty collision occurred; and the nature of the it was to return with it before night, accident and effect of the collision show train till it became too dark to observe evidence here stated, owed no duty what-

doctrine involved is left as an indirect, but none the less certain, deduction from the fact that, in passages affirming or discussing the servant's acceptance of ordinary risks, judges employ a phraseology which shows that an ordinary risk is always viewed by them as being one which is comprehended by the servant, and that a risk which is ordinary and at the same time not appreciated by the servant involves a logical impossibility and a contradiction in terms.<sup>2</sup>

employee of mature years and of ordi- and which due care on the part of the presumed to know, appreciate, and as-vent, should not be visited on the lat-sume the ordinary and apparent risks ter." Snow v. Housatonic R. Co. (1864) of injury from the machinery and appli- 8 Allen, 441, 85 Am. Dec. 720. "When ances with or about which he is work- the plaintiff entered the defendant's ing." Jones v. Manufacturing & Invest. service, he impliedly agreed to assume "The rule is that the servant is held by cluding the risk of injury from the kind his contract of hiring to assume the risk of machinery then openly used. It is of injury from the ordinary dangers of not material whether he examined the the employment; that is to say, from machinery before making his contract, such dangers as are known to him, or or not. He could look at it if he chose, discernible by the exercise of ordinary or he could say, I do not care to examcare on his part." Johnson v. Devoe ine it; I will agree to work in this mill, Snuff Co. (1898) 62 N. J. L. 417, 41 and I am willing to take my risk in Atl. 936. According to a distinguished regard to that.' In either case, he would English judge, the nonliability of mas- he held to contract in reference to the ter to servant in cases where a stranger arrangement and kind of machinery then would be liable appears to be founded on the servant's undertaking or subjecting himself to the "ordinary" risk of his service, the dangers of which "he is just as likely to be acquainted with as the master." Grove, J., in Fowler v. Lock (1872) L. R. 7 C. P. 272. The risks "ordinarily incident to the service" include "all of which the servant has notitle; that is, all that are "patent and "One entering the employment of anobvious to him." Taylor v. Wootan other assumes the obvious risks arising (1891) 1 Ind. App. 188, 27 N. E. 502. from the nature of the employment, from upon any employment, is supposed to know and to assume the risks naturally incident thereto. If he is to work in conjunction with others, he must know that the carelessness or negligence of one of his fellow servants may be pro- 500. "Parties entering into a contract ductive of injury to himself; and, be- for service by one of them make their sides this, what is more material as af- engagements in reference to the subjectfecting his right to look to his employer matter to which the contract relates, and for damages for such injuries, he knows their rights and liabilities depend upon or ought to know that no amount of care the contract as applied to the subject or diligence by his master or employer can by possibility prevent the want of can by possibility prevent the want of ployee impliedly agrees to assume all due care and caution in his fellow serv- the obvious risks of the business in ants, although they may have been rea- which he contracts to work." Murch v. sonably fit for the service in which they Thomas Wilson's Sons & Co. (1897) 168 are engaged. It is certainly most just Mass. 408, 47 N. E. 111. "In accepting and reasonable that consequences which an employment the latter [servant] is

nary mental capacity and intelligence is employer or master could in no way pre-Co. (1899) 92 Me. 565, 43 Atl. 512. all the obvious risks of the business, inregularly in use by his employer, so far as these things were open and obvious, so that they could readily be ascertained by such examination and inquiry as one would be expected to make if he wished to know the nature and perils of the service in which he was about to engage." Rooney v. Sewell & D. Cordage Co. (1894) 161 Mass. 153, 36 N. E. 789. <sup>2</sup> "A workman or servant, on entering the manner in which the business is carried on, and from the condition of the ways, works, and machinery, if he is of sufficient capacity to understand and appreciate them." Goodes v. Boston & A. R. Co. (1894) 162 Mass. 288, 38 N. E. 500. "Parties entering into a contract with which they are dealing. the servant or workman must have fore- assumed to have notice of all patent seen on entering into an employment, risks incident thereto, of which he is

The considerations which have induced the courts to entertain the presumption of the servant's knowledge of all ordinary risks are well set forth in the following passage:

"An employee will be deemed to have assumed all the risks naturally and reasonably incident to his employment, and to have notice of all risks which, to a person of his experience and understanding, are, or ought to be, open and obvious. This is a reasonable rule, for, when a man seeks employment in any particular department, of either industrial or intellectual activity, he thereby represents himself to be qualified by the necessary experience or learning, as the case may be,

inform himself." Sykes v. Packer (1882) 99 Pa. 465, citing Whart. Neg. § 206. "When a servant knows the dangers he has to encounter, and still engages in the service, he has no ground for complaint if he receive injuries from such dangers." Winkler v. St. Louis Basket & Box Co. (1897) 137 Mo. 394, 38 S. W. 922. A servant who engages 38 S. W. 922. A servant who engages to do a particular duty in a particular manner, and has full knowledge of the dangers incident to the performance of the duty, cannot complain that the thing he undertakes to do is dangerous. Kuhns v. Wisconsin. I. & N. R. Co. (1887) 70 Iowa, 561, 31 N. W. 868. An employee of mature age is presumed, on taking employment in any service, to possess knowledge and skill fitting him therefor, and to be acquainted with the therefor, and to be acquainted with the dangers attending such service. Peterdangers attending such service. Peterson v. New Pittsburg Coal & Coke Co. (1898) 149 Ind. 260, 49 N. E. 8. "A servant is understood to assume the ordinary risks incident to the particular service in which he voluntarily engages, to the extent those risks are known to him at the time of his employment, or should be readily discernible to a person of his age and capacity in the exson of his age and capacity in the exercise of ordinary care and prudence." Stager v. Troy Laundry Co. (1901) 38 Or. 480, 53 L. R. A. 459, 63 Pac. 645.

In the leading case of Priestley v. Fowler (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987, Lord Abinger, during the argument, distinguished between the case of a passenger on a stagecoach which brings out the constant logical who had no means of knowing how the

nary risks and perils incident to the 634; Kuhns v. Wisconsin, I. & N. R. Co.

informed, or of which it is his duty to employment which the servant can fore-inform himself." Sylves v. Packer see, or shun, or avoid, or guard against see, or shun, or avoid, or guard against by prudence, skill, and forecast" (Cooper v. Pittsburgh, C. & St. L. R. Co. [1884] 24 W. Va. 37); all risks naturally and reasonably incident to the service in which he embarks, so far as the hazards of the service are obvious and within the apprehension of a person of his experience and understanding (Jenney Elperience and understanding (volume) sectric Light & P. Co. v. Murphy [1888] 115 Ind. 566, 18 N. E. 30); the risk of injury from all the ordinary dangers incident to the employment, of which he had notice before voluntarily exposing himself (Paland v. Chicago, St. L. & N. O. R. Co. [1892] 44 La. Ann. 1003, 11 So. 707); "all the usual, known dangers incident to the employment" (Herdman-Harrison Milling Co. v. Spehr [1893] 145 Ill. 329, 33 N. E. 944); the dangers which naturally arise from the nature of the work to be performed, whether visible or invisible, known or unknown (Linton Coal & Min. Co. v. Persons [1895] 15 Ind. App. 69, 43 N. E. 651); "all the open and visible risks incident to the employment in which he engages" (Hall v. Chicago, B. & N. R. Co. [1891]
46 Minn. 439, 49 N. W. 239); "ordinary
and apparent" risks (Coolbroth v.
Maine C. R. Co. [1885] 77 Me. 165).
The possibility of a fellow servant's

being negligent was spoken of as a hazard well known to the plaintiff in International & G. N. R. Co. v. Tarver (1888) 72 Tex. 308, 11 S. W. 1043.

Other cases in which language is used association between the notions of the who had no hears of knowing how the association between the notions of the coach was constructed or loaded, and ordinary quality of risks and the servthe case of the regular driver of a van, ant's comprehension thereof are the following was on his master's premises and lowing: Day v. Toledo, C. S. & D. R. had the means of knowledge.

Compare also the following state-Hathaway v. Michigan C. R. Co. (1883) ments: The servant assumes "the ordi51 Mich. 253, 47 Am. Rep. 569, 16 N. W.

for the performance of the duties which he proposes to assume; and such experience or learning necessarily brings a knowledge of the ordinary risks of the employment."3

b. Presumption that a servant agrees to undertake ordinary risks. -It has frequently been declared that the consideration of the servant's implied contract to assume the ordinary risks of his employment is the stipulated compensation for his services, and that the amount of that compensation is adjusted with reference to the character of those risks.4 Obviously, however, this theory is borne out only to a very

(1887) 70 Iowa, 561, 31 N. W. 868; 12 S. W. 172, and Brown v. Oregon Lum-Doyle v. St. Paul, M. & M. R. Co. ber Co. (1893) 24 Or. 315, 33 Pac. 557. (1889) 42 Minn. 79, 43 N. W. 783; It has been held, however, that an em-Northern C. R. Uo. v. Husson (1882) ployee in a sawmill who applies to be 101 Pa. 1, 47 Am. Rep. 690; Texas & retained as an oiler some time after he P. R. Co. v. Hinnick (1894) 10 C. C. A. has been employed as such does not 1, 23 U. S. App. 310, 61 Fed. 635; Coolthereby represent himself as competent broth v. Haine C. R. Co. (1885) 77 Me. for the position and assume all its risks, 165; Foster v. Kansas Salt Co. (1899) where his request has no influence on 60 Kan. 859, 57 Pac. 961; Gibson v. the employer's action. Guinard v. Or. 493, 32 Pac. 295. See also the cases cited in § 266, infra, as to the assump-

stipulates that he has the experience to not complain of the peculiar taste and perform properly the duties of his posi- habits of his employer, nor sue him for tion, and that he knows at least the ob- damages sustained in and resulting from vious dangers attending the employment that peculiar service." Hayden v. in which he engages. Mayes v. Chicago, Smithville Mfg. Co. (1861) 29 Conn. R. I. & P. R. Co. (1884) 63 Iowa, 562, 548. Compensation is supposed to be 14 N. W. 340, 19 N. W. 680. Similar adjusted with reference to the hazardous statements are found in Gulf, C. & S. F. nature of the service. Stager v. Troy R. Co. v. Williams (1888) 72 Tex. 159, Laundry Co. (1901) 38 Or. 480, 53 L.

60 Kan. 859, 57 Pac. 961; Gibson v. the employer's action. Guinard v. Oregon Short Line R. Co. (1893) 23 Knapp-Stout & Co. Co. (1895) 90 Wis. the employer's action. Guinard v. 123, 62 N. W. 625.

"The presumption of law is that the

tion of the risks of unusually dangerous risks are considered in adjusting the employments. The rationale of these amount of compensation for the services rulings is in part that such risks are to be rendered." ('umberland & P. R. to be rendered." ('umberland & P. R. an obvious incident of the work to be Co. v. State (1875) 44 Md. 283. "The done. In Louisville, N. A. & C. R. Co. servant, . . as between himself and v. Fravley (1886) 110 Ind. 18, 9 N. E. his master, is supposed to have con-594, it was remarked that the rule by tracted on those terms." Noyes v. which a servant assumes the usual risks Smith (1856) 28 Vt. 59. Ordinary of the service is "especially" applicable risks "are supposed to enter into the to all those risks which require only the compensation to be received by him for exercise of ordinary observation to make his services." Cooper v. Pittsburgh, C. them apparent. So also in Steinhauser & St. L. R. Co. (1884) 24 W. Va. 37. v. Spraul (1895) 127 Mo. 541, 27 L. R. "A servant has the means of knowing, A. 441, 28 S. W. 620, 30 S. W. 102, it as well as his employer, the usual perils was said that a servant "assumes the of the business, and can exact a rate of risks incident to such employment, and compensation in reference to them." this is especially true of seen dangers Sherman v. Rochester & S. R. Co. (1858) and patent defects." But the implied 17 N. Y. 156. The servant is paid "for qualification, if it was really intended the exact position and hazard he as-as such, which is indicated by the latter clauses in these statements, is inemployment when, from unforeseen perconsistent with the cases already cited. ils, he finds his reward inadequate or unsupervisor. The semployment was a satisfactory. consistent with the cases already cited. Its, he linds his reward inadequate or un
<sup>a</sup> Wagner v. H. W. Jayne Chemical satisfactory. The employee,
Co. (1892) 147 Pa. 475, 23 Atl. 772. So, having knowledge of the circumstances
also, it has been said that a servant who and entering his (i. e. the master's)
enters a certain employment impliedly service for the stipulated reward, canlimited extent by the actual facts of everyday life, and for this reason it cannot be regarded as anything more than a convenient juristic fiction propounded for the purpose of obtaining a rational foundation for a doctrine already formulated.5

engages in the service, and that his comcannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid." The following passage from the recent decision in Bethlehem Iron Co. v. Weiss (1900) 40 C. C. A. 270-274, 100 Fed. 45, may also be advantageously quoted in this connection: "It is the duty of the master, whether that duty rests upon the terms of the contract of service, expressed or implied, or upon the rules of law governing the is exposed to no extraordinary risks which he could not reasonably anticipate. In other words, that there are no risks attending the business other than general nature, or, if there are such extraordinary risks, that they should be explained to the servant, or be known by or be entirely obvious to him. The servant also has the right to expect from the master that his fellow servants have been selected with due regard to their competency and carefulness, and that they are under such proper supervision as the case may require. In this sense, it is the duty of the master to provide for the servant a reasonably safe place to work in, and it is in this sense alone that the duty thus stated is to be un-

R. A. 459, 63 Pac. 645. In Chicago, M. ordinary risks incident to the service, R. A. 459, 63 Pac. 645. In Chicago, M. ordinary risks incident to the service, de St. P. R. Co. v. Ross (1884) 112 U. so far as those risks at the time of ens. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. tering upon the service are known to 184, Mr. Justice Field, after referring him, or should be readily discernible to to the rule defining the liability of a person of his age and capacity in the master for injuries caused by his servants to third persons, proceeded thus: the business is dangerous or not. The "Where injuries befall a servant in its law governing the relation of master and servant assumes freedom of contract here." employ, a different principle applies. servant assumes freedom of contract be-Having been engaged for the perform- tween them. Much of the world's work ance of specified services, he takes upon is dangerous, and it could hardly be carhimself the ordinary risks incident ried on successfully unless those who thereto. As a consequence, if he suf- were employed in it should be held to fers by exposure to them, he cannot reassume the dangers that were incident cover compensation from his employer. to it, or which were known, or so obvious The obvious reason for this exemption that they ought to be known, by one is that he has, or in law is supposed to entering the employment." Before the have, them in contemplation when he abolition of slavery in the United States, the accepted rule was that a person hirpensation is arranged accordingly. He ing the services of a slave was not liable for an injury resulting to such slave from any of the usual hazards incident to the employment, the reason assigned being that such hazards were presumed to be known to the owner of the slave and taken into account when the rate of compensation was fixed. Heathcock v. Pennington (1850) 33 N. C. (11 Ired. L.) 640; McDaniel v. Emanuel (1846) 2 Rich. L. 455; Kelly v. Wallace (1856) 6 Fla. 690; Pensacola & G. R. Co. v. Nash (1868) 12 Fla. 497. As the Engsituation, to see to it that the servant lish employers' liability act of 1880 and the American statutes modeled upon it (see chapter XXXVII., post) have put servants upon the same footing as strangers in actions for negligence, and such as usually attend business of that no contract to assume the risks of a given situation can be implied in the case of any person other than a servant, the effect of those statutes is to take from the master the defense that all ordinary risks incident to an employment are assumed by the servant, unless they are concealed, or are known to the master, and not to the servant. Thomas v. Quartermaine (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, per Lord Esher.

<sup>5</sup> The following passage puts the case for the theory much too strongly: "The derstood; otherwise, it would be incon-ordinary risks of the service in which sistent with the well-established rule of one is engaged are usually, in fact, conlaw that a servant, upon entering the sidered in making the engagement and service of his master, assumes all the adjusting the wages. And this may, Vol. I. M. & S.—38.

An attempt has also been made to justify the doctrine that the servant impliedly agrees to assume the ordinary risks of his employment by the considerations "that he is as well able to guard against them as his employer; and that it is equally just and reasonable to both, and strongly calculated to secure fidelity and prudence on the part of the servant, that he should rely solely on the skill and prudence of himself and his fellow servants in the business for protection from injury." But the common sense of the matter is rather that which is expressed in the following passage of the opinion in an off-cited case:

"It is assumed that the exemption operates as a stimulant to diligence and caution on the part of the servant for his own safety as well as that of his master. Much potency is ascribed to this assumed fact by reference to those cases where diligence and caution on the part of servants constitute the chief protection against accidents. But it may be doubted whether the exemption has the effect thus claimed for it. We have never known parties more willing to subject themselves to dangers of life or limb because, if losing the one or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant."7

261. What risks are deemed ordinary; generally.— An examination of the language and reasoning of the courts shows that the question whether a risk is or is not an ordinary one may be determined with reference to either one of two conceptions which are logically distinct.

According to one of these, the differentiating test is furnished by the principle already adverted to in § 3, ante, viz., that every risk which is not caused by a negligent act or omission on the master's part is assumed by the servant. An investigation conducted along the line thus indicated obviously throws us back upon the doctrines examined in the preceding chapters. The passages quoted in the subjoined note will serve as sufficient illustration of the phraseology used by the

doctrine as to the assumption of ordinary risks is spoken of as being founded either on an implied agreement or upon ableness and justice of the rule itself, considerations of public policy. De as applied to the relations of master and Graff v. New York C. & H. R. R. Co. servant."

(1879) 76 N. Y. 132. But the more correct way of stating the situation manifestly is that considerations of public 787, 789, 5 Sup. Ct. Rep. 184.

with great propriety, be held to be always so in legal contemplation." Chiplication of the contract depends and cago & G. E. R. Co. v. Harney (1867) 28 by which it is justified. In Goodes v. Ind. 28, 92 Am. Dec. 282.

Boston & A. R. Co. (1894) 162 Mass.

Boston & A. R. Co. (1894) 162 Mass. 288, 38 N. E. 500, the court, in reiteration of the contract of the court, in reiteration case to the assumption of ordiesary to inquire whether it "rests upon contract or upon the inherent reason.

courts for the expression of the principle that the risks which an employment still involves after a master has done everything that the law requires him to do for the purpose of securing the safety of his servants are presumed to be accepted by each and all of those servants. unless by reason of their immature age or their inexperience they are incapable of appreciating the hazards to which they are exposed.1

<sup>1</sup> The risks of employment assumed are pliedly agreed to risk and for which the those which occur after the master has master is not liable." Noyes v. Smith done what the law enjoins. Benzing v. (1856) 28 Vt. 59. The risks which the Steinway & Sons (1886) 101 N. Y. 547, servant assumes are "necessary risks, 5 N. E. 449. "The law implies as part such as attach or belong to the work, of the contract of service that the serv- and which even the ordinary care of ant agrees to and does assume all the the master cannot provide against." ordinary risks of personal injury, without negligence of his employer." Sherman v. Rochester & S. R. Co. (1858)

For other cases in which this mode of 17 N. Y. 153, 156. "In all cases at comexpression is employed, see Hudson v. after the exercise of that diligence and tiff's employment, is for the jury. Flancasualties, which the servant has im- jury is properly instructed that a rail-

mon law, a master assumes the duty Ocean S. S. Co. (1888) 110 N. Y. 625, toward his servant of exercising reason- 17 N. E. 342; Louisville & N. R. Co. v. able care and ailigence to provide the Boland (1892) 96 Ala. 626, 18 L. R. A. servant with a reasonably safe place at 260, 11 So. 667; Little Rock & Ft. S. R. which to work, with reasonably safe ma- Co. v. Duffey (1880) 35 Ark. 602; Illiwhich to work, with reasonably safe matchinery, tools, and implements to work with reasonably safe materials to work with reasonably safe materials to App. 607; Hoosier Stone Co. v. McCain work upon, and with suitable and com- (1892) 133 Ind. 231, 31 N. E. 956; petent fellow servants to work with Dandie v. Southern P. R. Co. (1890) him; and when the master has properly 42 La. Ann. 686, 7 So. 792; Thomas v. discharged these duties, then, at common Missouri P. R. Co. (1891) 109 Mo. 187, law, the servant assumes all the risks 211, 18 S. W. 980; Muirhead v. Hanand hazards incident to or attendant wibal & St. J. R. Co. (1885) 19 Mo. Ann. and hazards incident to or attendant nibal & St. J. R. Co. (1885) 19 Mo. App. upon the exercise of the particular employment or the performance of the particular work." Atchison, T. & S. F. 497; Davis v. Baltimore & O. R. Co.
R. Co. v. Moore (1883) 29 Kan. 632. (1893) 152 Pa. 314, 25 Atl. 498; H. S.
"It is well settled that where one enHopkins Bridge Co. v. Burnett (1892)
ters into the service of another he as85 Tex. 16, 19 S. W. 886; Johnson v. sumes to run all the ordinary risks per- Chesapeake & O. R. Co. (1892) 36 W. taining to such service; and this means Va. 73, 14 S. E. 432. One particular only that he cannot recover for any inform of the principle deserves special jury that his employer, by the exercise notice, viz., that which is suggested by of ordinary care and prudence, could not considering it in its relation to the docof ordinary care and prudence, could not considering it in its leaston to the document of the provide against." Louisville, C. & L. trine that the servant cannot recover for R. Co. v. Cavens (1873) 9 Bush, 559, injuries due to defective conditions of 565. "A servant by entering into his which the master had no constructive nomaster's service assumes all the risks tice. See chapters x., XI., ante. The master's service assumes all the risks tice. See chapters X., XI., ante. The of that service which the master cansort control." Gilman v. Eastern R. "latent defects," i. e., defects which the Corp. (1865) 10 Allen, 233, 87 Am. Dec. master cannot be expected to discover. 635, quoted with approval in Caldwell Richardson v. Cooper (1878) 88 Ill. 270 v. Brown (1866) 53 Pa. 453. "Ordinary (273). The question whether the breakrisks are such as remain after the eming of a ladder, caused by a cross piece ployer has used all reasonable means to therein breaking because a nail that prevent them." Selen v. Southern P. fastened its left end to the side piece prevent them." Seley v. Southern P. fastened its left end to the side piece Co. (1890) 6 Utah, 319, 23 Pac. 751. was driven near a knot in the side piece, "It is only such injuries as have arisen was one of the ordinary risks of plaincare on the part of the master, that igan v. Guggenheim Smelling Co. can properly be termed accidents or (1899) 63 N. J. L. 647, 44 Atl. 762. A

According to the other conception the essential inquiry will simply be whether or not the risk can reasonably be said to answer the description of "ordinary," supposing that word to be construed in its familiar, everyday sense.2 Two separate ideas, one or other of which is more or less prominent according to the nature of the evidence, are conveyed by this epithet. One is that the occurrence which produces the risk is so regularly and normally incident to the employment that anyone who considers the matter at all must see that the liability to be injured by such an occurrence is an ever-present possibility.<sup>3</sup>

But as a brakeman in taking service astell a jury that he assumes only the risk of Neath R. Co. (1864) 5 Best & S. 570, of such secret defects as could not be 33 L. J. Q. B. N. S. 260. discovered by the employer by ordinary diligence and those which were open to

<sup>2</sup> This term is the one most commonly used to designate risks of the class now under discussion. The cases in which it is found are so numerous that it is not worth while to undertake to collect them. In Prather v. Richmond & D. R. Co. (1888) 80 Ga. 434, 9 S. E. 530, the defendant criticised the use of the words "ordinary perils," in a charge, because the jury might infer from it that, if accidents frequently happened, they were

road brakeman assumes the risk of a of which is to be reasonably anticipated latent defect in a coupling link not dis- as a natural incident to and consequence coverable on inspection. Alabama G. of the work in which he is employed. S. R. Co. v. Carroll (1898) 28 C. C. A. Noble v. Jones (1897) 103 Ga. 584, 30 207, 52 U. S. App. 442, 84 Fed. 772. S. E. 535. In a leading case the servant was spoken of as assuming the "probable sumes all the risks normally incident to dangers attendant upon entering the enthe employment, it is a misdirection to gagement in question." Morgan v. Vale

The idea expressed in the text obviously underlies the following phrases, common observation. Tewas Mexican R. which have been used in speaking of or-Co. v. King (1896) 14 Tex. Civ. App. dinary risks: Obviously incident to the 290, 37 S. W. 34. work (Winkler v. St. Louis Basket & work (Winkler v. St. Louis Basket & Box Co. [1896] 137 Mo. 394, 38 S. W. 921); ordinary incident as a matter of common knowledge (Hannigan v. Lehigh & H. R. Co. [1898] 157 N. Y. 244, 51 N. E. 992); belonging to the work itself or to the service in which the servant engages (Perry v. Marsh [1854] 25 Ala. 659); ordinarily incident to the employment (Consolidated Coal Co. v. the jury might infer from it that, if Haenni [1893] 146 Ill. 614, 35 N. E. accidents frequently happened, they were 162; Little Rock & Ft. S. R. Co. v. therefore ordinary perils, and no recovery could be had though the other R. Co. v. Minnick [1893] 6 C. C. A. 387, employees were negligent. But the court 13 U. S. App. 520, 57 Fed. 362; Riley said: "We do not think that any such v. West Virginia C. & P. R. Co. [1885] informate could be drawn from the law 27 W. Ve. 146; Caffrey R. New York inference could be drawn from the lan- 27 W. Va. 146; Gaffney v. New York guage used. Taken in connection with & N. E. R. Co. [1887] 15 R. I. 456, 7 the charge upon the question of negli- Atl. 284; Galveston, H. & S. A. R. Co. gence, it is a sound proposition in law. v. Garrett [1889] 73 Tex. 262, 13 S. W. The only adverse criticism we can make 62); incident to the service, work, busithe word 'ordinary?' Does not the employee assume the risk of all perils inployee assume the risk of all perils inL. ed. 1114, 7 Sup. Ct. Rep. 1166; Davis cident to his employment,—necessary, v. Baltimore & O. R. Co. [1893] 152 ordinary, and extraordinary,—except the Pa. 314, 25 Atl. 498; Quinn v. Johnson negligence of the company, its servants Forge Co. [1892] 9 Houst. 338, 32 Atl. and agents?" (It should be remembered, 858; Trihay v. Brooklyn Lead Min. Co. in reading the extract, that in Georgia [1886] 4 Utah, 468, 11 Pac. 612; Steinthe doctrine of common employment has hauser v. Spraul [1895] 127 Mo. 541, been abrogated by statute, so far as rail- 27 L. R. A. 441, 28 S. W. 620, 30 S. W. road companies are concerned).

3 A servant assumes the risk of injury paul, M. & M. R. Co. [1889] 42 Minn. occasioned by a casualty, the happening 79, 43 N. W. 787); common incident

other is that the risk is one which must always exist by reason of the inherent and unavoidable characteristics of the operations which the servant is required to perform.4 In some statements these two ideas are combined.<sup>5</sup> The second of these ideas clearly carries us very near

152 Pa. 314, 25 Atl. 498); usually incident to the employment (Texas & P. R. Co. v. Archibald [1898] 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777); usual (Davidson v. Cornell [1892] 132 N. Y. 234, 30 N. E. 573; Blanton v. Dold [1891] 109 Mo. 75, 18 S. W. 1149); usual and ordinary (Worlds v. Georgia R. Co. [1896] 99 Ga. 283, 25 S. E. 646; Atchison, T. & S. F. R. Co. v. Wagner [1885] 33 Kan. 666, 7 Pac. 208); usual or ordinary (Illinois Steel Co. v. Bau-man [1899] 178 Ill. 351, 53 N. E. 107); naturally incident to the employment (Morgan v. Vale of Neath R. Co. [1864] 5 Best & S. 570, 33 L. J. Q. B. N. S. 260; Uren v. Golden Tunnel Min. Co. [1901] 24 Wash. 261, 64 Pac. 174); natural and ordinary (Landgraf v. Kuh [1900] 188 Ill. 484, 59 N. E. 501; Howd v. Mississippi C. R. Co. [1874] 50 Miss. 178); natural or ordinary (Schwandner v. Birge [1884] 33 Hun, 186); natural (Morgan v. Vale of Neath R. Co. [1864] 5 Best & S. 570, 33 L. J. Q. B. N. S. 260; Cumberland & P. R. Co. v. State [1875] 44 Md. 283; Couch v. Charlotte, C. & A. R. Co. [1884] 22 S. C. 557; Gulf, C. & S. F. R. Co. v. Silliphant [1888] 70 Tex. 623, 8 S. W. 673); accompanying or arising from the natural or usual method of conducting the particular business (Strager v. Troy Laundry Co. [1901] 38 Or. 480, 53 L. R. A. 459, 63 [1901] 38 Or. 480, 53 L. R. A. 459, 63
Pac. 645); naturally and reasonably incident to the service (Jenney Electric Light & P. Co. v. Murphy [1888] 115
Ind. 566, 18 N. E. 30; Philadelphia, W. & B. R. Co. v. Keenan [1883] 103 Pa. 124; Rummell v. Dilworth [1885] 111
Pa. 343, 2 Atl. 355; Wagner v. H. W. Jayne Chemical Co. [1892] 147 Pa. 475, 23 Atl. 772) 23 Atl. 772).

The use of the word "naturally" in charging the jury that a servant assumes all risks ordinarily or naturally incident to his employment is not objectionable. Missouri, K. & T. R. Co. v. St. Clair (1899) 21 Tex. Civ. App. 345, 51 S. W. 666.

sense of being infrequent, see Jackson-

(Davis v. Baltimore & O. R. Co. [1893] ville, T. & K. W. R. Co. v. Galvin (1892) 29 Fla. 636, 16 L. R. A. 337, 11 So. 231, where it was held that a brakeman was held to assume the risk of injury from iron or lumber projecting over the end of a car.

> In an action for injuries received by a brakeman while coupling cars owing to a sinking of the drawhead alleged to be the result of a defect in the carrier iron, it is error to refuse to impart greater explicitness to an instruction which merely tells the jury in general terms that the employer is bound to use ordinary care in furnishing reasonably safe appliances, by the addition of a charge to the effect that, in determining whether the defendant company is liable or not, they may consider whether or not it was a usual thing for the defendant to have on its line cars with different heights of drawbars, and whether or not those engaged in the transportation and inspection of cars, in the exercise of reasonable care on their part, would consider such defects as may be shown by the evidence to be such as would be likely to occur in the business of railroading, which may be reasonably anticipated by those engaged in the business of handling the cars. Texas & P. R. Co. v. Rhodes (1895) 18 C. C. A. 9, 30 U. S. App. 561, 71 Fed.

4 In this point of view ordinary risks have been described by one of the following epithets: Necessary (Sommers v. Carbon Hill Coal Co. [1898] 91 Fed. 337); necessarily incident to the employment or business (Boyd v. Harris [1896] 176 Pa. 484, 35 Atl. 222; Louisville & N. R. Co. v. Boland [1892] 96 Ala. 626, 18 L. R. A. 260, 11 So. 667; Louisville & N. R. Co. v. Gower [1887] 85 Tenn. 465, 3 S. W. 824); necessarily attendant upon the conduct of the business (Dowell v. Burlington, C. R. & N. R. Co. [1883] 62 Iowa, 629, 17 N. W. 901); inseparable from the business That a hazard is not necessarily (Brown v. Chicago, R. I. & P. R. Co. taken out of the category of those [1886] 69 Iowa, 161, 28 N. W. 487; which are assumed, merely for the Dowell v. Burlington, C. R. & N. R. Co. reason that it is "unusual" in the [1883] 62 Iowa, 629, 17 N. W. 901).

<sup>5</sup> As, where the courts speak of neces-

to the conception that the risks which are assumed are those which cannot be obviated by the exercise of due care on the master's part.

In a strictly logical sense it is manifest that, as the proposition that the master was not in fault in permitting the existence of a given risk is directly and necessarily implied in the proposition that the risk was an ordinary one, the situations covered and defined by these two conceptions must be identical. But the present writer is strongly of the opinion that, in practical litigation, the method of inquiry which will produce the most equitable and satisfactory results is that which fixes the attention first of all upon the question of the defendant's negligence.

It is impossible to make any extensive study of the cases without coming to the conclusion that the application of the test supplied by the second conception not infrequently results in the formation of a sort of vicious circle, in which the essential question whether there was culpability on the master's part is apt to be lost sight of or obscured to the servant's disadvantage.

The question whether a risk is ordinary, being one of fact, is primarily for the jury. But the risk may be declared by the court to be an ordinary one whenever it is of opinion that there is no sufficient evidence to warrant the opposite conclusion. Cases illustrating both these situations will be found cited in the notes to the ensuing sections.

262. Risks caused by the acts of fellow servants.— In the earliest case in which the doctrine as to ordinary risks was laid down, the injury was caused by the negligence of a fellow servant. The cases dealing with this aspect of the doctrine are reviewed at length in the second volume of this treatise, and need not be further discussed in this place.

263. Risks arising from the character of the instrumentalities used.— The recognition of the right of an employer to carry on his business in his own way, and to adopt any pattern or description of instrumen-

sary and usual risks (Strahlendorf v. western Teleph. Co. v. Woughter (1892) Rosenthal [1872] 30 Wis. 674; Schultz 56 Ark. 206, 19 S. W. 575. v. Chicago & N. W. R. Co. [1878] 44

\*A charge is erroneous which pre-Wis. 638); or natural and necessary cludes the jury from the right to conhazards (Harding v. Railway Transfer sider whether the coupling of a car Co. [1900] 80 Minn. 504, 83 N. W. 395). loaded in a particular way came within

commonly attend the employment, it is Sacksonville, 7. & A. W. R. Co. V. Garerror to charge that he assumes only vin (1892) 29 Fla. 636, 16 L. R. A. 337, the risks which are necessarily inci- 11 So. 231. dent to it. Gulf, C. & S. F. R. Co. v. Inland Steel Co. v. Eastman (1898) Kizziah (1893) 86 Tex. 81, 23 S. W. 80 Ill. App. 59. 578, Reversing (1893) 4 Tex. Civ. App. 1 Pricsly v. Fowler (1837) 3 Mees. 362, 22 S. W. 110, 26 S. W. 242; South & W. 1, Murph. & H. 305, 1 Jur. 987.

As a servant assumes the risks which the ordinary risks of the employment. commonly attend the employment, it is Jacksonville, T. & K. W. R. Co. v. Gal-

talities which he may prefer (see chapter v., ante), involves the consequence that any risk which is due merely to the character of an instrumentality, and not to its abnormal condition or intrinsically defective quality, is to be deemed an ordinary risk of the employment.<sup>1</sup>

railway servant who has to couple or Mass. 412, 20 Am. Rep. 331. A railroad otherwise handle cars assumes any risks engineer who knows and understands the which are created by the peculiar man-features and workings of the engines ner in which they are constructed, the used by the company, and the character inability to maintain the action being and extent of a watch kept upon a asserted whether the cars belong to his wooden bridge forming part of the roadown employers or to another company. bed, assumes the risk of injuries due to Winkler v. St. Louis Basket & Box Co. the burning of such bridge by fire set culiar kind of brake on defendant's own of one of such engines. Texas & P. R. car); Hulett v. St. Louis, K. C. & N. Co. v. Minnick (1893) 6 C. C. A. 387, R. Co. (1878) 67 Mo. 239 (drawheads 13 U. S. App. 520, 57 Fed. 362 (1894) of different heights); Wright v. Dela- 10 C. C. A. 1, 23 U. S. App. 310, 61 Fed. ware & H. Canal Co. (1886) 40 Hun, 635 (smokestack was of a peculiar de-343 (brake on foreign car was of a com- sign, rendering the escape of sparks a mon construction familiar to injured common occurrence). servant); Thomas v. Missouri P. R. Co. eign car with couplings of peculiar con- of handling cars or engines of difstruction); Chicago, B. & Q. R. Co. v. ferent construction is assumed by rail-Montgomery (1884) 15 Ill. App. 205 way servants, if such risk is appar-(similar facts).

action where he is injured while App. 297, 80 Fed. 988 (receiver of railcoupling cars with double deadwoods or way company held not to be liable for bumpers, whether the cars belong to his an injury caused by the want of a conown employers or to another company. tinuous handrail across the rear end of Dysinger v. Cincinnati, S. & M. R. Co. a switch engine, although such rails (1892) 93 Mich. 646, 53 N. W. 825; were proved to be in use on other en-Kohn v. McNulta (1893) 147 U. S. 238, gines of that kind); Woodworth v. St. 37 L. ed. 150, 13 Sup. Ct. Rep. 298; Paul, M. & M. R. Co. (1883) 5 McCrary, Toledo, W. & W. R. Co. v. Black (1878) 574, 18 Fed. 282; Simms v. South Caro-88 Ill. 112; Indianapolis, B. & W. R. lina R. Co. (1886) 26 S. C. 490, 2 S. E. Co. v. Flanigan (1875) 77 Ill. 365; 486; Henry v. Bond (1888) 34 Fed. 101; Hatter v. Illinois C. R. Co. (1892) 69 Miss. 642, 13 So. 827; Chicago, B. & 88 Fed. 462 (cars not of uniform size). 71 N. W. 42; Norfolk & W. R. Co. v. (1892) 96 Ala. 626, 18 L. R. A. 260, 11 Cottrell (1887) 83 Va. 512, 3 S. E. 123. So. 667, it was said: "It is a matter See also § 394, note 1, subd. c, and § of common knowledge that the demands 396, note 3, subd. d, post.

ing trains.

R. Co. (1898) 88 Fed. 462.

check chains on cars is one incident to in selecting styles or patterns of coupis chargeable with its assumption where as the ingenuity of others in their inhe knows that some of the cars are not vention, and, consequently, not only do provided with them, and did not notice, such patterns vary on different roads,

<sup>1</sup>(a) Risks assumed on railways.—A Ladd v. New Bedford R. Co. (1876) 119 (1896) 137 Mo. 394, 38 S. W. 921 (pe- by sparks escaping from the smokestack

application  $\mathbf{A}$ nother of the (1891) 109 Mo. 187, 18 S. W. 980 (for-eral rule is that the enhanced risk ent and does not require special skill In several cases the servant has or knowledge to detect it. Peirce v. been declared to have no right of Bane (1897) 27 C. C. A. 361, 53 U. S. Rogers v. Louisville & N. R. Co. (1898) and exigencies of commerce require, in Brakemen take the risk of the use by the transportation of freight, that the their employers of cars not equipped cars of one company shall be hauled over with air brakes, which will necessitate the road of another, and that, in order their moving about over the tops of mov- to meet this demand, the gauge of the Rogers v. Louisville & N. tracks of the great trunk lines has been made uniform. . . The taste and The risk arising from the want of judgment of the managers of railroads the employment of a trainman, and he ling, it has been said, have been as varied when he took his place on a certain car, but sometimes on the same road. Cars whether it had or had not check chains. of these different patterns carrying

264. Risks created by permanent conditions incident to the business as openly conducted. - A doctrine which, in a logical point of view, is perhaps only a specific application of that which is stated in the last section, but which is often formulated as one expressive of a distinct principle, is that an employee assumes, as an incident of his service, any risks which arise from the permanent, visible conditions of his master's plant.1 In the last analysis this doctrine is obviously referable either to the principle that a master has a right to carry on his business in his own way, or to the principle that it is not negligence to require a servant to encounter perils which he fully understands. In most, if not all, the cases cited below as exemplifying the servant's assumption of the risk in question, one or the other of these two principles is explicitly adverted to as a ground of the decision.2

through freight so often pass from one Scully (1895) 163 Mass. 216, 39 N. E. road to another that the extra hazard 1007. The risk caused by the want of must be deemed to have assumed at the Co. (1901) 62 App. Div. 279, 70 N. Y. time of entering the service." In Toledo, Supp. 1086. For other cases W. & W. R. Co. v. Black (1870) 62 Tr. W. & W. R. Co. v. Black (1878) 88 Ill. 112, it was laid down that the risk of coupling cars with coupling bars of difcoupling cars with coupling bars of dif-ferent heights which it is necessary to join with crooked links was assumed by brakemen. In Holmes v. Southern P. Co. (1898) 120 Cal. 357, 52 Pac. 652, the court, in holding that a railroad switchman assumes the risk of any in-crease of danger arising from the coup-ling of cars, the drawhead in one of which is 1½ inches higher than that in the other, where he is frequently re-quired to couple cars with drawheads of quired to couple cars with drawheads of different heights, said: "It is manifest that the coupling could have been safely made if the brakeman had been on the alert. . . . Difference (in height) may be expected, and when due diligence is used does not materially increase the danger. In Gulf, W. T. & P. R. Co. v. any extra hazard.

(b) Risks assumed in other occupations.—An employee engaged in driving in the employment. Southern P. Co. piles, whose duty requires him to be at v. Seley (1893) 152 U. S. 145, 38 L. ed. the top of the piles to swing them into 391, 14 Sup. Ct. Rep. 530; St. Louis, I.

thereby occasioned in handling them by a loose pulley for shifting the belt by employees ought to be considered, and, which power is communicated to a mawe may say, is one of the risks or dan- chine is assumed by a man who is op-

> 1 "So far as risks are obvious, pertain-"So far as risks are obvious, pertaining to the apparently permanent features of the business as it is openly conducted, an employer has a right to believe that his employee agrees to assume them. They are, therefore, not included among those to be guarded against in the performance of his general duty to furnish reasonably safe appointments for the employee, and the employer cannot be held guilty of negligence in failing to make provision ligence in failing to make provision against them." Murch v. Thomas Wilson's Sons & Co. (1897) 168 Mass. 408, 47 N. E. 111.

<sup>2</sup> (a) Risks assumed on railways.— A brakeman assumes the risk arising from the fact that the curves in a railroad yard are so sharp as to allow drawheads danger. In Gulf, W. T. & P. R. Co. v. to pass each other when the cars come Abbott (1893; Tex. Civ. App.) 24 S. W. together. Tuttle v. Detroit, G. H. & M. 299, the action failed, where there was R. Co. (1887) 122 U. S. 189, 30 L. ed. only 3 inches difference in the heights 1114, 7 Sup. Ct. Rep. 1166. A brake-of the drawbars, and this was shown to man assumes the risk caused by the be quite a common difference not causing want of blocking in frogs, where that has been their normal condition on the defendant's line as long as he has been position, assumes the risk of injury from M. & S. R. Co. v. Davis (1891) 54 Ark. the fall of the driving hammer as the 389, 15 S. W. 895 (same facts); Lake machine is constructed. McPhee v. Shore & M. S. R. Co. v. McCormick

265. Risks arising out of temporary conditions incident to the use of the instrumentalities.—The cases cited in the last two sections exemplify the assumption of these ordinary risks which, in a broad sense, may be regarded as arising from the intrinsic qualities of the instrumentalities or materials used in the employer's business. In the sub-

mentalities or materials used in the employer's business. In the sub
(1881) 74 Ind. 440; (in this case one ordinary risk. Scidmore v. Milwaukee, of the special findings of the jury was L. S. & W. R. Co. (1895) 89 Wis. 188, that the plaintiff might easily have ascertained the condition of the frogs if not liable for injuries to an experienced he had taken pains to inquire about it). As it is manifest that a split switch cannot be blocked without destroying its manifest that a split switch cannot be blocked without destroying its miliar with it, and who was struck by efficiency, the risk arising from the absence of blocking in this case is one of those assumed by a man who enters the service of a railroad company which, to alknowledge, uses such switches of the cars was less than 2½ feet, and Grand v. Michigon C. R. Co. (1890) 83 that between their eaves less than 2 feet, Mich. 564, 11 L. R. A. 402, 47 N. W. Where the accident occurred in the day837. A brakeman after three months of service assumes the risk of falling width or otherwise from ordinary pox innor a properly located cattle guard cars. Viving v. New York & N. E. 117. Coons (1883) 31 Ill. App. 75. A brakeman or switchman who knows that the are witch and witch are assumed shows an injury caused by his slipping or culverts or ditches crossing the track stumbling against the arm of a guard are without coverings assumes risk of rail while uncoupling cars. Curtis v. injury therefrom. West v. Southern P. Chicago & N. W. R. Co. (1897) 95 Wis. Co. (1898) 29 C. C. A. 219, 56 U. S. App. 323, 85 Fed. 302; De Forest v. Jewetra are without coverings assumes risk of rail while uncoupling cars. Curtis v. injury therefrom west v. Router P. Chicago & N. W. R. Co. (1897) 95 Wis. Co. (1901; Ky.) 64 S. W. 738. The senting. Compare § 68, subd. d., ante. railway yard assumes the risk of farming randall v. Baltimore & O. R. Co. (1883) is left under the end of the ties. Clark 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. v. Missouri P. R. Co. (1892) 48 Kan. Rep. 322. A swit

or other structures near the track when close to a street railway track is asboarding or riding on freight cars. sumed by an employee on the cars. Hall Dacey v. New York, N. H. & H. R. Co. v. Wakefield & S. Street R. Co. (1901) (1897) 168 Mass. 479, 47 N. E. 418; 178 Mass. 98, 59 N. E. 668. An engineer Bell v. New York, N. H. & H. R. Co. who is familiar with the conditions as (1897) 168 Mass. 443, 47 N. E. 118; sumes the risk incident to walking Goodes v. Boston & A. R. Co. (1894) alongside his engine upon a trestle at 162 Mass. 287, 38 N. E. 500; Fisk v. a place where there is no platform. Fitchburg R. Co. (1893) 158 Mass. 238, Chicago B. & Q. R. Co. v. Abend (1880) 33 N. E. 150. The existence of a "clear-7 Ill. App. 130. A station agent asing post" between the main and switch sumes the risk arising from the want tracks of a railroad, the office of which of platform or warehouse accommodatracks of a railroad, the office of which of platform or warehouse accommodais to indicate the line beyond which tions at the station. Chaddick v. Lindstanding cars are to be considered free say (1897) 5 Okla. 616, 49 Pac. 940 from danger of interference with mov- (trunk thrown on the right of way was ing cars on the main track, creates an struck by an engine and flung round so

joined note are collected a large number of decisions intended to show the circumstances under which recovery has been denied on the same ground in the case of risks resulting from the manner in which the instrumentalities are used. It is sometimes not easy to say whether a particular decision should be classified under this head or under one

which the agent was standing).

while leaning forward to clean a coup- 225. ling, cannot recover therefor, when he had long been familiar with the posi- Co. (1897) 168 Mass. 408, 47 N. E. 111,

us to strike and break a car step on ployment. French v. Columbia Spinning tich the agent was standing). Co. (1897) 169 Mass. 531, 48 N. E. (b) Risks assumed in other occupa- 269. An employee who knows of the tions .- Employees working in factories, existence of a skylight in a roof on tec., assume the risk of coming into contact with uncovered machinery. Shaw working on the same by reason thereof, v. Sheldon (1886) 103 N. Y. 667, 9 N. assumes the risk of falling through the E. 183; Kleinest v. Kunhardt (1893) skylight. Garety v. King (1898) 27 160 Mass. 230, 35 N. E. 458 (servant App. Div. 114, 50 N. Y. Supp. slipped on a wet floor and fell against 179. An employee of ordinary in an exposed pulley). A servant whose telligence, who has worked in a an exposed pulley). A servant whose telligence who has worked in a clothing was caught in a rapidly revolv-plant for manufacturing salt, and uning shaft about 3 feet above the floor derstands its plan, assumes the ordinary of a mill cannot recover where he had risks incident to the service, where the repeatedly passed under it at other construction of the plant is simple, and times, as had other employees, and at the methods easily understood. Foster the time of the injury it was no more v. Kansas Salt Co. (1899) 60 Kan. 859, dangerous than at other times. Brown 57 Pac. 961. An employee who is fav. Tabor Mill Co. (1900) 22 Wash. 317, miliar with the means adopted by the 60 Pac. 1126. An employee in a mill employer for the safety of the outer assumed the risk of stepping into a de- garments of employees, and makes no pression in the floor, which existed at complaint with reference thereto, asthe time of her employment and was sumes the risk of the loss of a garment perfectly visible. Hoard v. Blackstone incident to such means. Cantancarito Mfg. Co. (1900) 177 Mass. 69, 58 N. E. v. Siegel-Cooper Co. (1898) 23 Misc. 180. An employee engaged to assist in 664, 52 N. Y. Supp. 29 (employer proshoveling coal under boilers and to keep vided a wardrobe guarded by a competent the fronts of such boilers clean assumed person). An employee using a circular the risk of working upon the uneven and saw to cut pieces of wood assumes the ridgy brick floor of the boiler room, risk that one of them may be thrown where it was expected by both employer back by it and strike him. Wilson v. and employee to be used until the for- Steel Edge Stamping & Retaining Co. mer chose to replace it. Nealand v. (1894) 163 Mass. 315, 39 N. E. 1039. Lynn & B. R. Co. (1899) 173 Mass. 42, An employee in a factory assumes the 53 N. E. 137. A servant who had been risk of being unable to get out of the employed for four years in defendant's windows in case of fire, where they have boiler room, and had seen the construc- always been screwed down in order to tion of the boilers, and understood their position with respect to a bridge suspended in front of them, cannot recover American Glucose Co. (1897) 154 N. Y. for injury caused by his falling through a space between the end of the bridge firming (1896) 12 App. Div. 624, 42 N. and the boilers, while he was making Y. Supp. 1126 (no violation of a statement of the bridge where the labelers where the hellow where the labelers where the labelers where he had a statement of the processor. a space between the end of the bridge and the boilers, while he was making Y. Supp. 1126 (no violation of a search his way from the boilers, where he had ute was shown by the circumstances proved). An experienced employee tan Street R. Co. (1901) 59 App. Div. hurried, coerced, deceived, nor surprised, 250, 69 N. Y. Supp. 570. One who sus- assumes the risk of working near an untained personal injuries by reason of a covered pit by candle light. Mcfall from a running board in a mill, Alcenan v. Myrick (1896) 68 Ill. App.

tion and length of the board, which was recovery was denied to a pilot who went not altered during the time of his em- to sleep in a chart room without leaving

of those adverted to in the preceding sections. But in most instances there is a well-marked distinction between the two classes of risks.1

plaintiff had not received a special S. W. 985). warning as to the properties of the fuel.

risks incident to the manipulation of the coupling apparatus of cars are ordinary as respects a brakeman. Oliver v. Ohio River R. Co. (1896) 42 W. Va. 703, 26 S. E. 444; Hannigan v. Lehigh & H. River R. Co. (1898) 157 N. Y. 244, 51 N. E. 992, Reversing (1895) 91 Hun, 300, 36 N. Y. Supp. 293 (danger of injury from the meeting of drawheads). See also § 263, supra. The danger of injury from the operation of trains over cattle guards is one incident to the service of any servant who has to couple cars. Fuller v. Lake Shore & M. S. R. Co. (1896) 108 Mich. 690, 66 N. W. 593.

A trainhand assumes the risk of injury from those jerks which are common occurrences in the operation of trains, whether from the taking up of the slack or other causes. Davis v. Baltimore & O. R. Co. (1893) 152 Pa. 314, 25 Atl. 498; Central R. & Bkg. Co. v. Sims (1888) 80 Ga. 749, 7 S. E. 176; Shields v. Kansas City Suburban Belt R. Co. (1901) 87 Mo. App. 637 (switchman on top of car was thrown off by the jerk consequent upon stopping them to en- of the derailing of a train from a horse able another switchman to uncouple unexpectedly straying upon the railroad them, after he had failed to do so while track. Bowes v. Hopkins (1898) 28 C. they were in motion). Or from a stop- C. A. 524, 56 U. S. App. 217, 84 Fed. page of the ears not more sudden than 767. ordinarily occurs. Puffer v. Chicago G.

the door open, as he had been warned W. R. Co. (1896) 65 Minn. 350, 68 N. to do, and was injured by the fumes of W. 39 (plaintiff stooped over from the a special kind of fuel used in the stove. footboard of an engine without having The conduct of the plaintiff, therefore, hold of the handrail, and was thrown seems to have been clearly negligent. off by the shock). Nor can he recover But the court does not rely on this pos-where a piece of ore with which a car sible deduction from the evidence, its is loaded turns under his foot, and preconclusions being summed up as fol-cipitates him to the ground (East Tenlows: "The chart room and the stove nessee, V. & G. R. Co. v. Suddeth [1890] by which it was heated were a part of 86 Ga. 388, 12 S. E. 682); nor where he the permanent construction and arrange- is thrown down by treading on an unment of the steamship, and in all their usually large clinker which has dropped details they were open to the observa- on the track (Lee v. Central R. & Bkg. tion of everybody who came upon that Co. [1890] 86 Ga. 231, 12 S. E. 307); part of the ship. Such danger as there nor where his foot is caught by the brake was from the use of them to one who beam of a car at a place where there engaged to act as pilot was an obvious are cinders on the track which do not risk of the business, which was covered extend above the tops of the rails, while by his contract to serve on that ship. he is attempting to make a coupling It may be fairly questioned, however, if (Houston & T. C. R. Co. v. Smith [1896] the application of the principle relied Tex. Civ. App. 38 S. W. 51. Writ of upon would have been justifiable, if the Error Denied in [1896] 90 Tex. 123, 38

A switchman assumes the risk of at-For numerous other cases of a similar tempting to pass from his switch on to type see §§ 67-80, 239, note 3, ante. a track on which an engine is slowly 1 (a) Risks incurred by trainmen.— following cars which he has switched. (Compare §§ 209, 209a, 217, ante). The Dering v. New York C. & H. R. R. Co. risks incident to the manipulation of the (1893) 50 N. Y. S. R. 832, 22 N. Y. Supp. 344. A switchman assumes the risk of injury from the explosion of a load of nitro-glycerine which is being transported on a foreign car. Foley v. Chicago & N. W. R. Co. (1880) 48 Mich. 622, 42 Am. Rep. 481, 12 N. W. 879.

The frequent movement of cars without any signal to indicate that they are in motion is one of the risks assumed by yard hands. Crowe v. New York C. & H. R. R. Co. (1893) 70 Hun, 37, 23 N. Y. Supp. 1100. A brakeman assumes the risk caused by the piling of lumber at its proper and usual distance from the track. Gaffney v. New York & N. E. R. Co. (1887) 15 R. I. 456, 7 Atl. 284. Compare the similar decisions cited in § 264, supra, as to permanent structures.

Trainmen assume the risk of injury by the trains coming into collision with animals trespassing on the road, whether there are cattle guards or not. Ward v. Bonner (1891) 80 Tex. 168, 15 S. W. 805. A switchman assumes the risk

A locomotive fireman assumes the

266. Risks incident to specially dangerous employments.— A doctrine frequently recognized in the formal statements of the courts is

risk of being overcome by the heat while Elev. R. Co. [1897] 17 App. Div. 588, in a position over the boiler which he is 45 N. Y. Supp. 474); nor by one who obliged to assume when oiling the mahas been injured by the accumulation obliged to assume when oiling the machinery by hand, while the automatic Iubricator is in a defective condition.

Stockwell v. Chicago & N. W. R. Co.
(1898) 106 Iowa, 63, 75 N. W. 665.

A fireman who knew that on his run

the engine, owing to the want of a turntable, was run backwards when the train was traveling in a certain direction, cannot recover for an injury caused by the that it was reversed. Kuhns v. Wisconsin, I. & N. R. Co. (1887) 70 Iowa, 561, 31 N. W. 868. Whether an accident occasioned by a switch being misplaced, whereby a train is run upon a side track and against cars standing by an engineer in entering into the employment of the company to run its en-

eastward on the west-bound track, assumed the risk of the possible, although in winter. They cannot recover, thereinfrequent, return of a car on that track fore, for injuries due to their being for repairs, when the motorman was experienced, knew the general rule of all railroads that cars should proceed on the right-hand track, and knew that it was possible that he might meet a returning car or wagons. Savage v. Nas- sau Electric R. Co. (1899) 42 App. Div.
 241, 59 N. Y. Supp. 225. A conductor on an open street car assumes, as part of the risk of the employment, any enhancement of the danger from the presence of a passenger on the running board along the side of the car. Hall v. Wakefield & S. Street R. Co. (1901) 178 Mass. 98, 59 N. E. 668. The court declined to make any distinction because of the fact that the passenger in question was a superintendent, who was not obliged to be on the board, as there was room on the seats.

Employees operating trains assume the risks which inclement weather to employ- $_{
m their}$ conditions addment. Martin v. Chicago, R. I. & P. R. Co. (1901; — Iowa, —) 87 N. W. 654. Hence no action can be maintained by a trainman who has been injured by the accumulation of ice or snow on the brake of a car otherwise in good order, after it leaves a yard (Hanrahan v. Brooklyn of a collision between a train and a hand

of ice on the edge of a car where he was obliged to stand to work the brake (O'Bannon v. Louisville & N. R. Co. [1888] 9 Ky. L. Rep. 706, 6 S. W. 434). They also assume such risks as are usually and customarily incident to the falling of snow and forming of ice on and removal of the same from the tracks and places where employees are required derailment of the engine due to the fact to work, if such removal is made in a proper and reasonable manner. Lawson v. Truesdale (1895) 60 Minn. 410, 62 N. W. 546 (switchman slipped while he was mounting a car); Fay v. Chicago, St. P. M. & O. R. Co. (1898) 72 Minn. 192, 75 N. W. 15 (similar facts); there, is not within the risks assumed Piquegno v. Chicago & G. T. R. Co. (1883) 52 Mich. 40, 50 Am. Rep. 243, 17 N. W. 232 (similar accident to brakegines, was queried in one case, but not man). So, it was held that the condidetermined. Lyon v. Detroit, L. & L. tions caused by the removal of snow M. R. Co. (1875) 31 Mich. 429. from a track in the usual manner by A motorman who took a car from the means of a snow plough create risks barn, by the direction of the despatcher, which are presumed to be contemplated by them when they accept employment swept off of an engine by a snowbank formed beside the track by the operation of clearing the track. Dowell v. Burlington, C. R. & N. R. Co. (1883) 62 Iowa, 629, 17 N. W. 901; Brown v. Chicago, R. I. & P. R. Co. (1884) 64 lowa, 652, 21 N. W. 193.

(b) Risks incurred by trackmen.-(Compare §§ 209, 209a, 218-220, ante). A servant engaged in keeping a railway track in proper condition assumes the risk of the passage of trains at any time without being specially warned as to their approach. This rule has been applied in the case of section men. Chicago, B. & Q. R. Co. v. Soderberg (1897) 50 Neb. 674, 70 N. W. 230; Brunell v. Southern P. Co. (1899) 34 Or. 256, 56 Pac. 129; International & G. N. R. Co. v. Arias (1895) 10 Tex. Civ. App. 190, 30 S. W. 446 (rule declared to be applicable, whether the plaintiff was experienced or inexperienced). And of a laborer employed to clean snow and ice from the switches in a yard. Chicago & E. I. R. Co. v. Maloney (1898) 77 Ill. App. 191.

Such a servant also assumes the risk

that the principle which charges a servant with an assumption of the ordinary risks of an employment is applicable whether that employ-

car upon which he is riding (Chicago worked more than three months on the & A. R. Co. v. Goltz [1897] 71 Ill. App. track of a railroad, where about one 414); even where it is not being run third of the trains are irregular, or exupon schedule time. (Sullivan v. Fitchtra trains not running on schedule time, burg R. Co. [1894] 161 Mass. 125, 36 is chargeable with notice of the practice N. E. 751, where the court declined to run such trains, and assumes the risk rule that this condition was effected by incident to the narries from the current. the that this conclusion was affected by incident to the service from that cause. the existence of a rule of the company Larson v. St. Paul, M. & M. R. Co. requiring such trains to "run cautiously (1890) 43 Minn. 423, 45 N. W. 722. around curves and over grade crossings, A trackwalker assumes the risk of belooking out for trackmen." This cauing caught by a train on a trestle. Gibtion was deemed to have reference to son v. Oregon Short Line R. Co. (1893) the safety of the trains, not of the track- 23 Or. 493, 32 Pac. 295. See also subd. men). For the purposes of this rule it (f) of this note. men). For the purposes of this rule it (f) of this note. makes no difference that the day is (c) Risks incurred by other railway foggy, since the service contracted for employees.—A man stationed on a tresembraces all kinds of weather. Hinz v. tle to signal trains in a fog assumes the Chicago, B. & N. R. Co. (1896) 93 Wis. risk of being caught by one of them. 16, 66 N. W. 718; International & G. N. Kcnnedy v. Manhattan R. Co. (1884) 33 R. Co. v. Hester (1885) 64 Tex. 401. Hun, 457. An employee required to pass These decisions are based upon the supposed knowledge of the injured servant work to his boarding house assumes the that his employers have adopted the risk of the bridge being used by a derivative of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the bridge being used by a derivative formula of the br posed knowledge of the injured servant that his employers have adopted the that his employers have adopted the trains. The existence of this essential element of knowledge is sometimes inferred from specific testimony of circumstances conveying notice to the servant,—as, where he had been specially on a side track, who knew that it was a instructed to be on the lookout for special trains, and, as a matter of precaution, to flag round curves and through tion, to flag round curves and through circumstances (Turner v. Norfolk & W. R. or where he knew that there was a standing rule that a train might be expected by trackmen at any moment, and pected by trackmen at any moment, and cars in a railway yard take the risk of that no notice whatever would be given injury from the cars being struck by anthat no notice whatever would be given injury from the cars being struck by anof the despatch of extra trains or the other car, when they habitually do such passage of such a train (Olson v. St. work without asking that the cars be Paul, M. & M. R. Co. [1888] 38 Minn. protected by a flag. Unfried v. Balti-117, 35 N. W. 866; Jolly v. Detroit, L. more & O. R. Co. (1890) 34 W. Va. 260, & N. R. Co. [1892] 93 Mich. 370, 53 N. 12 S. E. 512 (this is spoken of as an W. 526); or where, although there is "ordinary risk" in the opinion, but seems no express announcement to this effect to be rather a case of the servant's acin the rules, the wording of a rule relating to the despatch of wild trains is legation of negligence stating that the such as to amount to an implied notifiplaintiff's son was crushed between two cation that, under certain circumstances, cars where an opening had been left in the such trains may be expected to come train for the use of the employees, which such trains may be expected to come train for the use of the employees, which along the track without any warning being given of their approach (Shepard v. notice to him, is not sustained by evi-Boslon & M. R. Co. [1893] 158 Mass. dence that the opening was such as was 174, 33 N. E. 508); or where he had assusual and necessary from time to time in certained by practical experience that shifting cars in the yard. Plunkett v. his employer was in the habit of running Contral R. Co. (1898) 105 Ga. 203, 30 special trains without warning (Penn-S. E. 728. An employee at a railway subscript R. Co. v. Wachter [1883] 60 station whose duty it is to throw the Sylvania R. Co. v. Wachter [1883] 60 station, whose duty it is to throw the Md. 395). A section man who has mail bags into passing trains, assumes

ment may or may not be described as being inherently dangerous. It is, in fact, quite clear that any other position would be entirely illogi-

the risk of falling under a train while work of coupling the car is done in the performing that duty. Coolbroth v. daytime, and the brakeman must have Maine C. R. Co. (1885) 77 Me. 165 (dec-become aware of the custom to load cars laration describing the service as one in this manner during the time that he "known to defendants, and not known to has been in the company's service prior the plaintiff, to be dangerous, held not to the accident in suit. Irvine v. Flint to allege anything beyond the "ordinary & P. M. R. Co. (1891) 89 Mich. 416, 50 and apparent dangers" which plaintiff N. W. 1008. assumed). A painter in the employ of a railroad corporation, who is in the to be liable for injuries caused by such habit of going from point to point on a a risk, without adverting specially to steam hand car, assumes the risk of its the question whether the car was hanjumping the track, unless it appears dled in the daytime or at night. Toledo, that the accident is due to a defect un- W. & W. R. Co. v. Black (1878) 88 Ill. known to him. McQueen v. Central 112; Wabash, St. L. & P. R. Co. v. Dear-

pany's cars from station to station on its Intosh v. Missouri P. R. Co. (1894) 58 roads and audit accounts, is a servant Mo. App. 281; Jacksonville, T. & K. W. of the company, and assumes the risk of R. Co. v. Galvin (1892) 29 Fla. 636, 16 injury from a derailment of the train as L. R. A. 337, 11 So. 231; Brennan v. an ordinary risk of his employment. Michigan C. R. Co. (1892) 93 Mich. 156, Minty v. Union P. R. Co. (1889) 2 53 N. W. 358 (there the rules of the Idaho, 437, 4 L. R. A. 409, 21 Pac. 660. company had called the attention of the ble where such an accident is not caused of loading cars); Doyle v. St. Paul, M. by the negligence of the company. The & M. R. Co. (1889) 42 Minn. 79, 43 N. introduction of the theory of the assump- W. 783; Nash v. Chicago, M. & St. P. R. tion of the risk seems, therefore, to be Co. (1897) 95 Wis. 327, 70 N. W. 293 rather out of place, except as an implied (in this case there was the corroborative deduction from the absence of negligence, circumstance that the servant's atten-

An employee of a street railway comtracks for the purpose of turning switches, assumes the risk of injury from stepping back against a moving trailer in sudden alarm caused by the plunging of

Co. (1899) 152 Ind. 461, 53 N. E. 462.
(d) Risks incident to the manner in which the load is placed on railway cars. -Trainmen who are required in broad daylight to couple cars loaded with materials projecting beyond their ends are link); Louisville & N. R. Co. v. Gower not subjected to a risk of an extraordi- (1887) 85 Tenn. 465, 3 S. W. 824 (disnary or unusual character. Northern approving instruction which left jury to C. R. Co. v. Husson (1882) 101 Pa. 1, infer that such a service was not to be 47 Am. Rep. 690. So, it has been laid anticipated by a brakeman, as an occathat the materials composing the load to be performed); Lothrop v. Fitchburg project over the ends of the car is possi- R. Co. (1890) 150 Mass. 423, 23 N. E. bly negligence as regards a brakeman 227. In the last case it was suggested unfamiliar with the fact that it is the that, under some circumstances, there custom of his employers to do this, no might be an obligation to notify brakenegligence can be predicated where the men when a load was in that condition;

Other cases declare the company not Branch Union P. R. Co. (1883) 30 Kan. dorff (1883) 14 Ill. App. 401; Boyle v. 689, 1 Pac. 139.

It has been held that the traveling Mass. 102, 23 N. E. 827; Jackson v. auditor of a railroad company, whose Missouri P. R. Co. (1891) 104 Mo. 448, duties are to travel on the railroad com- 16 S. W. 413 (load had slipped); Mc-But this rule is, of course, only applica- servant to the frequency of this manner tion had been called by a printed notice pany, who is stationed between the to the danger in coupling cars loaded in this manner).

In several other decisions the specific ground on which the servant's right to recover was denied was that the loading stidden alarm caused by the plunging of record and the standard to a car on another of cars in this manner cannot be imputed track. Thompson v. Citizens' Street R. as negligence to the railway company. Co. (1899) 152 Ind. 461, 53 N. E. 462. Day v. Toledo, C. S. & D. R. Co. (1880) 42 Mich. 523, 4 N. W. 203 (brakeman was compelled by the projecting load to stoop, and the delay thus caused led to his fingers being caught by the coupling down that, while the loading of cars so sional though extremely hazardous duty

cal and unreasonable. Provided the risk from which the injury results is, as a matter of fact, obviously incident to the employment undertaken by the servant, it is impossible to argue, with any show

but it was declared that, at all events, engine. Osborne v. Lehigh Valley Coal no such obligation existed as to a brake- Co. (1897) 97 Wis. 27, 71 N. W. 814. man who was called upon to handle a

car in broad daylight.

of asserting that such a risk is assumed, every few minutes assumes the risk of or that its existence implies no negligence, where the servant has frequently Iron ('liffs ('o. (1889) 78 Mich. 271, 44 been called upon to handle such cars be- N. W. 270. Compare similar cases, cited fore. Atchison, T. & S. F. R. Co. v. in subd. (b), supra, as to railway em-Plunkett (1881) 25 Kan. 188; Scott v. ployees. Oregon R. & Nav. Co. (1886) 14 Or. 211, An assumption of risks under a spe-13 Pac. 98 (foreign car).

In some instances, it will be observed. cases of this type are treated as being controlled by the conception that the manner of placing a load is a mere detail of the work, the result being that the servant cannot recover even if the arrangement was a negligent one. See chapter XXXII., post. By this indirect route, we are conducted through the doctrine of common employment to the same conclusion as that embodied in the above-cited decisions which view such an arrangement as an ordinary risk.

The risk of the displacement of rails or other freight, so that it projects over the ends of a car, is assumed so far as it is obvious. Doyle v. St. Paul, M. & M. R. Co. (1889) 42 Minn. 79, 43 N. W.

It is not negligent to pile coal and wood above the top of a tender, so that it is liable to be thrown off by a jolt. Sc'ultz v. Chicago & N. W. R. Co. (1887) 67 Wis. 616, 58 Am. Rep. 881, 31 N. W. 321.

A brakeman who is injured by stepping on one of the loose pieces of lumber with which a car is loaded cannot recover, such a risk being an ordinary one so far as he is concerned. Miller v. New York C. & H. R. R. Co. (1888) 14 N. Y. S. R. 656.

(e) Risks incurred by persons not employed by railway companies, but exposed to the risks resulting from the operation of railways.—(See also subd. (k), infra.) An employee engaged in loading coal into cars upon a coal dock in the nighttime assumes the risk from empty cars running down an inclined track by gravity to the place of loading, in walking upon the track with knowledge that cars are to be expected at any business. Stone v. Bedford Quarries Co. time, while the sight of approaching cars (1901) 156 Ind. 432, 60 N. E. 35. is obscured by escaping steam from an

So an employee in a blast furnace whose duties require him to cross a track Some decisions merely go to the extent frequently along which cars are passing being struck by one of them. Adams v.

> cific contract by a local employee of an express company includes the risk of injuries by cars of a railroad company with which the express company does business. Pittsburgh, C. C. & St. L. R. Co. v. Mahony (1897) 148 Ind. 196, 40 L. R. A. 101, 46 N. E. 917, Motion to Modify Overruled in (1897) 148 Ind.

207, 47 N. E. 464.

(f) Risks incurred in handling heavy objects.—A railroad company is not liable for an injury to a section hand caused by the accidental stumbling of the foreman while assisting such section hand and another person in carrying a heavy tie over rough ground, where the section hand knew the condition of the ground. Lee v. Chesapeake & O. R. Co. (1897) 18 Ky. L. Rep. 829, 38 S. W. 509. One engaged with coemployees in moving iron rails assumes the risk of injury from the rebounding of a rail as it is thrown upon the other rails, and the employer is not liable therefor because he may have failed to furnish tongs or other appliances proper and convenient for the work. Beichert v. Reed (1897) 20 App. Div. 635, 47 N. Y. Supp. 119. A servant is presumed to understand the danger that pieces of timber which are laid upon hooks attached to a belting which elevates them to the required level may drop out and fall,—especially when they are covered with a coating of ice. Jones v. Manufacturing & Invest. Co. (1899) 92 Me. 565, 43 Atl. 512. As to a workman employed to brace slabs of stone after they have been placed in an upright position on a flat car, so that they will not fall while being transported, the risk of being injured by their fall before they are permanently braced is obvious and inseparably incident to the

One employed to place pigs of lead up-

on an inclined wooden elevator, up which the shaft with his load in the customary they were drawn by an endless chain manner, and is killed, will be held to with an apron attachment, cannot re- have assumed the risk. Perras v. A. cover for an injury sustained by one of Booth & Co. (1901) 82 Minn. 191, 84 N. the bars falling upon him, since it was W. 739, 85 N. W. 179 (case, however, one of the risks incident to his employ- was held to be for the jury, as the eviment, although a few hours before the dence was not conclusive as to the existaccident a strip of iron had been nailed ence of an habitual practice which would along the worn sides of the elevator to make the possible absence of the elevator protect them, and the weight of a pig an of lead forced this band into a scallop leaving a nail protruding which threw the bar of lead down the elevator. Elliott v. Carter White-Lead Co. (1898) 53 Neb. 458, 73 N. W. 948. Whether an injury caused to a section foreman by the falling or slipping of railroad ties while he is superintending their loading from a flat car is an ordinary risk is a

(g) Risks incurred in operating machinery.—The risk that a strip of hard board which may fall on the teeth of a rapidly revolving circular saw will be it for the purpose of lowering the ele-thrown violently forward is assumed by vator, and is killed by falling to the bot-an experienced employee. Tenant v. tom of the shaft. Browne v. Siegel, C. (1886) 38 Hun, 353, Affirmed (1888) of a risk, though it is so designated by in 109 N. Y. 496, 17 N. E. 216, on the the court. ground that the failure to set the saw was the negligence of a fellow servant operations.—One of the natural inciin regard to a matter of detail. See dents of the handling of glass in the prochapter XXXII., post. The risk of being cesses of its manufacture is that it will cut by the knives of a "jointer" is as- be broken without violence from or the sumed by an experienced workman, fault of those who handle it. Myers v. Rudd v. Bell (1887) 13 Ont. Rep. 47.

the proper manner of handling the par-ticular machine he saw in use when he Bauman (1899) 178 Ill. 351, 53 N. E. began work at the mill, unless it was 107, Affirming (1898) 78 Ill. App. 73. deceptively changed, and not that he An employee in a rolling mill cannot recould handle it properly, if operated cover for injuries caused by the fact that after the method contemplated by the a rail which was not sufficiently heated builder.

yator has been thus removed, backs into in a case where the question was wheth-

ever-present danger). A porter whose duty it is to clean the floors of a store at night, and who knows that the freight elevator by which it is customary to transfer him and his utensils from one story to another may at any time not be standing at the particular story where he happens to be, in which case it will have to be raised or lowered to that story by the employee assigned to that question for the jury. Texas C. R. Co. duty, assumes, as a risk incident to the v. Lyons (1896; Tex. Civ. App.) 34 S. service, the danger arising from this system of operating it; and no action can service, the danger arising from this system of operating it; and no action can be maintained by his personal representative if he walks through the gate of the shaft after the operator has opened Boston Mfg. Co. (1898) 170 Mass. 323, & Co. (1901) 191 Ill. 226, 60 N. E. 815, 49 N. E. 654. The danger due to a saw's Affirming (1900) 90 Ill. App. 49. This not being set is an ordinary incident of seems to be a case of contributory negliwork in a sawmill. Webber v. Piper gence, rather than a case of assumption

(i) Risks incident to manufacturing W. C. DePauw Co. (1894) 138 Ind. 590, In Glover v. Meinrath (1896) 133 Mo. 38 N. E. 37. Whether an explosion of 292, 34 S. W. 72, holding that an en- an iron mould, occasioned by the intengineer in a mill assumes the risk aris- tional act of a "pourer" in purposely ing from the substitution of hot water permitting slag to pass into the mould for steam in a cornmeal dryer which it in a quantity known to be dangerous, is is his duty to repair when out of order, an ordinary, usual, and known risk of the court said that the undertaking of one employed in the work of cooling and the engineer was that he comprehended uncapping such moulds, is a question of ilder. curled upwards as it passed through the (h) Risks incident to the use of ele-rolls. Inland Steel Co. v. Eastman vators.—Where warehouse employees are (1898) 80 Ill. App. 59. That a servant accustomed to remove an elevator at who enters the employ of another aswill, though at the time another em- sumes all the risks ordinarily incident to ployee is engaged in loading freight the business and arising from patent and thereon, an employee who, after the ele- obvious defects was an instruction given

er the plaintiff had knowledge of the miner assumes the risk of injury from 32 Atl. 726. An employer is not liable the floor being wet and slippery, if such on a wet floor while turning a lever and being thus brought into contact with an Cloud Fiber-Ware Co. (1894) 59 Minn. 116, 60 N. W. 1093. Compare similar cases cited under § 263, supra. The liability of a hammer to chip is a risk assumed by a riveter. H. S. Hopkins Bridge Co. v. Burnett (1892) 85 Tex. 16, 19 S. W. 886.

(j) Risks incident to the handling of ice.-A laborer employed to fill an ice upon the tiers of ice blocks, assumes as a risk ordinarily incident to his employment the danger of an injury caused by the slipping of a cake of ice. Shea v. Kansas City, Ft. S. & M. R. Co. (1898)

76 Mo. App. 29.

(k) Risks incident to the use of horses.—The possibility that the team of a wagon from which a servant is helping to unload heavy machinery may be frightened by a passing train is assumed Steffen v. Mayer (1888) 96 Mo. 420, 9 S. W. 630. A teamster who knows that steam occasionally blows off car stable, who knows that another em- winter, assumed the risk of so doing; of the ladder, accepts the risk that the method of lighting and heating it, and horse, while not held by the driver, may that the night watchman had been disstart off and come into collision with missed. Lang v. H. W. Williams the ladder. Byrnes v. Brooklyn Heights Transp. Line (1898) 119 Mich. 80, 77 R. Co. (1899) 36 App. Div. 355, 55 N. N. W. 633. The risk attendant upon Y. Supp. 269.

The slippery condition of a ladder at the the bow into the shore of the river and bottom of a shaft in a coal mine is an holding the boat in position by the revoordinary risk as regards a miner. lutions of the wheel merely, and with-O'Neill v. Wilson (1858) 20 Sc. Sess. out putting out lines in accordance with

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danger of entering a room filled with the falling of ore, where that is likely to the fumes of iron pyrites. Williams v. happen in the ordinary course of his Walton & W. Co. (1892) 9 Houst. 322, work. Paule v. Florence Min. Co. (1891) 80 Wis. 350, 50 N. W. 189. A for an injury to a servant resulting from miner assumes the risk that the roof of a tunnel which has been properly inis its normal condition. Murphy v. spected may fall in (Davis v. Nuttalls-American Rubber Co. (1893) 159 Mass. burg Coal & Coke Co. (1890) 34 W. Va. 266, 34 N. E. 268. An employee in a 500, 12 S. E. 539), or that fire-damp mill assumes the obvious risk of slipping may explode (Berns v. Gaston Gas Coal Co. [1885] 27 W. Va. 285, 55 Am. Rep. 304), at all events, where the accumulauncovered gearing. Scharenbroich v. St. tion of the dangerous vapor takes place so suddenly that the employer cannot be expected to discover it in time to prevent the accident. Thus, it has been held that a mine owner is not liable for an explosion of gas which accumulates in sufficient quantities to explode within fifteen minutes. Sommers v. Carbon Hill Coal Co. (1898) 91 Fed. 337.

(m) Risks incurred by quarrymen. house, whose work requires him to stand Where the bank of earth above the stripped ledge in a stone quarry was more apt to slide than usual owing to a heavy rain, but before going to work, plaintiff, an experienced quarryman, in company with other employees of defendant, including the foreman of the quarry, examined the ledge and pronounced it safe, he cannot recover for injuries caused by the subsequent sliding of the earth. Western Stone Co. v.

(1899) 85 Ill. App. 82.

(n) Risks incurred by crews of vessels.-As to a fireman on a sea-going steamer it is an ordinary risk that an from boilers assumes the risk of his unfastened ladder descending into a coal horses being frightened by the noise, bunker may be thrown down by the whether the escape of the steam is due to pitching and rolling of the steamer. the direct act of the engineer or to the Balleng v. New York & C. Mail S. S. Co. automatic operation of the safety valve. (1899) 28 Misc. 238, 58 N. Y. Supp. Denver Tramway ('o. v. O'Brien' (1896) 1074. One of the crew of a steamer, 8 Colo. App. 74, 44 Pac. 766. A carpen- who slept on the vessel after it was tied ter at work upon a ladder in front of a to the dock and being prepared for the ployee is engaged in removing waste ma- and his administratrix cannot recover terial with a horse and cart which fre- for his death caused by a fire which quently pass in and out of the building, broke out at night, where he was fanecessitating the removal and replacing miliar with the boat and knew of the landing a steamboat for the delivery of (1) Risks incident to work in mines.— a small quantity of freight, by running Cas. 2d Series, 427. An experienced the general usage of vessels navigating

of reason, that the essential elements from which an assumption of that risk is predicable are not present.<sup>1</sup>

(1894) 9 C. C. A. 124, 23 U. S. App. 19, necessity of working at night with such light as lanterns afford is assumed by the crews of steamboats engaged in the river trade on the Mississippi. Red which danger is necessarily inherent, River Line v. Smith (1900) 39 C. C. A. 620, 99 Fed. 520.

(o) Risks caused by wild animals kept in confinement.—An employee assumes the risk of injury by animals, feræ naturæ, such as elks and deer, when he voluntarily engages to work inside of the inclosure in which they are

ling electrical appliances.-In the absence of anything to show that he is excusably ignorant of the hazards incident to his work, the servant of an employer who produces electricity for the purposes of his business assumes the risk of character of which causes he has had coming in contact with wires along opportunity to ascertain." Sykes v. which a current is passing, unless he has good reason to suppose that they are not charged. Davis v. Port Huron Engine & Thresher Co. (1901) 126 Mich. 429, 85 N. W. 1125 (servant fell on slippery roof over which he was stringing a wire, and, either to save himself, or involuntarily, took hold of another wire which ing from the natural and ordinary inciwas charged); Carr v. Manchester Electric Co. (1900) 70 N. H. 308, 48 Atl. 286 (lamp trimmer injured owing to 38 N. E. 37. A servant assumes all the the crossing of the wires of his ordinary hazards incident to the emown employer with those of another company); Junior v. Missouri Electric Light & P. Co. (1895) 127 Mo. 79, 29 S. W. 988; Newnom v. Southwestern Teleg. & Teleph. Co. (1898; Tex. Civ. App.) 47 S. W. 669. In one case the risk caused by an imperfectly insulated wire was declared to be the "most characteristic" one of a lineman's employment. Chisholm v. New England Teleph. & Teleg. Co. (1900) 176 Mass. 125, 57 N. E. 383. The danger of contact with a live dynamo is assumed by a workman who thoroughly understands the conditions. injured in coupling foreign cars of pe-Fritz v. Salt Lake & O. Gas & Electric culiar construction). Compare Light Co. (1899) 18 Utah, 493, 56 Pac.

such river, is incidental to the employ-ployment from its nature necessarily ment of a deckhand upon such steam- hazardous, he accepts the service sub-Red River Line v. Cheatham ject to the risks incidental to it." Clarke v. Holmes (1862) 7 Hurlst. & 60 Fed. 517. The risks arising from the N. 943, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, per Cockburn, C. J.

"There are many kinds of work in where precautions such as would insure safety to the workman are either impossible, or would only be attainable at an expense altogether incommensurate with the end to be accomplished. In all such cases the workman must rely upon his own nerve and skill; and in the absence of express stipulation to the contrary kept. Bormann v. Milwaukee (1896) the risk is held to be with him, and not 93 Wis. 522, 33 L. R. A. 652, 67 N. W. with the employer." Lord Watson in 924.

(p) Risks incurred by workmen hand
(p) 467, 40 Week. Rep. 392, 55 J. P. 660. When the servant "undertakes hazardous duties, he assumes such risks as are incident to their discharge from causes open and obvious, the dangerous Packer (1882) 99 Pa. 465, citing Whart. Neg. § 214. Same passage also quoted in Southwest Improvement Co. v. Andrew (1889) 86 Va. 270, 9 S. E. "The fact that the service is a 1015.dangerous one adds nothing to the liability of the master for injuries resultdents of the undertaking." Myers v. W. C. De Pauro Co. (1894) 138 Ind. 590, ployment, whether the employment be otherwise. Reese dangerous or Wheeling & E. G. R. Co. (1896) 42 W. Va. 333, 26 S. E. 204; Hoffman v. Dickinson (1888) 31 W. Va. 142, 6 S. E. 53: Oliver v. Ohio River R. Co. (1896) 42 W. Va. 703, 26 S. E. 444; Knight v. Cooper (1892) 36 W. Va. 232, 14 S. E.

Sometimes this doctrine appears in the form that "extraordinary" dangers are among those assumed, where they are essentially incident to the buiness. Thomas v. Missouri P. R. Co. (1891) 109 Mo. 187, 18 S. W. 980 (brakeman statement that the ordinary risks of a particular business are those which are "When a servant enters on an em- part of the natural and ordinary method

It is not easy to see what useful purpose is served by enunciating the doctrine of assumption of risks in terms which recognize a distinction between occupations which are inherently dangerous and those which are not so. If that descriptive phrase has any definite meaning at all, it may certainly be applied with perfect propriety to any industrial occupations which involve the use of electricity or machinery, as well as to the work of miners and seamen. Yet there is no general agreement to segregate these employments and place them in a class by themselves. Sometimes they are spoken of as inherently dangerous; sometimes the injuries which they produce are discussed without any reference to this conception. The same remark is applicable to the injuries of the kind noted in the ensuing sections.

267. Risks incident to construction work .- The principle has already been stated (§ 29, ante), that a master's obligations to servants engaged in doing work of which the essential purpose is to bring the material substances which will compose the plant into a condition in which they will be suitable for use as instrumentalities of a going concern are less onerous than the obligations which he owes to the servants who deal with those instrumentalities when the business is in operation. When viewed from our present standpoint, facts of the

of conducting that business, although rily skilled in the employment, then the with reference to a different business, or obvious dangers which he enters upon in a different department of the same busithe employment. Belleville Stone Co. v. ness. Jackson v. Missouri P. R. Co. Comben (1898) 62 N. J. L. 449, 45 Atl. (1891) 104 Mo. 448, 457, 16 S. W. 413, 1090, adopting and affirming the judg-quoting 1 Shearm. & Redf. Neg. § 185 ment in (1898) 61 N. J. L. 353, 39 Atl. (brakeman injured by projecting load on car which he was coupling). In In Massie v. Peel Splint Coal Co. Joyce v. Worcester (1885) 140 Mass. (1896) 41 W. Va. 620, 24 S. E. 644, it 245 A. N. E. 565, the following instruct was held that liability of a migra owner. 245, 4 N. E. 565, the following instruction was held that liability of a mine owner tion was approved: "If the employ- for injuries to an employee from the fall employment, he assumes those risks employee's tapping the slate, as it was also." But the use of this phraseology, his duty to do before propping. The if not absolutely incorrect, is at least to general proposition relied upon in the be deprecated in view of the customary syllabus written by the court was that application of the epithet "extraordi- the plaintiff had knowledge of the danhary" to designate risks caused by the ger, and wilfully encountered it, but the master's negligence.

contracts to use diligence to protect the covery where the occurrence is one of employee from ordinary risks, it was those contemplated as incident to an emnot necessary to qualify the expression ployment involving special dangers. "ordinary risks" by the words, "not ob- The court, in fact, said that it was not

they may fairly be called extraordinary servant also assumes the risks of those with reference to a different business, or obvious dangers which he enters upon in

ment is attended with extraordinary of slate could not be based upon his negdangers or risks which are fully known ligent failure to provide the latter with to the workman when he enters on the props, where the fall was caused by the case seems to be more properly classified In an instruction that an employer with those which deny the right of rewious to the employee, and in regard to necessary to speculate as to what was which he had not been warned," where the proximate cause of the injury,—the court also charged that, when the whether it was plaintiff's want of due employment presents special features of care, or whether the accident was due to danger, such as are open to one ordina-

kind involved in the cases in which this principle is regarded as furnishing a protection to the master are usually such as to bring them within the scope of the defense now under discussion. The position taken is that, although the servants belonging to the former of the classes above specified are sometimes exposed to certain risks which are different in character from, as well as greater in degree than, those encountered by the other class of servants, there is no logical ground upon which it can be asserted that these risks, if they are, as a matter of fact, ordinarily and naturally incidents of the work to be done, are not impliedly assumed like other kinds of risks which answer that description.1

1 (a) Principle applied to risks incurred in the construction of railways, train cannot recover for injuries caused imperfect condition of a road he is emnary manner, though it may be imperployed to assist in making perfect. feetly graded and ballasted. Rosen... He assumes greater risks upon baum v. St. Paul & D. R. Co. (1888) 38 such a road than upon a completed one, Minn. 173, 36 N. W. 447. where he might expect that the track was clear and all obstructions removed." Manning v. Chicago & W. M. R. Co. track hand employed thereon to any un(1895) 105 Mich. 260, 63 N. W. 312 usual risk. Galveston, H. & S. A. R.
(brakemen killed by tree projecting Co. v. Arispe (1891) 81 Tex. 517, 17 S.
over track running through a forest). W. 47; Reese v. Wheeling & E. G. R. Co.
A servant in engaging to work in and (1896) 42 W. Va. 333, 26 S. E. 204. construction train over a newly construction train over a newly constructed and imperfect roadbed. Colorado Midland R. Co. v. O'Brien (1891) 16 Colo. 219, 27 Pac. 701. To same effect see Evansville & R. R. Co. v. Henderson (1893) 134 Ind. 636, 33 N. E. 1021 (1895) 142 Ind. 596, 42 N. E. 216; Evansville & R. R. Co. v. Barnes (1894) An employee engaged in building a rail-137 Ind. 306, 36 N. E. 1092 (both cases way bridge, who knows that wedges in which a construction train was deused for the purpose of procuring an railed on a road where the process of building was to lay the track on half timbers are conveyed are liable to slip the necessary number of ties, after out of place, assumes the risk of injury which the rest of the ties were put in from that cause. Bedford Belt R. Co. and the ballast added); Moss v. Johnson (1859) 22 Ill. 633 (rails not secured 359. by chairs); Walling v. Congaree Constr. Co. (1893) 41 S. C. 388, 19 S. E. 723 (imperfectly spiked rails spread and derailed train); Baltimore & O. S. W. R. Co. v. Welsh (1897) 17 Ind. App. 505, 47 N. E. 182 (accident caused by sag in track); Central R. & Bkg. Co. v. Sims (1888) 80 Ga. 749, 7 S. E. 176 (servant while walking over a flat car to reach the caboose was injured by sudden jerk of gravel train, not more severe than might have been expected).

An employee riding on a construction -"An employee cannot complain of the by a side track constructed in the ordi-

The backing of a construction train in the usual manner does not subject a

in a completed state, and that carpenters are constantly employed in covering it with plank, assumes the risk of working therein while there are uncovered spaces. Kennedy v. Manhattan R. Co. (1895) 145 N. Y. 288, 39 N. E. 956. even surface on a track on which heavy v. Brown (1895) 142 Ind. 659, 42 N. E.

(b) Principle applied to other kinds of construction work.—Beique v. Hosmer (1897) 169 Mass. 541, 48 N. E. 338 (open hole in unfinished building); Clancy v. Guaranty Constr. Co. (1898) 25 App. Div. 355, 50 N. Y. Supp. 800 (same facts); Conway v. Furst (1895) 57 N. J. L. 645, 32 Atl. 380 (watchman in unfinished building fell down elevator shaft); Stuart v. New Albany Mfg. Co. (1895) 15 Ind. App. 184, 43 N. E. 931 (beam fell). A subcontractor of a car-

The necessary qualifications of this principle are indicated by the decisions that it can only be invoked against servants who are actually connected with the work of construction; that those servants are entitled to expect a degree of care and skill equal to that ordinarily exercised in railway construction; and that the defense of an assumption of ordinary risks is not a bar to the action, where such servants are injured by a defect in a portion of the road which is already in operation.4

so dark that he could not see in the pas-reach the forge. Dehning v. Delroit sage through which it was necessary for Bridge & Iron Works (1895) 46 Neb. him to pass, cannot recover from the 556, 65 N.W. 186. contractor for injuries by falling parties when they made their contract, that there was any risk that Sinnott would remain at his work until it was so dark in the passageway that he could not see his hand before his face, and then attempt to go through there without a light and meet with an accident, that must be deemed to have been an ordinary risk of the business which he contracted to do, or a risk growing out of the peculiar manner in which he chose to do it.

In Holloran v. Union Iron & Foundry Co. (1895) 133 Mo. 470, 35 S. W. 260, where a plank slipped on a girder and allowed the plaintiff to fall while he was assisting to move a derrick, the court "In the course of the erection of a new building it is almost impossible to keep it in an absolutely safe condition at every moment of the work. The skel-eton has to be erected before the covering, the iron work before the brick and frame. Certain risks are ordinarily incident to the state of things found in the unfinished condition of every building in course of construction. But the mechanics and laborers employed and paid to build it are presumed to understand their duties and the risks usually attendant upon them, and, knowing be-forehand the methods in use, they assume the risks usually incident to the discharge of their duties."

After being a month in the service, a laborer whose duty it is to carry coal of a bridge in course of construction as- construction work). sumes the risk of falling off a narrow

penter, remaining at work until it was plank which he has to cross in order to

An employee engaged in shifting a through an opening in the floor. Murthrough an opening in the floor. Murplatform in the shaft of a salt mine
phy v. Greeley (1888) 146 Mass. 196, during the process of its construction,
15 N. E. 654. The court said: "If it
can fairly be said, contemplating the
and that there are holes in the platform,
probabilities from the situation of the
assumes the risk of falling through a assumes the risk of falling through a hole. Sharpsteen v. Livonia Salt & Min. Co. (1896) 3 App. Div. 144, 38 N. Y. Supp. 49. A workman assumes the risk of working near a dam having an angle of about 135 degrees with the surface of the water, where the current is so swift that he cannot swim out of it, if there is nothing to prevent his seeing and appreciating the peril. Bullivant v. Spokane (1896) 14 Wash. 577, 45 Pac. 42. A person familiar with the work of building a slip by driving piles assumes the risk of driving; and no re-covery can be had for his death by drowning while shoving a float around the end of a pile-driver, where it appears that his pike pole slipped, and that he overbalanced himself and fell in. Fisher v. Chicago & G. T. R. Co. (1889)
77 Mich. 546, 43 N. W. 926. See also Yager v. The Receivers (1882) 4
Hughes, 192, 88 Fed. 773 (bridge gave

A brakeman on a freight train is not so connected with the work of improving the yards at a division station as to charge him with having assumed the risk arising from the defective condition of the yards resulting from such im-Provements, which causes his injury. Hurst v. Kansas City, P. & G. R. Co. (1901) 163 Mo. 309, 63 S. W. 695.

Colorado Midland R. Co. v. Naylon (1892) 17 Colo. 501, 30 Pac. 249 (simple political properties and artists for

ple spiking of three ties, and entire failure to spike fourth tie, on a curve of 5 for a forge resting on an elevated part degrees, not a risk assumed by men on

\*Evansville & R. R. Co. v. Maddux

Some cases involving injuries received in doing construction work are governed by the principle stated in § 269, infra.

As to the limits of the master's exemption in cases of construction work, see § 270, infra.

268. Risks incident to the work of restoring instrumentalities to a normal condition of safety.— A principle analogous to that which is stated in the preceding section is that a servant who engages in the work of bringing back to a safe condition any part of the plant which has become abnormally dangerous assumes all the risks which are obviously incident to the work thus undertaken. As regards such a servant those risks are ordinary, even though their existence may, as regards servants whose duties involve merely the use of the instrumentality in question, imply culpability on the master's part. other words, a servant put to work to repair a defective appliance cannot be heard to complain of its being defective, "inasmuch as that very thing is the cause of his being there, and he undertook to set it right, being paid for the risk he ran, and voluntarily incurring it."1 The rule which casts upon the master a liability for failing to provide reasonably safe instrumentalities for the use of his servants is deemed to be suspended under such circumstances.<sup>2</sup>

A perusal of the subjoined note will show that the facts presented in this class of cases, no less than those presented in the class of cases referred to in the preceding section, are usually of such a nature that the servant's inability to maintain an action may be predicated as a result of the operation of the principle discussed in § 29, ante.3

Employers, 3d ed. page 252. carrying a rail. Gulf, C. & S. F. R. Co. It is a most undoubted principle that, v. Jackson (1894) 12 C. C. A. 507, 27 where a piece of property is out of repair, the men who are employed in makning the risks assumed by such ing it safe take upon themselves what- servants are those arising from the ne-

(1893) 134 Ind. 571, 33 N. E. 345, Rehearing denied in 134 Ind. 585, 34 N. E. moving, and relaying a portion of the 511.

\*\*Thomas v. Quartermaine (1887) L. washed into a river by high water, as-R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. sumes the risk incident to the ground S. 340, 57 L. T. N. S. 537, 35 Week. being broken and obstructed by dèbris, Rep. 555, 51 J. P. 516, per Fry, L. J., and so causing the stumbling of one of quoting Roberts & Wallace, Liability of his fellow servants engaged with him in carrying a rail. Gulf Q. 4.8 F. R. Co.

ever of added risk comes from the exist- cessity of doing the required work in the Ing condition of the place or the work. intervals between the running of the Colorado Coal & I. Co. v. Lamb (1895)
6 Colo. App. 255, 40 Pac. 251.

Chicago & N. W. R. Co. v. Ward (1871) 61 Ill. 130; Flannagan v. Chicago & N. W. R. Go. (1880) 50 Wis.

6 Colo. App. 255, 40 Pac. 251.

Co. (1890) 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. Rep. 382 (servant injured by the failure of his coservants to act in concert with him in lifting a rail, the consequence being that it falls. cannot 22, 7 N. W. 337. consequence being that it falls, cannot recover, although such want of co-ordipairing the roadbed or structures on a nate action may be due to their confurailway.—A railroad employee sent out sion of mind produced by an impatient in the nighttime with a gang of extra order of the foreman upon the approach

269. Risks incident to work the progress of which is constantly creating new elements of unsafety .- The rule that it is the duty of a

of a train for which it was necessary to plaintiff] and plaintiff were at work leave a clear track.)

which the contention of counsel that the established by all the cases. sary, and wherever needed. The partic- dition." ular labor in which he was engaged at to assist in repairing").

pairing other structures.-McGlynn v. gaged in removing snow was injured by Brodie (1866) 31 Cal. 376. The serv- the overturning of the car in which he ant was injured by the fall of a cupola was traveling, owing to an unsuccessful in a foundry which he was repairing, attempt of the conductor to remove a the injury being received on the second snowbank from the track by means of day in which he was engaged in the job. the snowplow alone); Derr v. Lehigh The court said: "He was engaged with Valley R. Co. (1893) 158 Pa. 365, 27 Fitzpatrick in making the repairs dur- Atl. 1002 (engineer injured while ening the preceding day. He therefore gaged in opening a track obstructed by knew—for he had the opportunity to snow); Morse v. Minneapolis & St. L. R. know—its exact condition far better Co. (1883) 30 Minn. 465, 16 N. W. 358 than the defendants, who do not appear (engineer injured while "bucking" snow to have been about the cupola at all dur- with locomotive); Drake v. Union P. R.

ave a clear track.)

The risk of the accithe master is deemed to be free from dent was a risk incident to the employliability for injuries received by such ment in which plaintiff was engaged. servants, not only where, as in the cases Possessed of all the knowledge which dejust cited, the accident happened while fendants had as to the condition of the they were actually engaged on the task of cupola, and with an opportunity of bereparation, but also where it happened coming better informed in the progress while they were being conveyed upon a of the work in which he was engaged, construction train to or from the place plaintiff accepted the employment and at which the work was to be done continued in it down to the moment of Brick v. Rochester, N. Y. & P. R. Co. the accident. Where a party works (1885) 98 N. Y. 211. Vaughn v. Cali- with or in the vicinity of a piece of mafornia C. R. Co. (1890) 83 Cal. 18, 23 chinery insufficient for the purposes for Pac. 215 (employees upon a construc- which it is employed, or for any reason tion train engaged in finding and repair-ing washouts caused by a severe storm, knowledge of its condition, he takes the with a knowledge of all the facts and of risk incident to the employment in the purpose for which the train started, which he is thus engaged, and cannot held to have assumed the extra-harard-maintain an action for injuries susous risks of such employment); Carl-tained arising out of the accidents reson v. Oregon Short Line & U. N. R. Co. sulting from such defective condition of (1892) 21 Or. 450, 28 Pac. 497 (in the machinery. This is the principle particular bridge at which the accident Any other rule would place the defendoccurred was not known to be out of re- ants in a very embarrassing position, pair, or that deceased was not employed for, the cupola having got out of repair to assist in repairing that bridge, took and become dangerous, they were liable the case out of the rule stated in the to become resonsible for accidents that text, was rejected, the court observing: might result from allowing it to con-"It was known that the track of defend-tinue in that condition; and if plaintiff ant's road from the Cascade Locks west can recover they are also responsible for for several miles was obstructed by injuries arising to those at work on and landslides and washouts, caused by the about it in attempting to remedy the unusual, if not extraordinary, storms evil by putting it in a safe condition. then prevailing, and deceased was em- It would be hazardous for defendants to ployed to go out upon the road and as- allow the cupola to continue in an unsist in putting it in condition for use, safe condition, and equally hazardous to making such repairs as might be neces- employ workmen to put it in a safe con-

(c) Principle applied to servants rethe time of the casualty involved the use moving ice and snow from railway of the very track which he was employed tracks .- Howland v. Milwaukee, L. S. & assist in repairing"). W. R. Co. (1882) 54 Wis. 226, 11 N. (b) Principle applied to servants re- W. 529 (shoveler of snow on a train ening the time Fitzpatrick [a coservant of Co. (1889) 2 Idaho, 453, 21 Pac. 560

master to exercise ordinary care to provide a reasonably safe place of work for his servants is held not to be applicable to cases in which

"In this latitude storms of more or less somewhat as a sickly climate favors a severity, like the one in question, frephysician's practice. It is to the interquently occur. It is a duty railroad est of those who use machinery for it to companies owe to the public to remove snow from the track and operate the road as soon as it can be done by the exercise of great diligence and the use to make repairs. True it is that the of all the means and appliances at their risk of concealed dangers incident to the command. The company has the undoubted right to adopt such methods for as the skilled machinist is best compethat purpose as its best judgment may dictate. It may be that it would not he is the proper man to incur the hazhave the right to adopt doubtful experidemonstrated in what manner the required duty can be best performed, had no ground of complaint, where the Such methods, it must be assumed, are jury were instructed that the plaintiff known to the companies and its em- assumed the risk incident to the condiployees. The latter therefore, when tion in which he was informed that the they undertake the performance of any machine was, and that, if the request or duty which requires them to engage in the information was that the machine bucking snow, assume the usual and was out of repair and for the plaintiff ordinary hazards of their occupation; to go and repair it, he impliedly conand if the effort to remove the snow by tracted to take the obvious risks of the that method is made in the manner in condition in which the machine was common use they have no right to com- when he agreed to repair it.

certain station beyond which the road is taken to the repair shop will, as regards blockaded does not assume the risk of a a trainman, be treated as an ordinary snow slide between the stations on the one wherever it is reasonable to infer trip he is ordered to run. Fisher v. that he knew, or should have known, the Oregon Short Line & U. N. E. Co. peril to which he was exposed. Judkins (1892) 22 Or. 533, 16 L. R. A. 519, 30 v. Maine C. R. Co. (1888) 80 Me. 417, Pac. 425, distinguishing Carlson v. Ore- 14 Atl. 735; Yeaton v. Boston & L. R. gon Short Line & U. N. R. Co. (1892) Corp. (1883) 135 Mass. 418; McCosker 21 Or. 450, 28 Pac. 497, subd. (a) supra. v. Long Island R. Co. (1881) 84 N. Y.

than he did; and the object of calling Minn. 54, 19 N. W. 349). In the last-

(same accident to fireman); Bryant v. him in the room was that he might as Burlington, C. R. & N. R. Co. (1885) 66 certain the cause of the trouble and ap-Iowa, 305, 55 Am. Rep. 275, 23 N. W. ply the remedy. . . . The incompetency and inattention of the others In the last cited case the court said: gave him more to do in his vocation, be always in good condition, but for it to fail often and get out of order is advantageous to the man whose business is work of making repairs is upon him, but tent to discover and avert such dangers, ard." In Martineau v. National Blank Experience has undoubtedly Book Co. (1896) 166 Mass. 4, 43 N. E. 513, the court said that the defendant

plain if an accident occurs."

(e) Principle applied to trainmen

It has been held, however, that the handling disabled cars.—The enhanced conductor of a train ordered to run as risk created by the defective condition an extra to carry snow shovelers to a of rolling stock which is set apart to be (d) Principle applied to servants re- 77 (arguendo). Such knowledge is inpairing machinery.-Injuries caused by ferred where he deliberately took charge a defect in machinery do not constitute of a crippled engine and operated it a cause of action as regards a servant (Houston & T. C. R. Co. v. O'Hare employed to remedy that defect, even [1885] 64 Tex. 600), or where the dethough the dangerous condition resulted fective car was marked "out of order." from the incompetency or neglect of or where it was his special duty to take other employees, officers, or agents of the defective cars out of trains (Arnold v. company. Dartmouth Spinning Co. v. Delaware & H. Canal Co. [1890] 125 N. Achord (1889) 84 Ga. 14, 6 L. R. A. Y. 15, 25 N. E. 1064; Chesapeake & O. 190, 10 S. E. 449. Speaking of the R. Co. v. Hennessey [1899] 38 C. C. A. plaintiff the court said: "So far as ap- 307, 96 Fed. 713; Chicago & N. W. R. pears, no one knew more of the state and Co. v. Ward [1871] 61 Ill. 130; Fraker condition of the machinery at the time v. St. Paul, M. & M. R. Co. [1884] 32 the very work which the servants are employed to do is of such a nature that its progress is constantly changing the conditions as regards

cited case, where plaintiff mistook a fairly suggested by ordinarily careful court modified the defendant's sixth re- the servant be declared incapable quest by inserting the words italicised maintaining the action, if the defective so that, as given, it reads as follows: car was marked "out of order," in ac"The peril incident to the coupling of cordance with a rule or custom of the damaged cars is one to which every railroad brakeman may be exposed by the
very nature of his employment, and one
with a rule or custom of the
company. Watson v. Houston & T. C.
R. Co. (1883) 58 Tex. 434; Gulf, C. &
very nature of his employment, and one
S. F. R. Co. v. Mayo (1896) 14 Tex.
which at times must necessarily be incurred. The existence of such peril
while such car is being taken to the
Co. (1880) 50 Wis. 462, 7 N. W. 337,
place of repair implies no negligence
the court pronounced reasonable a rule
whatever upon the part of the railway to send all cars used in carrying or is clear that the arrangements and regu- wise negligent. transfer of such cars might be reasonably suitable and proper for the purpose, and yet, through some accident or misfortune or some negligent act or omission of a fellow servant in carrying them out, a brakeman or other laborer might be misled or misdirected so as to mistake the character of the car at its destination; and mistakes or confusion in giving orders may be reasonably exofficers."

R. Co. (1886) 35 Minn. 490, 29 N. W. the result of a blast in the locality, 173, it was laid down that, if a brake- where he goes to the vicinity for the man is notified generally that a car is in purpose of determining whether all the bad order, and handles it, not knowing shots have been fired (Boemer v. Cenin particular for what reasons it is to tral Lead Co. [1897] 69 Mo. App. 601); be withdrawn from service, he handles that the duty of a lineman to repair a it as a car which is unsuitable for use, defect in insulation of a wire makes the and at his own risk, so far as regards lisk of injury in so doing one which he any risks which are apparent or are assumes (Smart v. Louisiana Electric

damaged car for a sound one, the trial and diligent obervation. Especially will

whatever upon the part of the railway to send all cars used in carrying ore, company, and is no ground for recovery after they are unladen at the point of by an injured brakeman, if he is either transshipment, to the company's repair directly or by the circumstances notified shops for inspection and for such repairs that the car is damaged or is being as any of them may be found to require, moved to a place for repairs. It is a and reiterated the following statement risk he assumes for himself." To this of principles in the opinion rendered on risk he assumes for himself." To this of principles in the opinion rendered on modification defendant excepted. The the former appeal of the same case (45 comments of the supreme court were as Wis. 98): "Cars and engines are fre-follows: "The vice of this instruction quently damaged, and it becomes necesas thus modified and given is, we think, sary to remove them to some proper that it makes the question of the defend-place for repairs; and it may happen the fact of acant's liability turn upon the fact of ac- that they are so seriously damaged that ant's nability turn upon the lact of actinating are so seriously damaged that tual notice directly or indirectly, to the brakeman, leaving out of view the question as to the exercise of due diligence in the work. Yet this is one of the perby the company in the matter of providils of the business, and if a person so ing and publishing suitable regulations employed is injured because of the for the transfer of damaged cars, or the broken and unsafe condition of the car existence or effect of any usage which or engine, he has no remedy against the might be deemed equivalent thereto. It owner, unless such owner has been other-. . . Besides, in this lations made and in operation for the case the defect in the car which he attempted to climb upon was plain and visible,—one which he could not fail to see had he looked where he was placing his foot."

(f) Other illustrative cases.—Other decisions to the same effect are those which hold that an employee sent into a room on the day of the explosion of a fly-wheel, to clear away the ruins, assumes the risk of a piece of iron falling pected to occur without the fault of the upon him from the ceiling (Kanz v. defendant or its superior or managing Page [1897] 168 Mass. 217, 46 N. E. officers." 620); that a miner assumes the risk of In Kelley v. Chicago, St. P. M. & O. rock falling from the roof of a mine as

an increase or diminution of safety. The hazards thus arising as the work proceeds are regarded as being the ordinary dangers of the employment, and by his acceptance of the employment the servant necessarily assumes them.1

Paul City R. Co. [1898] 74 Minn. 163, ter's representative was not to have the 77 N. W. 28; Saxton v. Northwestern place of work carefully inspected after Teleph. Exch. Co. [1900] 81 Minn. 314, every blast, and ascertain the conditions 84 N. W. 109); that a workman in a of the roof and walls of the tunnel. The sugar refinery who is injured by falling employment of timbering was considered with a mass of sugar through the fun- by the learned judge to have had no renel of a bin, while he is engaged in re- lation to the presence of dangerous moving an obstruction which had inter- masses of materials like that which inrupted the downflow, cannot recover jured the plaintiff, and the case was es-(Bohn v. Havemeyer [1887] 46 Hun, sentially different from one in which the 557).

facts, see § 269, infra.

1 Finalyson v. Utica Min. & Mill Co. of removing stoops in a mine accepts (1895) 14 C. C. A. 492, 32 U. S. App. the risk of a fall of the roof. Cook v. 143, 67 Fed. 507. To the same effect Bell (1857) 20 Sc. Sess. Cas. 2d Series, see Gulf, C. & S. F. R. Co. v. Jackson 137. A shot worker employed in a coal (1894) 12 C. C. A. 507, 27 U. S. App. mine to pull down the loose coal after a 519, 65 Fed. 48. The insecurity necessarily incident to the work of tearing are liable to be in a more or less danger-down a building is a risk assumed by a ous condition, assumes such dangers as man engaged in that work. Clark v. a risk incident to his employment. Liston (1894) 54 Ill. App. 578; Chicago Muddy Valley Min. & Mfg. Co. v. Par-Edison Co. v. Davis (1900) 93 Ill. App. rish (1897) 74 Ill. App. 559. A sec-284 (servant backed off a platform from thich had been removed in which had been washed out cannot rethe course of the work). An injury recover for an injury caused by the fall sulting from the accidental fall of a of a heavy mass of earth from the side joist of a building, due, so far as apofthe trench which had been dug to repears, to some latent defect in the conceive the timbers composing the culvert, struction of the edifice, creates no cause although during his temporary absence of action in favor of a laborer hired to from the place of work the side had assist in its demolition. Smith v. Sel-been made perpendicular, and he had The danger to workmen walking on the change after his return, owing to the keelson of a barge which they were en- fact that he was hurried about his work. gaged in unloading, owing to the round- Kletschka v. Minneapolis & St. L. R. Co. ing top thereof, is not one for which the (1900) 80 Minn. 238, 83 N. W. 133. An master is responsible, as it is a condition employee assumes the additional risk progresses and the keelson is exposed, ment by undermining the base and pris-

Light Co. [1895] 47 La. Ann. 869, 17 Foley v. Brooklyn Gaslight Co. (1896) So. 346); that a lineman assumes hazards growing out of the defective or insecure condition of the poles he is compelled to climb and assist in removering an entry assumes the danger of the lagher [1896] 68 III. App. 248); that one employed to assist in replacing unsafe wooden poles supporting trolley wires, with iron poles, cannot recover ring and is loosened by the jarring from such employees' drilling. Wires, with iron poles, cannot recover Finalyson v. Utica Min. & Mill. Co. for an injury caused by the fall of a decayed wooden pole against which the ladder upon which he was standing rested, since he was harmed by the defect he ion, that it was for the jury to say was hired to repair (Broderick v. St. whether the primary duty of the mas-Paul City R. Co. [1898] 74 Minn. 163. injury was inflicted while the plaintiff For other cases presenting similar was in the act of removing such masses.

A servant who undertakes the work <sup>1</sup> Finalyson v. Utica Min. & Mill Co. of removing stoops in a mine accepts which the railing had been removed in which had been washed out cannot relars (1888) 40 La. Ann. 527, 4 So. 333. had no opportunity to observe the which the workmen create as the work incident to the removal of an embank-

If the conditions exemplified in cases of this type are proximately caused by the negligence of the injured person's fellow servants, recovery is of course denied as a result of the operation of the doctrine of common employment. See more especially, in this connection, chapter xxxII., post.

## C. Assumption of extraordinary risks.

## 270. Extraordinary risks not assumed by a servant.— A principle

ing or blasting off the top. Bradley v. Chicago, M. & St. P. R. Co. (1897) 138 Mo. 293, 39 S. W. 763. A laborer who, being acquainted with the nature of the work, engages in undermining a bank for the purpose of causing it to fall, that the evidence showed the fall to have been caused by the loosening of the day before that on which the injury was received, a fact of which the plainan additional risk not assumed by the plaintiff). An employee, who, while engaged in digging a bed of gravel from by the falling of the clay, cannot recover, as he is bound to know where the earth is undermined and will fall in. Griffin v. Ohio & M. R. Co. (1890) 124 Ind. 326, 24 N. E. 888. A laborer working in a gravel pit assumes the risk arising from the liability of sand and gravel to fall during the process of excavation. Swanson v. Lafayette (1893) 134 Ind. 625, 33 N. E. 1033. A laborer engaged in excavating a bank of iron ore assumes the risk incident thereto, if he understands the condition. Aldridge v. Midland Blast Furnace Co. (1883) 78 Mo. 559. A laborer engaged in digging a trench at a part of a street which has been filled in assumes the risk incident to a collapse of the earth at the sides of the trench, where it is obvious from the nature of the materials that the street has been filled. Carlson v. Sioux Falls going above an overhanging gravel ledge, R. Co. v. Spellman (Tex. Civ. App. wholly irrelevant. 1896) 34 S. W. 298.

In Swanson v. Great Northern R. Co. (1897) 68 Minn. 184, 70 N. W. 978, the allegations of the plaintiff showed that he was put at work at a large hill from which defendant was removing gravel; that he was ordered upon the slope of cannot recover against his employer for this hill to assist other workmen in an injury caused by a fall of earth, loosening the material, that it might, which extended further along the bank following the laws of gravitation, fall than was expected. Allen v. Logan down to the bottom of the pit, there to City (1894) 10 Utah, 279, 37 Pac. 496 be loaded upon cars by the steam shovel. (Bartch, J., dissented on the ground The remarks of the court on this state of facts were as follows: "The place was made dangerous and its character material, caused by the blasting of the was continually changing, by reason of the work in which plaintiff and others were engaged. The progress of the work tiff was ignorant. This he thought was necessarily changed the character of the place and enhanced the danger, and under such conditions it has never been held that it is the absolute duty of the under a thin stratum of clay, is injured master to furnish the servant a safe place in which to work."

For other cases involving similar facts, but decided against the servant on a different ground, see § 278, note 1,

subd. (p), in/ra.

The principle stated in the text has also been relied upon in a case where it was held that a railroad company is not liable for injuries to a laborer engaged to load merchandise into its cars, from the fall of a pile of boxes of tea upon which he had climbed for the purpose of loading them into the car, due to the unsafe piling by a steamship company in unloading the same upon the wharf near the track of the railroad company, where the railroad company had no authority or duty to perform in piling the boxes. Carolan v. Southern P. Co. (1897) 84 Fed. 84. But if the unsafety was, as it would seem, due to the negligence of Water Co. (1895) 8 S. D. 47, 65 N. W. the servants of a third party, and the 419. An employee assumes the risk in dangerous conditions existed before the servant began work, it is obvious that and digging a ditch for the purpose of the principle was not properly applied dislodging the ledge. Missouri, K. & T. under the circumstances, and was in fact

which has been formulated and applied so frequently as to have be come axiomatic is that a servant is prima facie not chargeable with an assumption of extraordinary risks, -risks, that is to say, which may be obviated by the exercise of reasonable care on the master's part. The use of this somewhat singular phraseology for the purpose of affirming the master's responsibility for injuries caused by his negligence is accounted for by the historical accident, noticed in § 1, ante, by which it happened that the foundations of the law of employers' liability were originally laid by asserting the servant's assumption of all the risks which were manifestly incident to his employment; and the various circumstances under which the servant's right to recover has been conceded have, in the first instance at least, been viewed merely as grounds for predicating an exception to the rule thus formulated.1

tant, of those exceptions [i. e., to the v. Fitchburg R. Co. (1872) 110 Mass. doctrine of assumption of risks], arises 240, 14 Am. Rep. 598. Increased danfrom the obligation of the master, gers caused by negligence on the part of whether a natural person or a corporate the employer are not to be deemed included that the house of the corporate the corporate the corporate the corporate the corporate that the house of the corporate the corporate the corporate the corporate the corporate that the house of the in the same contract [i. e., of hiring] that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal con-templation, is presumed to risk." Hough v. Texas & P. R. Co. (1879) 100 U. S. 213, 217, 25 L. ed. 612, 615. "The rule of law which exempts the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow servants, does not excuse the employer from the exercise of ordinary care in supplying and maintaining suit-

body, not to expose the servant, when dent to the business. Anglin v. Texas conducting the master's business, to per- & P. R. Co. (1894) 9 C. C. A. 130, 23 ils or hazards against which he may be U. S. App. 62, 60 Fed. 553. "A risk guarded by proper diligence upon the which the master has created by doing part of the master. To that end the or permitting something to be done master is bound to observe all the care which ought not to have been done, or which prudence and the exigencies of by omitting some precaution which in the situation require, in providing the the exercise of ordinary care ought to servant with machinery or other instru- have been taken, cannot be regarded as mentalities adequately safe for use by one of the ordinary risks of any emthe latter. . . It is equally implied ployment" assumed by the employee in the same contract [i. e., of hiring] George v. Clark (1898) 29 C. C. A. 374, that the master shall supply the physi- 56 U. S. App. 505, 85 Fed. 608. An exception to the rule that a servant assumes the risks of the employment "arises from the obligation or duty of the master not to expose the servants, while conducting his business, to perils or hazards which might have been provided against by the exercise of due care and proper diligence upon the part of the master." Baltimore & O. & C. R. Co. v. Rowan (1885) 104 Ind. 88, 3 N. E. 627. The servant does not assume "the hazard of extaordinary risks added by the failure of the employer to perform the duty enjoined upon him by law."

Rogers v. Leyden (1890) 127 Ind. 50, 26 N. E. 210. "It is those risks alone which cannot be obviated by the adoption of reasonable measures of precaution of reasonable measures of precaution by the measure that the country to the measure of the country to the measure that the country to the able instrumentalities for the performance of the work required. One who ensures of the work required. One who ensures the employment of another has a Min. Co. (1385) 99 N. Y. 376, 2 N. E. right to count on this duty, and is not 24. "Dangers which are known and can required to assume the risks of the masses the mitigated or avoided by the exercise

Any instruction is correct which embodies the principle that an employee does not assume all the risks incident to his employment, but

of reasonable care and precaution on Co. (1892) 93 Mich. 172, 53 N. W. 10; the part of those carrying on the busi- Tierney v. Minneapolis & St. L. R. Co. ness, and injuries from which happen (1885) 33 Minn. 311, 53 Am. Rep. 35, through neglect to exercise such care, 23 N. W. 229; Bergquist v. Chandler are not incident to the business; and the Iron Co. (1892) 49 Minn. 511, 52 N. W. master is generally liable for damages 136; Gibson v. Pacific R. Co. (1870) occurring therefrom." McGovern v. 46 Mo. 163, 2 Am. Rep. 497; Whalen v. Central Vermont R. Co. (1890) 123 N. Centenary Church (1876) 62 Mo. 326 Y. 280, 25 N. E. 373. "There is no implied contract growing out of the contract of service, that the servant shall Co. (1891) 109 Mo. 488, 19 S. W. 239; take the risk of the master's negligence, Nicholds v. Crystal Plate Glass Co. or that the latter shall be exempt from responsibility to the servant for his own

the master's liability is defined in language similar to that of the above-cited cases are so numerous that it would be unprofitable to cite them all. The following will serve as sufficient examples: Ashworth v. Stanwix (1861) 3 El. & El. 701, 30 L. J. Q. B. N. S. 183, 7 Jur. N. S. 467, 4 L. T. N. S. 85; Southern P. Co. v. Burke (1894) 9 C. C. A. 229, 13 U. S. App. 110, 23 U. S. App. 1, 60 Fed. O. S. App. 110, 25 O. S. App. 1, 00 Fed. 704; Perry v. Marsh (1854) 25 Ala. 659; Little Rock, M. R. & T. R. Co. v. Leverctt (1886) 48 Ark. 333, 3 S. W. 50; Little Rock & Ft. S. R. Co. v. Voss (1892; Ark.) 18 S. W. 172; Zeigler v. Danbury & N. R. Co. (1885) 52 Conn. Fisher v. Oregon Short Line & U. N. R. 543; Middle Georgia & A. R. Co. v. Bar-Co. (1892) 22 Or. 533, 16 L. R. A. 519, nett (1898) 104 Ga. 582, 30 S. E. 771; Illinois Steel Co. v. Bauman (1899) 178 III. 351, 53 N. E. 107; Alton Paving, Bldg. & Fire Brick Co. v. Hudson (1898) 176 Ill. 270, 52 N. E. 256; Consolidated Coal Co. v. Haenni (1893) 146 Ill. 614, 35 N. E. 162; Lasalle v. Kostka (1901) 190 Ill. 130, 60 N. E. 72; Baltimore & O. S. W. R. Co. v. Peterson (1901) 156 Ind. 364, 59 N. E. 1044; Hall v. Bedford Quarries Co. (1901) 156 Ind. 460, 60 N. E. 149; Moran v. Harris (1884) 63 Iowa, 390, 19 N. W. 278; Knapp v. Sioux City & P. R. Co. (1887) 71 Iowa, 41, 32 N. W. 18; Buzzell v. Laconia P. Co. (1901) 23 Utah, 94, 63 Pac. 814; Mfg. Co. (1861) 48 Me. 113, 77 Am. Trihay v. Brooklyn Lead Min. Co. (1886) Dec. 212; Rhoades v. Varney (1898) 4 Utah, 468, 11 Pac. 612; Dumas v. 91 Me. 222, 39 Atl. 552; Frye v. Bath Stone (1893) 65 Vt. 442, 25 Atl. 1097; Gas & Electric Co. (1900) 94 Me. 17, Houston v. Brush (1894) 66 Vt. 331, 46 Atl. 804; Wonder v. Baltimore & O. 29 Atl. 380; Severance v. New England R. Co. (1870) 32 Md. 411, 3 Am. Rep. Tale Co. (1900) 72 Vt. 181, 47 Atl. 833; 143; Cumberland & P. R. Co. v. State Walty v. Lake Superior Terminal & (1875) 44 Md. 283; Eddy v. Aurora Transfer R. Co. (1898) 100 Wis. 128, 75 Iron Min. Co. (1890) 81 Mich. 548, 46 N. W. 1022. N. W. 17; King v. Ford River Lumber

(defective machinery or incompetent servants); Henry v. Wabash Western R. Nicholds v. Crystal Plate Glass Co. (1894) 126 Mo. 55, 27 S. W. 516, 28 S. W. 991; O'Mellia v. Kansas City, St. J. personal wrongs." Anthony v. Leeret & C. B. R. Co. (1893) 115 Mo. 205, 21 (1887) 105 N. Y. 591, 12 N. E. 561. S. W. 503; Blanton v. Dold (1891) 109 The decisions in which the extent of Mo. 75, 18 S. W. 1149; Nicholds v. Crystal Plate Glass Co. (1894) 126 Mo. 55, 27 S. W. 516, 28 S. W. 991; Kearney Electric Co. v. Laughlin (1895) 45 Neb. 401, 63 N. W. 941; O'Neill v. Chicago, R. I. & P. R. Co. (1901) 62 Neb. 358, 86 N. W. 1098; Comben v. Belleville Stone Co. (1896) 59 N. J. L. 226, 36 Atl. 473; Abel v. Delaware & H. Canal Co. (1891) 128 N. Y. 664, 28 N. E. 663; Farley v. New York (1897) 152 N. Y. 222, 46 N. E. 506, Rev'g 9 App. Div. 536, 41 N. Y. Supp. 622; Forter v. Western North Carolina R. Co. (1887) 97 N. C. 63, 2 S. E. 580; Boss v. Northern P. R. Co. (1891) 2 N. D. 128, 49 N. W. 655; 30 Pac. 425; Stager v. Troy Laundry Co. (1901) 38 Or. 480, 53 L. R. A. 459, 63 Pac. 645; Maguire v. Little (1887; R. I.), 13 Atl. 108; Missouri P. R. Co. v. Crenshaw (1888) 71 Tex. 340, 9 S. W. 262; Gulf, C. & S. F. R. Co. v. Silliphant (1888) 70 Tex. 623, 8 S. W. 673; Galveston, H. & S. A. R. Co. v. Arispe (1891) 81 Tex. 517, 17 S. W. 47; Texas & P. R. Co. v. Eberheart (1897) 91 Tex. 321, 43 S. W. 510, Affirming (1897; Tex. Civ. App.) 40 S. W. 1060; Chapman v. Southern P. Co. (1895) 12 Utah, 30, 41 Pac. 551; Hill v. Southern 4 Utah, 468, 11 Pac. 612; Dumas v.

only such as are ordinarily incident to the employment.<sup>2</sup> On the other hand, any instruction which is inconsistent with or ignores the principle is erroneous.3

<sup>2</sup> Moore Lime Co. v. Richardson (1897) refuse a request for a requested instruction to this effect. Galveston, H. & S. A. R. Co. v. Pitts (1897; Tex. Civ. App.) 42 S. W. 255. In any case where there is prima facie evidence of negligence, an unqualified instruction that a servant assumes the ordinary risks of the employment is properly supplemented by a statement in which the jury are told that this rule does not apply to risks which are extraordinary and which did not exist at the time the servant was hired. Libby, McN. & L. v. Scherman (1893) 146 Ill. 553, 34 N. E. 801. An instruction that a locomotive engineer assumes all risks ordinarily incident to the business, but he may presume that the company will furnish a reasonably safe track, and he does not assume risks brought about by the company's negligence, is not subject to the objection that he could only presume the company would use all ordinary diligence to furnish a safe track, and that he assumed the risk of a defective track if, by the exercise of ordinary care, he might have known of it. Texas & P. R. Co. v. Mc-Clane (1900) 24 Tex. Civ. App. 321, 62 S. W. 565.

3 As, where the jury are told that the law presumes that every person who accepts employment does so with the risks incident thereto. Piette v. Bavarian Brewing Co. (1892) 91 Mich. 605, 52 N. W. 152. Or where the words of the trial judge are open to the construction that a servant assumes every danger which may possibly arise in the performance of his duties. Pittsburg Bridge Co. v. Walker (1897) 170 Ill. 550, 48 N. E. 915. An instruction that a brakeman on a train assumes the risk of dangers incident to the speed at which the train is run is not correct, unless it is quali-fied by the proviso that such assumption is implied only if the defendant was not negligent in running the train at that speed. Conners v. Burlington, C. R. & N. R. Co. (1888) 74 Iowa, 383, 37 N. W. 966. An instruction that

sils, and employments, which were obvi-95 Va. 326, 28 S. E. 334. It is error to ous to him or ascertainable in the exercise of ordinary care, is improper unless the master's duty in respect to such matters and plaintiff's right to rely upon the discharge of such duty is also stated. Ambrose v. Angus (1895) 61 Ill. App. 304. A requested instruction that, if a railroad employee knew or might have known that the company operated its trains in such a manner as to make his employment unusually dangerous, and voluntarily continued to expose himself to such hazard in performing his duty, recovery cannot be had for his death from being struck by a train while so employed, is properly refused where the circumstances affecting the duty of the employer and the employee to exercise care and caution commensurate with the danger are ignored. Illinois C. R. Co. v. Gilbert (1895) 157 Ill. 354, 41 N. E. 724. In nored. an action for an injury received by a railway employee by having his foot caught in an imperfect track and being run over, the defendant is not entitled to have the jury instructed that, if the injured man was in the habit of driving cars over the track, and by the use of ordinary care and observation could have been aware of its condition, he took upon himself the risk of the employ-Such a charge was considered misleading for the reason that it might have led the jury to suppose that, under the conditions shown, the risk was one incident to the employment. adelphia, W. & B. R. Co. v. State (1882) 58 Md. 372.

A requested instruction, that if a car repairer knew of the custom or manner in which cars were placed upon the repair tracks, where he was liable to be at work, he assumed all the risks incident to the manner of making entry on such track, and plaintiff would not be entitled to recover by reason of the manner of the entry, is properly refused, as it would prevent a recovery though the jury should believe that the defendant was guilty of negligence in running the plaintiff in entering upon his work in car onto the repair track, without ref-connection with a derrick by the break-erence to the question as to whether it ing of which he was injured assumed all had made proper rules. Texas & P. R. the risk in connection with his associa- Co. v. Eberheart (1897) 91 Tex. 321, 43 tion as to the place in which he worked S. W. 510, Affirming (1897; Tex. Civ. and the character of the material, uten- App.) 40 S. W. 1060.

This qualification of the general rule as to the assumption of ordinary risks, and not that rule itself, is deemed to be controlling in cases of the types adverted to in §§ 267-269, ante, where the peculiar hazards of the employment are unnecessarily augmented by a specific want of care on the master's part.4

There is some authority for the doctrine that a contract by which the master is declared in unqualified terms to be free from responsibility for accidents occurring from any cause whatever should be construed in such a sense as to leave him still liable for injuries caused by his negligence.<sup>5</sup> Still less can an intention to undertake extraor-

A laborer sent out on a work train bridge after the storm, or to take such where steel workers are engaged in joinother due and precautionary measures ing the framework of the building astrack from place to place where his services were needed to clear the track of <sup>5</sup> In Memphis & C. R. Co. v. Jones obstructions, the risk he assumed in (1859) 2 Head, 517, a slove was hired precautions."

A civil engineer in the employ of a to repair a track after a storm assumes railroad company, who rides on a train the enhanced risks arising from the over a new track which he is engaged in want of repair, so far as they are due laying, when ordered to do so, assumes to the action of the storm. But he does only the risks ordinarily incident to not assume any risks which result from travel over such new track, with due the neglect of the master to use proper care in the management of the train and care, before the storm, to keep a bridge the condition of the track. His assumpin repair, or to ascertain the condition tion of such risks will not relieve the of the track or bridge after the storm, company of the charge of negligence or to take such due and proper precau- arising from an undue rate of speed and tionary measures to prevent accidents the failure to repair defects in the track to its employees as the exigencies of the made by stones. Meloy v. Chicago & N. situation may require. Carlson v. Ore-W. R. Co. (1889) 77 Iowa, 743, 4 L. R. gon Short Line & U. N. R. Co. (1892) A. 287, 42 N. W. 563. An employee as-21 Or. 450, 28 Pac. 497. A shoveler ensumes the additional risk incident to gaged by a railway company to assist the removal of an embankment by unin removing dirt and other obstructions dermining the base and prying or blastfrom its track, upon which they have ing off the top, over that involved in been wasned by an unusual storm or taking the bank down from the top, but freshet, does not assume the risk of the not that incident to the failure of the company's failure before the storm to master to exercise reasonable care to keep in proper repair a bridge over remove the overhanging earth as the which the train on which he is carried excavation proceeds. Bradley v. Chica-is required to pass, or to send out a go, M. & St. P. R. Co. (1897) 138 Mo. track walker in advance of the trains to 293, 39 S. W. 763. An experienced tile ascertain the condition of the track or setter employed in a fireproof building to prevent accidents as may be required sumes all ordinary hazards of the work by the exigency of the situation. Conlon he engages in, but not the risk of being v. Oregon Short Line & U. N. R. Co. injured by falling material, which it is (1893) 23 Or. 499, 32 Pac. 397. The customary to guard against and make court said: "It may be admitted that, suitable provision to prevent. Pioneer if the performance of his duties had Fireproof Constr. Co. v. Howell (1901) required that he should ride over the 189 Ill. 123, 59 N. E. 535, Affirming (1900) 90 Ill. App. 122.

cluded the danger of bridges being un- from his owner under a contract to the dermined or swept out by freshets or following effect: All risks incurred or floods, when they occurred from inevita- liability to accidents whilst in said servble accident, but not when the danger ice is compensated for and covered by might have been ascertained and averted the pay agreed upon; the said railroad in time to avoid the injury, by the ex- company assuming no responsibility for ercise of reasonable care or of proper damages from accident, or any cause whatever. The court said: "It might

dinary risks be attributed to a servant, where the words relied upon as being indicative of such an intention are reasonably susceptible of a different construction.6

271. — unless comprehended by the servant.— In statements of the general principle enunciated in the last section there are often found words which recognize, in the form of an exceptive limitation, the existence of the principle which declares, as will presently be shown, the circumstances under which a risk, though extraordinary, is deemed to have been assumed. An extraordinary risk, it is said, is not assumed unless it is, or ought to be, known to and comprehended by the servant, or—as the same conception may also be expressed in logically equivalent terms—where the servant is chargeable neither with an actual nor a constructive knowledge and comprehension of the risk.1

be somewhat difficult to define the exact and run at his own risk," and that the and sensible construction. It would be most absurd to suppose that it was the intention and understanding of the parties that the company should be protectties that the company should be protecties that the company should be protecties of from liability, not only against all Pa. 509, 19 Atl. 345, 346, the court said: the road, and also against injuries company had no participation, but like-

meaning and effect of the foregoing stip- employer will stand no responsibility, ulation. This, however, is not necessary and replies that he has run clevators, for the present determination. But there and that there need be no fear of him. is no sort of difficulty in determining The natural meaning of such an answer, what it does not mean. It is true the under the circumstances, is merely that language of the instrument is very the employer need not be concerned strong, but it must receive a reasonable about the servant's competency. Fairbank Canning Co. v. Innes (1887) 24 Ill. App. 33, Affirmed (1888) 125 Ill. 410, 17 N. E. 720.

the ordinary casualties to which the "The general rule that a workman asslave might be exposed in working on sumes the risks incident to his employment when he enters upon it is well setcaused by third persons in which the tled, but its application is subject to certain qualifications. He certainly has wise against injury or loss occasioned by the right to expect his employer to prothe wilful wrong or gross negligence of vide machinery, tools, and appliances the company itself, or its agents! Such that are reasonably safe for his use, and a construction of the agreement is alto- he assumes no risks growing out of their gether inadmissible. The stipulation is defective character, unless he has been not available for the defendant against fully advised that they are defective and its own wilful wrong or culpable neglidangerous. He has the right to sup-gence." In jurisdictions where express pose that his employer has provided agreements not to sue a master for insuch guards and means of protection juries resulting from his negligence are from injury, in the use of the machinjuries resulting from his negligence are from injury, in the use of the machinregarded as invalid (see volume III.), ery, tools, and appliances, as are usual
a contract like the one in the case cited
would, for the purpose of upholding it, and he cannot be held to assume the
naturally be construed in the same manrisks attendant on their absence, unless
ner as that favored by the court. But
the validity of such agreements does not
tion has been called to it. . . . If the
seem to have been anywhere discussed
till some years after this case was detill some years after this case was detill defective ampliances, and if the dethe defective appliances, and if the de-<sup>6</sup> A man employed to run an elevator fendants were not justified in supposing does not assume risks of defective conhecunderstood it, it cannot be held that, struction because, after he has been in the contractual relation of master hired, he is told that he "must look out and servant, he assumed the risk which

Instructions are correct or erroneous according as they conform to or are inconsistent with this principle.2

resulted in his injury." Glen Mfg. Co. (1892) 67 N. H. 404, 40 122 Mich. 171, 81 N. W. 101, 84 N. W. or presumptive knowledge of the dan- 863, 37 S. W. 829, 38 S. W. 894; Cumger. Recd v. Stockmeyer (1896) 20 C. mings v. Collins (1876) 61 Mo. 520; C. A. 381, 34 U. S. App. 727, 74 Fed. Hollenbeck v. Missouri P. R. Co. (1897) 186. A servant does not assume the 141 Mo. 97, 38 S. W. 723, 41 S. W. 887; 50; Gisson v. Schwabacher (1893) 99 Cal. 419, 34 Pac. 104; Higgins v. Williams (1896) 114 Cal. 176, 45 Pac. 1041; Cooper v. Portner Brewing Co. (1901) 112 Ga. 894, 38 S. E. 91; Unit-(1886) 116 Ill. 100, 5 N. E. 92; Chicago & N. W. R. Co. v. Gillison (1898) 173 Ill. 264, 50 N. E. 657, Affirming (1897) 72 Ill. App. 207; Whitney & S. Co. v. O'Rourke (1898) 172 Ill. 177, 50 N. E. 242; Salem Stone & Lime Co. v. Griffin (1894) 139 Ind. 141, 38 N. E. 411; Olson v. Hanford Produce Co. (1900) 111 Iowa, 347, 82 N. W. 903; McDermott v. Iowa Falls & S. C. R. Co. (1891; Iowa) Pennsylvania Co. v. Whitcomb (1887) 111 Ind. 212, 12 N. E. 380; Pennsylvania Co. v. Brush (1891) 130 Ind. 347, Vol. I. M & S.-40,

Demars v. Phelps v. Chicago & W. M. R. Co. (1899) Atl. 902. A servant does not assume 66; Clapp v. Minneapolis & St. L. R. the unusual and extraordinary risk of Co. (1886) 36 Minn. 6, 29 N. W. 340; which the master knows or which he Murphy v. Wabash R. Co. (1892) 115 should know or foresee, unless such risks Mo. 111, 21 S. W. 862; Helfenstein v. are obvious, or the servant has actual Medart (1896) 136 Mo. 595, 36 S. W. danger from the failure of the master Kearney Electric Co. v. Laughlin (1895) to exercise reasonable care to provide 45 Neb. 390, 63 N. W. 941; Fancher v. safe machinery and appliances, or a safe New York, L. E. & W. R. Co. (1894) place in which to do his work, unless the 75 Hun, 350, 27 N. Y. Supp. 62; Holdanger is obvious, or he can acquire lingsworth v. Long Island R. Co. (1895) knowledge thereof in the exercise of or- 91 Hun, 641, 36 N. Y. Supp. 1126; dinary care. Comben v. Belleville Stone Dervin v. Herriman (1890) 26 Jones & Co. (1896) 59 N. J. L. 226, 36 Atl. 473. S. 193, 9 N. Y. Supp. 722; Wilkie v.
 For language including a similar Raleigh & C. F. R. Co. (1900) 127 N. point of view, see Saxton v. Hawksworth C. 203, 37 S. E. 204; Philadelphia & R. (1872) 26 L. T. N. S. 851; Harder & H. R. Co. v. Huber (1889) 128 Pa. 63, 5 L. Coal Min. Co. v. Schmidt (1900) 43 C. R. A. 439, 18 Atl. 334; Hoffman v. C. A. 532, 104 Fed. 282; Carpenter v. Clough (1889) 124 Pa. 505, 17 Atl. 19; Mexican Nat. R. Co. (1889) 39 Fed. Maguire v. Little (1887; R. I.) 5 New 315; Little Rock, M. R. & T. R. Co. v. Eng. Rep. 666, 13 Atl. 108; Taylor, B. Leverett (1886) 48 Ark. 333, 3 S. W. & H. R. Co. v. Taylor (1890) 79 Tex. & H. R. Co. v. Taylor (1890) 79 Tex. 104, 14 S. W. 918; Bonner v. La None (1891) 80 Tex. 117, 15 S. W. 803; San Antonio & A. P. R. Co. v. Engelhorn (1900) 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68; Pidcock v. Union P. ed States Rolling Stock Co. v. Wilder R. Co. (1888) 5 Utah, 612, 1 L. R. A. 131, 19 Pac. 191; Dumas v. Stone (1893) 65 Vt. 442, 25 Atl. 1097; Carbine v. Bennington & R. R. Co. (1889) 61 Vt. 348, 17 Atl. 491; Houston v. Brush (1894) 66 Vt. 331, 29 Atl. 380; Johnson v. First Nat. Bank (1891) 79 Wis. 414, 48 N. W. 712. <sup>2</sup> Herdler v. Buck's Stove & Range Co.

(1896) 136 Mo. 3, 37 S. W. 115; Pikesville, R. & E. G. R. Co. v. State (1898) 47 N. W. 1037; Bradbury v. Goodwin 88 Md. 563, 42 Atl. 214. It is proper to (1886) 108 Ind. 286, 9 N. E. 302; refuse an instruction that a servant "assumes the risk of all ordinary hazards and dangers of his employment, whether the same were known to him or not." 28 N. E. 615; Bland v. Shreveport Belt Whitney & S. Co. v. O'Rourke (1898) R. Co. (1896) 48 La. Ann. 1057, 36 L. 172 Ill. 177, 50 N. E. 242. A refusal R. A. 114, 20 So. 284; Veginan v. Morse to charge that plaintiff could not recover (1893) 160 Mass. 143, 35 N. E. 451; if his decedent knew that trains were Donahue v. Drown (1891) 154 Mass. habitually sent out insufficiently manned, 21, 27 N. E. 675; Scanlon v. Boston & and he had always gone on such trains, A. R. Co. (1888) 147 Mass. 484, 18 N. is not error, where it does not appear E. 209; Pictic v. Bavarian Brewing Co. that deceased had any knowledge that (1892) 91 Mich. 605, 52 N. W. 152; the train which preceded his own on Ragon v. Toledo, A. A. & N. M. R. Co. the morning in question had only two (1893) 97 Mich. 265, 56 N. W. 612; brakemen, Rose v. Boston & A. R. Co.

It will be observed that the affirmation of the servant's right of action, in the phraseology thus used, involves elements which, when considered from a different standpoint, supply another generic principle, viz., that the exposure of a servant to dangers of which he has no knowledge, actual or constructive, imports culpability. See § 58, ante.

From the principle, as thus stated, it follows that assumption of an extraordinary risk cannot be predicated, as a matter of law, where there is no evidence going to show that the servant understood, or ought to have understood, that risk, or where the evidence actually produced is fairly susceptible of the construction that he did not understand it.3

As to the burden of proving the servant's knowledge of an extraordinary risk, see chapter XLIII., post.

272. Application of the doctrine to specific cases. - Most of the cases in which the servant's nonassumption of extraordinary risks is asserted relate to injuries caused by dangerous conditions which arise from or are incident to the intrinsic quality or the permanent arrangement and relative disposition of the instrumentalities of the business or the materials which the servant is required to handle. But the general

It is proper to refuse a request for an instruction that a railroad employee assumed the risk of being struck by a cattle guard along defendant's line where he had reasonable ground to believe that they were constructed so near the track they were constructed so near the track Co. (1896) 59 N. J. L. 226, 36 Atl. 473; as to render it "possible" for him to be struck thereby when on the ladder of a freight car. Such assumption is inferable only where he knew that it was "probable" that he would be so struck. San Antonio & A. P. R. Co. v. Engellow (1900) 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68.

\*\*Western Coal & Min. Co. v. Ingradiation (1895) 17 C. C. A. 71, 36 U. S. App. 1, 70 Fed. 219; Collins v. Greenfield (1898) 172 Mass. 78, 51 N. E. 454; Ostimader v. Lansing (1897) 111 Mich. Wilson v. Louisiana & N. W. R. Co. he had reasonable ground to believe that

(1874) 58 N. Y. 217. Where a servant 693, 70 N. W. 332; Plefka v. Knappwhile engaged in his duty of cleaning Stout Lumber Co. (1897) 72 Mo. App. while engaged in his duty of cleaning Stout Lumber Co. (1897) 72 Mo. App. a headlight slipped from a step on an 309; George v. Clark (1898) 29 C. C. A. engine, due to an accumulation of grease 374, 56 U. S. App. 505, 85 Fed. 608; on such step, it is error to instruct the New York Biscuit Co. v. Rouss (1896) jury that he "assumed all risk of injury incident to the performance of the servince that he was engaged to perform," Cal. 409; Pittsburg Bridge Co. v. Walkwhere it was not shown that he knew er (1897) 170 Ill. 550, 48 N. E. 915; the condition of the step, or that it was Kann v. Meyer (1898) 88 Md. 541, 41 his duty to keep it clean. Bookrum v. Atl. 1065; McMahon v. McHale (1899) Gulveston, H. & S. R. Co. (1900; Tex. Civ. App.) 57 S. W. 919.

Minneapolis, St. P. & S. M. R. Co. It is proper to refuse a request for an (1896) 63 Minn. 489, 65 N. W. 1084; 114 Mass. 320, 54 N. E. 854; Leonard v. Minneapolis, St. P. & S. S. M. R. Co. (1896) 63 Minn. 489, 65 N. W. 1084; Mechan v. Judson (1899) 43 App. Div. 46, 59 N. Y. Supp. 578; Simmons v. Peters (1895) 85 Hun, 93, 32 N. Y. Supp. 680; Comben v. Belleville Stone Co. (1896) 59 N. J. L. 226, 36 Atl. 473; Postal Teleg. Cable Co. v. Coote (1900; Tex. Civ. App.) 57 S. W. 912.

Ostrander v. Lansing (1897) 111 Mich. Wilson v. Louisiana & N. W. R. Co.

principle is also frequently asserted with reference to accidents resulting from improper methods of carrying on the business, or from negligence in respect to the use and management of the instrumentalities

(1899) 51 La. Ann. 1133, 25 So. 961 Louisville, N. A. & C. R. Co. v. Wright trocking of cars due to excessive speed (1888) 115 Ind. 378, 394, 17 N. E. 584 threw off a tie which caused a derailment); Taylor, B. & H. R. Co. v. Taylor (1890) 79 Tex. 104, 14 S. W. 918 (Compare §§ 72, 87, ante). Houston (defective roadbed); Clapp v. Minne- & T. C. R. Co. v. Quill (1900; Tex. apolis & St. L. R. Co. (1886) 36 Minn. Civ. App.) 55 S. W. 1126, Judgment 6, 29 N. W. 340 (defective roadbed and Affirmed in (1900) 93 Tex. 616, 57 S. switches): Hollenbeck v. Missouri P. W. 948, but this point was not advert-R. Co. (1897) 141 Mo. 97, 38 S. W. 723, ed to. 41 S. W. 887 (uncovered ditch in road-(h) Defective rolling stock on rail-App.) 52 S. W. 89 (brakeman tripped up by sliver detached from rail); Our-R. Co. (1895) 91 Hun, 641, 30 II. Lis v. Chicago & N. W. R. Co. (1897) Supp. 1126 (defective brake); Goodrich 95 Wis. 460, 70 N. W. 665 (want of v. New York C. & H. R. R. Co. (1889)

See however, §§ 69, c, and 116 N. Y. 398, 5 L. R. A. 750, 22 N. E. ante.

See § 270, note 4, ante.

(c) Other defective structures on railways.—Great Northern R. Co. v. Kas-ischke (1900) 43 C. C. A. 626, 104 Fed. 440 (fastening of apron of coal chute); Pool v. Chicago, M. & St. P. R. Co. (1881) 53 Wis. 657, 11 N. W. 15 (defective method or laying planks on a crossing).

(d) Unsafe roof of railway tunnel.— Kearney Electric Co. v. Laughlin (1895) 45 Neb. 390, 63 N. W. 941 (tunnel was imperfectly propped and caved in). A servant who chooses to ride upon a locomotive assumes all the risks peculiar to that situation; but of such risks, the

29 U. S. App. 88, 64 Fed. 563.

(e) Dangerous objects near railway tracks.—(Compare §§ 70, 86, b, ante). Murphy v. Wabash R. Co. (1893) 115 Mo. 111, 21 S. W. 862 (cattle-guard fence); Bonner v. La None (1891) 80 Tex. 117, 15 S. W. 803 (switch stand); Crandall v. New York, N. H. & H. R. Co. (1896) 19 R. I. 594, 35 Atl. 307 (telegraph pole close to side track); Pikesville, R. & E. G. R. Co. v. State Thomas v. Ann Arbor R. Co. (1897) (1898) 88 Md. 563, 42 Atl. 214 (pole 114 Mich. 59, 72 N. W. 40; Mexican C.

track.—(Compare §§ 71, 86, c, ante).

(overhead bridge).

(1) Defective rotting stock on rationally parties of the bed); Davidson v. Southern P. Co. ways.—(Compare §§ 73, 74, 88, ante). (1890) 44 Fed. 476 (defectively con-Fancher v. New York, L. E. & W. R. structed ditch); San Antonio & A. P. Co. (1894) 75 Hun, 350, 27 N. Y. Supp. R. Co. v. Williams (1899; Tex. Civ. 62 (leaky faucet made floor of engine App.) 52 S. W. 89 (brakeman tripped slippery): Hollingsworth v. Long Island up by sliver detached from rail); Our-R. Co. (1895) 91 Hun, 641, 36 N. Y. tie v. Chicago & N. W. R. Co. (1897) Supp. 1126 (defeative brake): Goodrich

te.

A brakeman does not, as a matter of
(b) Defective bridges on railways.— law, assume the risk of coupling a freight car equipped with link and pin couplers to a coach equipped with a Miller hook, which permits the coupling bars to slip by each other, leaving a space of only about a foot between the ends of the cars, where there is on the freight car a bolt projecting several inches from the end of the car and beyond the nut, and he is not familiar with the construction of such a car with reference to the bolt. Thompson v. Missouri P. R. Co. (1897) 51 Neb. 527, 71 N. W. 61.

(i) Unusual combinations of certain types of rolling stock .- A yard employee is not bound at his peril to know danger of a rock falling from the roof of a danger which is so unusual as that of a tunnel is not one. Northern P. R. of coupling a pilot bar to a box car. Co. v. Beaton (1894) 12 C. C. A. 301, Kerns v. Chicago, M. & St. P. R. Co.

(1895) 94 Iowa, 121, 62 N. W. 692. (j) Defective highways.—The driver of a fire engine or hose cart going to a fire does not assume the risks from obstructions in the streets negligently allowed there by the city. Farley v. New York (1897) 152 N. Y. 222, 46 N. E. 506, Reversing (1896) 9 App. Div. 536, 41 N. Y. Supp. 622.

(k) Defective hoisting appliances.exceptionally near track of street rail- R. Co. v. Murray (1900) 42 C. C. A. way). 334, 102 Fed. 264 (loop of track; steel (f) Dangerous objects above railway used for lifting bridge girders).

One employed to wash bottles in the

or materials.<sup>2</sup> As regards both these classes of cases, it is evident that, if the injury is not traceable to an act or omission of the master himself, there is always a preliminary question to be settled, viz.,

basement of a building, no part of whose 175 Mass. 496, 56 N. E. 704 (undercut duty it is to carry anything up or down machine would start from a dead stop); stairs, does not, as a matter of law, as- Kann v. Meyer (1898) 88 Md. 541, 41 sume the risk incident to the running Atl. 1065 (machinist, while repairing of an elevator, although he understands an elevator, was injured by a defectively how to use it, and has run it on a num-constructed piston rod of an adjoining ber of occasions. Dallemand v. Saal- elevator); Stager v. Troy Laundry Co. feldt (1898) 175 Ill. 310, 48 L. R. A. (1901) 38 Or. 480, 53 L. R. A. 459, 63 753, 51 N. E. 645, Affirming (1897) 73 Pac. 645 (improper adjustment of guard Ill. App. 151.

shaft of a mine engaged in removing dirt vator safety device); Higgins v. Wildoes not assume the risk of working liams (1896) 114 Cal. 176, 45 Pac. 1041 therein after the removal of a bulkhead from under a column of dirt 75 feet trench). long, and the loosening of the dirt by running water through it, where he does ter XIII.). Hall v. Bedford Quarries Co. not know of the removal of the bulkhead. Mollie Gibson Consol. Min. & Mill. Co. v. Sharp (1894) 5 Colo. App. 321, 38 Pac. 850.

Graver Tank Works v. O'Donnell (1900) jured by the fall of a privy attached in Coote (1900; Tex. Civ. App.) 57 S. W. an insecure and dangerous manner to 912. the wall of the factory, may recover damages from his employer. Such an the ordinary dangers of operating mainjury is not the result of any accident chinery are enhanced, through the negincident to the employment. Ryan v. ligence of a superintendent who is Fowler (1862) 24 N. Y. 410, 82 Am. known to be intemperate, in allowing Dec. 315.

ting a ladder hole in a platform, and Co. v. Champion (1894) 9 Ind. App. leaving it without light or railing); 510, 36 N. E. 221, Rehearing Denied in Jamieson v. Russell (1892) 19 Sc. Sess. 9 Ind. App. 526, 37 N. E. 21.

Cas. 4th Series, 898 (open tank not cov
(r) Vicious animals.— Cooper v. ered or protected by a light as it usu-ally had been).

\*\*Remains Description\*\*

\*\*Portner\*\* Brewing Co. (1901) 112 Ga. 894, 38 S. E. 91.

(o) Dangerous conditions in mines.— Harder & H. Coal Min. Co. v. Schmidt (1900) 43 C. C. A. 532, 104 Fed. 282 (roof fell).

(p) Defective machinery.—Packer v.

rail of mangle); McGregor v. Reid, M. (1) Want of proper protection against & Co. (1899) 178 Ill. 464, 53 N. E. 323, falling bodies.—An employee in the Reversing (1898) 76 Ill. App. 610 (ele-(machine for hoisting earth from a

(q) Unfit servants.—(Compare chap-(1901) 156 Ind. 460, 60 N. E. 149 (complaint good against a demurrer which alleges an injury caused by incompetency of a fellow servant); Galveston, H.

(m) Defective structures. — William & S. A. R. Co. v. Arispe (1891) 81 Tex.

(average Tank Works v. O'Donnell (1900) 517, 17 S. W. 47; United States Rolling 91 Ill. App. 524 (scaffold). A factory Stock Co. v. Wilder (1886) 116 Ill. 100, hand bired to do knitting, who is in- 5 N. E. 92; Postal Teleg. Cable Co. v.

an intoxicated workman to do an act (n) Dangerous openings in floors, which must obviously cause unnecessary ctc.-Hogarth v. Pocasset Mfg. Co. danger to another workman. McPhee (1897) 167 Mass. 225, 45 N. E. 629; v. Scully (1895) 163 Mass. 216, 39 N. Maguire v. Little (1898; R. I.) 5 New E. 1007. In one case the court rejected Eng. Rep. 666, 13 Atl. 108; Cummings the contention that an employee assumes v. Collins (1876) 61 Mo. 520; Hoffman the risk arising out of the negligence v. Clough (1889) 124 Pa. 505, 17 Atl. of an incompetent coemployee though he 19; Johnson v. Bruner (1869) 61 Pa. is ignorant of the latter's incompetency, 58, 100 Am. Dec. 613; Pullman Palace if it is apparent that, under the circum-Car Co. v. Connell (1897) 74 Ill. App. stances, it is necessary to employ an in-447; Mayhew v. Sullivan Min. Co. experienced and incompetent employee (1884) 76 Me. 100 (pitfall made by cut- for the work. Chicago, St. L. & P. R.

(s) Breach of statutory requirements. —Landgraf v. Kuh (1901) 188 III. 484, 59 N. E. 501, Reversing (1899) 90 III. App. 134.

(a) Movements of railway cars.-Thomson-Houston Electric Co. (1900) Luebke v. Chicago, M. & St. P. R. Co. whether the employee for whose negligence it is sought to make him responsible was his representative, either under common-law doctrines or a statute in force in the jurisdiction where the accident occurred. See chapters xxvII-xxXII, post.

It is scarcely necessary to point out that, although the descriptive

(1883) 59 Wis. 127, 48 Am. Rep. 483, dangerous rate of speed. 17 N. W. 870 (car repairer held not to have assumed the risk of the want of proper precautions for protecting him from moving cars); Felice v. New York C. & H. R. R. Co. (1897) 14 App. Div. 345, 43 N. Y. Supp. 922 (action held to be maintainable for injuries received by a workman in a tunnel who was run over by an engine which came along the track unexpectedly and without warning).

Assumption of the risk is not an available defense where an employee of a city, employed on a railroad track which was in a rough condition, is complaining of an injury caused by running a train at an unreasonable speed over a switch, and then bringing it to a sudden stop (Coughlan v. Cambridge [1896] 166 Mass. 268, 44 N. E. 218); nor where a railroad employee assisting in loading cal into a tender was injured by the negligence of the engineer jured by the negligence of the engineer in failing to take the necessary precautions to prevent an involuntary movement of the engine, the result being that he was caught between the top of the cab and the coal chute (Missouri, K. & T. R. Co. v. Felts [1899; Tex. Civ. App.] 50 S. W. 1031); nor where a switchman coupling cars was injured by their being jammed together while he was between them by shoving other cars against them (Missouri, K. & T. R. Co. v. Crane [1896] 13 Tex. Civ. App. 426, 35 S. W. 797); nor where a foreman commanded a servant engaged in the commanded a servant engaged in the work of getting derailed cars on the track, to hold a stick against one of them in order that it might be pushed by a train backing against it, and not only omitted to have the stick placed in the proper manner, but had the train backed with unnecessary force (Missouri, K. & T. R. Co. v. Hamilton [1895; Tex. Civ. App.] 30 S. W. 679).

Even if a railway brakeman can be held to have assumed the risk of injury from a dangerously defective condition of the track, on account of his knowledge of the defect, he cannot be said, as matter of law, to have assumed the additional risk caused by running over such defective track at an unusual and

Lawhorn  $\nabla$ . Millen & S. R. Co. (1895) 97 Ga. 742, 25 S. E. 492.

The knowledge of a brakeman that a fireman was handling an engine will not necessarily prevent him from recovering for injuries caused by the negligent management of the engine, where the brakeman understood that the fireman was acting under the supervision of the regular engineer. In such a case the essential question is whether the engi-In such a case the neer was exercising due care. Leonard v. Minneapolis, St. P. & S. S. M. R. Co. (1896) 63 Minn. 489, 65 N. W. 1084.

A requested instruction that a brakeman on a railroad train assumes the risk of dangers incident to the speed at which a train may run is properly modified by the introduction of the proviso, only if the defendant was not negligent in running at that rate of speed. Conners v. Burlington, C. R. & N. R. Co. (1888) 74 Iowa, 383, 37 N. W. 966.

(b) Manner of placing loads on railway cars.—Mexican C. R. Co. v. Shean (1891; Tex.) 18 S. W. 151 (projecting load on railway car); Hamilton v. Des Moines Valley R. Co. (1872) 36 Iowa, 31 (usage of defendant and other companies no excuse for loading cars so that load projects); Croll v. Atchison, T. & S. F. R. Co. (1896) 57 Kan. 548, 46 Pac. 972 (trackman struck by piece of coal which fell from an overloaded tender of a passing train); Gulf, C. & R. F. R. Co. v. Wood (1901; Tex. Civ. App.) 63 S. W. 164 (similar facts); Devore v. St. Louis & S. F. R. Co. (1900) 86 Mo. App. 429 (push car improperly loaded by section foreman). Whether the regivers of a religion december of the religion of the religi Whether the receivers of a railroad company were guilty of negligence in permitting coal cars to be so loaded with telephone poles that insufficient space was left between the ends of the poles and a box car to which the cars were attached, and in placing such cars in a train in such manner as would probably render it necessary to detach them from the train and couple them with other cars while in transit,—is for the jury. George v. Clark (1898) 29 C. C. A. 374, 56 U. S. App. 505, 85 Fed. 608.

(c) Dangerous mode of operating ma-

epithet "extraordinary" is applicable, as a mere matter of verbal definition, to any risk which is uncommon or unusual, whether its existence does or does not charge the master with negligence, the fact of rarity may, in the present connection, be left out of account as a differentiating test, except in so far as it tends to show that the master was culpable. Apart from its significance in this regard, evidence of rarity is plainly of no avail to a servant whose right of action is dependent upon his proving that his injury was caused by a breach of duty. See chapter xvIII., post.

273. Rationale of the servant's nonassumption of extraordinary risks.— In view of the fact that the doctrine as to the servant's nonassumption of extraordinary risks was originally introduced into the common law as an exception to a principle which had been propoundcd as a universal one, it may be said that, as a matter of ultimate an-

chinery.— Helfenstein v. Medart (1896)
136 Mo. 595, 36 S. W. 863, 37 S. W.
829, 38 S. W. 294 (grindstone run at & S. C. R. Co. (1891; — Iowa, —) 47
dangerous speed) Nall v. Louisville, N.
1037 (end gate of car lay on an A. & C. R. Co. (1891) 129 Ind. 268, 28
N. E. 611 (servant called to help in removing an accumulation of driftwood frached)
104 Which was endangering a bridge was struck by a rope which was jerked suddenly by the engine to which it was attached).

(d) Changed position of instrumentalities .- Fairbank v. Haentzsche (1874)

73 Ill. 236.

801 (empty barrel was left at the bottom of a pile of full barrels, thus weakening the pile and causing it to fall); John Spry Lumber Co. v. Duggan (1898) 80 Ill. App. 394 (lumber fell on servant while passing it).

Where it is not customary for rocks to be rolled from a tunnel down a gulch in which another tunnel is building by the same company, the danger from a rock negligently rolled down such gulch caused by the failure of a foreman to is not assumed by an employee working

The falling of a post standing percar in an unusual and extra-hazardous pendicularly on a plate or beam at the manner. Clayburgh v. Kansas City, Ft. level of the third story of a building, S. & M. R. Co. (1894) 56 Mo. App. 630. by which the plaintiff's intestate was (j) Improper method of excavating by which the plaintiff's intestate was (j) Improper method of excavating killed while grading a railroad belong-banks of earth, etc.—An employee asing to the owner of the building, is not sumes the additional risk incident to one of the risks incident to come of the risks incident to one of the risks incident to service and the removal of an embankment by unassumed by him. *Mickee* v. *Walter A*. dermining the base and prying or blast-Wood Mowing & R. Mach. Co. (1893) ing off the top, over that involved in taking the bank down from the top (see

finding unexploded dynamite in the rocks he is required to break. Alton Lime & Cement Co. v. Calvey (1892) 47

Ill. App. 343.

(e) Dangers caused by the fall of (h) Bringing heated metals into conheavy objects.—Libby, McN. & L. v. tact with water.—Kirus v. Nichols Scherman (1893) 146 Ill. 553, 34 N. E. Chemical Co. (1901) 59 App. Div. 79, 69 N. Y. Supp. 44 (explosion of hot slag thrown into a crack which had opened, without servant's knowledge, in marshy ground).

(i) Improper method of handling heavy objects.—Knight v. Overman Wheel Co. (1899) 174 Mass. 455, 54 N. E. 890 (dangerous method of putting

a heavy shaft in position).

A servant does not assume the risk adopt reasonable precautions to protect therein. Uren v. Golden Tunnel Min. from injury a servant whom he requires Co. (1901) 24 Wash. 261, 64 Pac. 174. to assist in loading ties on a railway

alysis, that doctrine simply embodies the opinion of the courts that it is more conformable to justice and expediency to treat the extent of the master's liability as a question to be determined with reference to the general principle, Culpa tenet auctores suos, and not with reference to the theory of an implied agreement to undertake every risk incident to the employment. If we bear in mind that the rationale of this implied agreement is the servant's supposed advertence to the possibility of being injured by certain perils which may at any time eventuate in an accident, the reasons assigned for this opinion can scarcely be regarded as satisfactory. Indeed, they set in a striking light the logical difficulties in which the courts found themselves entangled when they set out to establish a qualification of the intolerably severe doctrine which had been produced by taking the servant's assumption of risks, instead of the master's obligation to provide for his servant's safety, as the basic conception of this department of the law of negligence.

The first of these reasons is derived from the simple consideration that, as the master has control of the conditions which affect the servant's safety, he is the party who ought in fairness to be held responsible if those conditions are not such as a prudent man would maintain under the circumstances.<sup>1</sup> It is clear that, when closely scrutinized,

\$ 269, supra), but not that incident to the failure of the master to exercise reasonable care to remove the overhanging earth as the excavation proceeds. Bradley v. Chicago, M. & St. P. R. Co.

11 If an inexperienced workman who is (1897) 138 Mo. 293, 39 S. W. 763. A person ordered to work in excavating continues to work there after his emearth from an embankment which is from the nature of the earth peculiarly liable to cave off, which fact he does not know although it is known to his superior, does not assume the risk of obeying the order, so as to prevent a recovery for his death by the falling of the earth. Thompson v. Chicago, M. & an action against his employer for the st. P. R. Co. (1883) 4 McCrary, 629, 14 Fed. 564. 14 Fed. 564.

(k) Failure to warn.—A railway company is liable for the death of an employee who, being in imminent danger, jumped from driftwood which he with jumped from driftwood which he with others had been attempting to dislodge from against the false works and pier of a railway bridge, and was drowned while endeavoring to swim ashore, although he would have been rescued if their preservation or maintenance in though he would have been rescued if he had remained where he was, where the danger of his position on the drift Texas & P. R. Co. (1879) 100 U. S. 213. was not seen or known by him, but was 25 L. ed. 612.

"The servant who is to use the instrumentalities provided by the master or with their preservation or maintenance in suitable condition after they have been supplied by the master." Hough v. Texas & P. R. Co. (1879) 100 U. S. 213. was not seen or known by him, but was 25 L. ed. 612.

ant upon the superintendent's absence, but the question is for the jury. Lynch v. Allyn (1893) 160 Mass. 248, 35 N. E.

"The servant who is to use the in-

this reason is nothing but a judicial declaration, of a quasi-legislative nature, that the servant's appreciation of the possibility of being injured by a certain occurrence, although it is conclusive against his right to recover if it relates to some kinds of risks, shall not entail

He is the actor. The master is the di-that the hazard which, it is insisted, the rector. The one commands, the other servant agreed to incur, is not, so far obeys. The servant is in subordination. as the master is concerned, one necesthat suitable machinery and the needed pears but just and fair and every way requirements are supplied. He has not reasonable that the servant should agree ing whether those furnished may be the employment and over which the safe, and he may be wanting in the in- party whom he serves has no control. telligence required for the proper determination of the question. His serv-the want of skill or from the inadvertice is compulsory, from the pressure of ence and neglect of those associated with

"The capital of the master furnishes the means of his employment. His will determines the place. His sagacity directs, controls, and supervises not merely the labor, but the machinery and other instruments and appliances by which the labor is performed. The superior intelligence and determining will of the master demand vigilance on his part, that his servants shall neither wantonly nor negligently be exposed to needless employer's neglect? The misfeasances and unnecessary peril." Buzzell v. La-conia Mfg. Co. (1861) 48 Me. 113, 77 Am. Dec. 212.

workmen for no absence of care, however flagrant, seems to me in the highest de-405.

See also Little Rock & S. F. R. Co. v. Voss (1892; Ark.) 18 S. W. 172.

In Harrison v. Central R. Co. (1865) an examination of this proposition is tion, it would not be, on that account,

He relies on the judgment of the master sarily inherent in the business. It apthe means nor the opportunity of know- to take upon himself the usual perils of He knows that there will be risk from want. His attention is exclusively due him in the conduct of the common busi-to the peculiar duties incident to his ness; but these dangers are the neces-branch of employment." sary, inseparable concomitants of the sary, inseparable concomitants of the employment; and there is, certainly, every appearance of justice in the legal implication that as to injuries arising from such causes, over which his employer possesses no power, and for the effects of which he is not morally responsible, they shall be borne by the servant. But upon what plausible pretense can it be said that the servant consents to abide the consequences of his of his fellow servants are, as between himself and his employer, the alienable incidents of the thing undertaken, while "It is in most cases impossible that it would be hardly admissible for a masa workman can judge of the condition ter to predicate that an injury to the of a complex and dangerous machine servant, arising from his own want of wielding irresistible mechanical power, care, was one of the necessary conseand, if he could, he is quite incapable quences of the servant's employment. of estimating the degree of risk involved. The only view consistent with reason is in different conditions of the machine; that the servant undertakes to bear the but the master may be able, and gen-risks naturally attendant on the busi-erally is able, to estimate both. The ness he assumes; and both sound morals master, again, is a volunteer; the work- and common justice forbid the master man ordinarily has no choice. To hold to allege that one of those risks is the that the master is responsible to his probability of his own default. Carelessness which works an injury to another is, in the eye of the law, civil misgree both unjust and inconvenient." conduct; and a stipulation that a party Byles, J., in *Clarke* v. *Holme* (1862) shall have the privilege of committing 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. such misconduct with impunity will not 356, 8 Jur. N. S. 992, 10 Week. Rep. be incorporated into a contract by intendment. Every rational implication is opposed to the existence of such an understanding. The claim to such exemption is inconsistent with morality 31 N. J. L. 293, the court thus disposed and public policy, so much so, indeed, of the argument that the servant activated that it might be somewhat questionable cepted the risk in question: "The first whether, if such contract existed in consideration which naturally arises on point of fact and by express stipulathat consequence where the risk is due to the master's negligence. other words, the element of anticipation, when such a risk is in question, is not to be regarded as one of the determinant factors of the problem to be solved.2

void. The facts of the present case ex-implies from the connection of master hibit, in a striking point of view, the and servant." exorbitance of the proposition claiming 2 It has actually been argued, though immunity for the consequences to the of course unsuccessfully, in several cases, servant of the master's negligence. The that the servant's knowledge of the posdemurrer in this case admits that the servant lost his life by reason of want ter or some employee for whose acts he of care in the master; that is, that the is responsible may at some future ina grave misdemeanor. It would be singular indeed if the law, in annexing inact so far as the private rights of the M. R. & T. R. Co. v. Leverett (1886) servant are concerned, with impunity. 48 Ark. 333, 346, 3 S. W. 50; Blanton If the rights of the parties, then, are v. Dold (1891) 109 Mo. 64, 18 S. W. to be regulated on the basis of a contract, in my opinion, upon the plainest rules of law, the defendants were responsible to their employee for all damage which was the product of their own misconduct. Nor will this result, as it seems to me, be varied if we consider to life attaches is important, not only to the servant, but, in an equal degree, interest, therefore, that no motive to the exercise of care on the part of the principal mover of such business should be taken away or impaired; and this would could move it, and in a place where there be the effect of declaring him irresponsible for his negligence to his employee. It is also of moment that those who moved or at all disturbed, where is the are employed in carrying out the details danger? of an undertaking which is at all hazardous should have an interest in observing and detecting the lapses of those two-horse wagon in a farmer's yard, to at the head of such business; for it is, in most cases, impracticable for such to protect themselves subordinates against the consequences of such mis- If the rule is to be established that any conduct without, at the same time, contributing something to the safety of the citizens at large. The interest of the servant to bring to light the neglects and jury, then there is no railway service omissions of duty of the employer should which is not dangerous, and the embe coincident with that of the commu- ployee takes his chances, not that the nity. All considerations of welfare to particular service or duty is dangerous the public, therefore, seem to lead to the in itself, but that it will be made so by same result as that reached by an ex- the habitual negligence of everybody who

sibility or the likelihood that the masof care in the master; that is, that the is responsible may at some future in-latter was guilty of the commission of determinate time be guilty of negugence is a sufficient basis for the inference that he impliedly accepts the risk of an incidents to the relationship of master and jury from such negligence whenever it servant, should clothe the former with shall actually be committed. But this the privilege to commit this criminal theory has been rejected. Little Rock, 1149, where the court somewhat unnecessarily supported its conclusion by adverting to the very general refusal of the American courts to enforce even express contracts exempting a master from liability for negligence in the performance of his personal duties. In Luebke this matter on the broader ground of v. Chicago, M. & St. P. R. Co. (1883) general convenience and public security. 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. general convenience and public security. 59 Wis. 127, 48 Am. Rep. 483, 17 N. W. That the master should be careful in 870, where a car inspector was injured the conduct of a business to which peril by cars carelessly driven on to the repair track, counsel for defendant took the ground that the plaintiff accepted to the community also. It is of public the chances and hazards of a most dangerous service. But the court said: "Is this so? When a car is standing still and disconnected from any power which was not the remotest reasonable suspicion or apprehension that it would be There would be nearly the same danger in degree, and the same in principle, if a person should go under a repair it, without any apprehension that the farmer would hitch to it while he was so under it and draw it over him. railway service is dangerous because all employees are careless and negligent whose duty it is to guard him from inamination of the contract which the law might be able, by his negligence, to in-

This way of stating the logical situation to which this reason conducts us indicates that it is, for dialectical purposes, practically equivalent to another reason, which consists merely in a categorical denial of the fact that the servant contemplates, among the risks of his employment, the possibility that he may be injured through his master's

proper means and appliances for his protection; and (2) that the employees voluntarily enters the service with themselves will do their duty in such knowledge of that fact, therefore he as-responsible service. In this view, the sumes all the risks liable to result from business of repairing this car by the such causes. To state such a proposiplaintiff, by going under it, which was tion is to refute it. While it is the law necessary, was not dangerous service. The car would not move over him, unby the gross negligence of someone else. to presume, but he had no right to presume or expect."

In Minnesota (a state in which, it should be remembered, the doctrine of coservice has been abolished, so far as violation of rules by two sets of emoof the injury is a fellow servant's negliployees, therefore plaintiff assumed all gence. See volume II., chapter XXVI.

jure him. Under the effect of such a the risks resulting from such causes. It rule, even travelers and passengers take is a plain proposition that it does not the chances of a most hazardous and require any rules to advise a person that dangerous method of travel, and cannot other employees of the master, or the complain if they are injured by such master himself, may be guilty of acts negligence as is the normal character- of negligence. Common experience tells istic of railway service. There are every man that this is so. Consequently, some presumptions upon which anyone defendant's proposition, reduced to plain connected with the railway service, terms is that, inasmuch as every pereither as employee or passenger, has a son who enters the service of another right to rely. They are (1) that the knows that his master or his fellow serv-company has provided all necessary and ants, however careful ordinarily, are liable to commit negligent acts, and as he that a person assumes all the open and visible risks incident to the employment less moved by some other force applied in which he engages, and of which he had knowledge when he entered upon his The car standing still and disconnected service, yet it would be pressing this was not dangerous any more than any principle beyond all reason or authority other inert body, and it was perfectly to attempt to carry it to the extent safe to lie down under its wheels if neccontended for by the defendant. To do essary, as it could do no harm. The so would be, in effect, to hold that the danger of this service consisted in the servant assumes all risks, known or unoutrageous carelessness of somebody else known, which could possibly result from in the management of the trains on that any conceivable future act of negligence track, which he was not only not bound on the part of the master." Hall v. Chicago, B. & N. R. Co. (1891) 46 Minn. 439, 49 N. W. 239.

Yet, if the element of contemplation alone be taken into account, it seems impossible to deny that the theory railway servants are concerned; see which has been rejected in these chapter XXXIX., post) we find the court cases is one from which there is thus discussing the contention that no escape. The presumption that a plaintiff voluntarily assumed all the master will do his duty, and the prerisks resulting from the negligence of sumption that a fellow servant will do other employees of the company in vio-his duty, are, so far as appears, based lating its rules: "The line of argument upon probabilities of precisely the same advanced in support of this position is, character, and are equally strong. The in substance, that, inasmuch as plain- courts, indeed, have virtually conceded tiff was advised by certain rules that the necessity of adding some extrinsic other employees might violate other consideration which shall serve as a rules, and obstruct the main track at a basis for differentiating the effects of forbidden time, and that rules were these two presumptions, and have fallen adopted in view of such a contingency, back upon the supposed requirements of so that, as far as possible, a collision public policy as a justification for denycould not happen without a concurrent ing the right of action where the cause negligence.3 The conception that the servant is not supposed to look forward to or take into account the contingency that he may be injured by a breach of duty on the master's part has produced a form of expression which is very frequently found in the reports,—viz., that a servant has a right or is entitled to assume, or to act upon the as-

sonal negligence or malfeasance, en- any kind, he assumes all the perils which hanced the risk to which the servant is belong to the work itself; and he must exposed, beyond those natural risks of be held to take all the risks which grow the employment which must be presumed out of, or in any way connected with, to have been in contemplation when the or pertain to, the performance of the employment was accepted, - as, for in- duties he has assumed to discharge. stance, by knowingly employing incom- Against such risks and accidents he petent servants, or supplying defective may, and he must, take proper precaumachinery, or the like,—no defense tions for himself, at his peril, and is founded on this principle can apply; for his own insurer. But this rule does not, the servant does not, as an implied part and should not, apply to accidents or of his contract, take upon himself any injuries resulting from extrinsic causes other risks than those naturally inci- and circumstances which cannot be fore-cent to the employment." Blackburn, seen by him, and which by the exercise J. in Morgan v. Vale of Neath R. Co. of ordinary care and caution he could (1864) 5 Best & S. 570, 33 L. J. Q. B. not anticipate or prevent." Ryan v. N. S. 260, Affirmed in L. R. 1 Q. B. 149, Fowler (1862) 24 N. Y. 410, 82 Am. 13 L. T. N. S. 564, 14 Week. Rep. 144, Dec. 315.

5 Best & S. 736, 35 L. J. Q. B. N. S. 23. "Generally and ordinarily the master Risks which are not assumed are those and servant, in the contract of employwhich are "not contemplated by the ment between them, do not contemplate ervant." Northern P. R. Co. v. Hambly extra hazards, . . . and hence the (1894) 154 U. S. 349, 38 L. ed. 1009, law does not imply, in the absence of 14 Sup. Ct. Rep. 983; Burke v. Ander-express stipulation to that effect, that son (1895) 16 C. C. A. 442, 34 U. S. the contract embraced such hazards." App. 132, 69 Fed. 814. In a leading Porter v. Western North Carolina R. Co. Massachusetts case, the court, after laying down the rule as to the servant's assumption of ordinary risks, proceeded a reasonably prudent and careful man juries to servants or workmen happen usual course of his employment. Kerns by reason of improper and defective mave. Chicago, M. & St. P. R. Co. (1895) chinery and appliances used in the pros-94 Iowa, 121, 62 N. W. 692 (instrucecution of a work. The use of these tion using these words approved). they could not foresee. The legal implication is that the employer will adopt to be deduced from the contract of the suitable instruments and means with parties, can be suggested which should which to carry on his business. These relieve the culpable master from rehe can provide and maintain by the use of suitable care and oversight; and if stood as contracting to take upon himhe fails to do so he is guilty of a breach of duty under his contract, for suspects nor has reason to look for; and the consequences of which he ought, in it would be more reasonable to imply a justice and sound reason, to be responrule of law and the principles on which it is founded, as now fully established ant to run the risk of them. But the by authority." Snow v. Housatonic R. Co. (1864) 8 Allen, 441, 85 Am. Dec. 720. This statement of principles was ity of the master may be planted upon adopted as correct in Gibson v. Pacific the same ground which would render R. Co. (1870) 46 Mo. 163, 2 Am. Rep. him responsible if the relation had not 497.

"If the master has, by his own per-dangerous job of work or a service of

(1887) 97 N. C. 66, 2 S. E. 581.

Only those risks are assumed which "But it is otherwise where in- would not expect to encounter in the

"No reason of public policy, and none sponsibility. A man cannot be underself risks which he neither knows nor contract upon the part of the master not Such we understand to be the to invite the servant into unknown dangers, than one on the part of the servquestion of contract may be put entirely aside from the case, and the responsibilexisted. Whether invited upon the "When a person is employed to do a premises by the contract of service, or

sumption, that the master has exercised and will exercise proper care. Sometimes this right is predicated subject to an exception in cases in which the servant had actual or constructive knowledge of the abnormal danger in question. Sometimes its existence is asserted without any such qualification. But the doctrine enunciated is evidently intended to be the same, whether the excepted situation is explicitly mentioned or not.4

by the calls of business, or by direct reson of any other individual, and is quest, is immaterial; the party extendequally accountable for an injury to it." ing the invitation owes the duty to the party accepting it to see that at least ordinary care and prudence are exer-cised to protect him against dangers not within his knowledge and not open to observation." Diamond State Iron Co. v. Giles (1887) 7 Houst. (Del.) 556, 11 Atl. 189.

(1851) 20 Ohio, 432, it was argued that, when a party contracts to perform services, he takes into account the dangers and perils incident to the employment, and receives wages accordingly. Upon this proposition the court commented as peril grows out of extrinsic causes or follows: "Take this for granted, and circumstances which cannot be discovve think it falls far short of sustaining ered by the use of ordinary precaution the main proposition. If the party does and prudence, the employer is liable pre-contract in reference to the perils incicisely as a third person, if the loss or dent to the business, he will only be pre-injury is caused by his neglect or want of sumed to contract in reference to such as necessarily attend it when conducted with ordinary care and prudence. far as an implied contract in reference be on the hypothesis that the business is reason to believe that he would be reto be properly managed. He cannot be quired to encounter them. Northern presumed to have contracted in referPacific Coal Co. v. Richmond (1893) 7
ence to injuries inflicted on him by negligence,—by wrongful acts. An express stipulation would at least be necessary

4 The following are a few out of the to make it a part of the contract. The numerous cases in which the doctrine is employer has paid him no money for the formulated: Texas & P. R. Co. v. Archiright to break his legs, or, as in this bald (1898) 170 U. S. 665, 42 L. ed. case, to empty on him the contents of a 1188, 18 Sup. Ct. Rep. 777; Weiss v. boiler of scalding water. It was not Bethlehem Iron Co. (1898) 31 C. C. A. the expectation, when the company hired 363, 59 U. S. App. 627, 88 Fed. 23; Stevens, that the two trains should run Jamieson v. Russell (1892) 19 Sc. Sess.

In a Missouri case, "extraordinary perils not incident to the employment? are defined as "perils which the servant could not reasonably anticipate." Steffen v. Mayer (1888) 96 Mo. 420, 9 S. W.

In ordinary cases, where a workman tl. 189.

is employed to do a dangerous job, or In Little Miami R. Co. v. Stevens to work in a service of peril, if the 1851) 20 Ohio, 432, it was argued that, danger belongs to the work itself, or to the service in which he engages, he will be held to all the risks which belong to either; but when there is no danger in the work or service in itself, and the care. Perry v. Marsh (1854) 25 Ala. 659.

The rule that, prima facie, the So servant does not assume any risks outside the scope of his employment, is reto the business will be presumed, it will ferred to the conception that he had no

by different cards and thus come in col- Cas. 4th Series, 898; Whitney & S. Co. lision. When a man employs another to v. O'Rourke (1898) 172 Ill. 177, 50 N. do work for him, each incur their obli- E. 242; Alton Paving, Bldg. & Fire gations. The person hired is bound to Brick Co. v. Hudson (1898) 176 Ill. perform the labor according to the agree- 270, 52 N. E. 256; Ford v. Fitchburg ment, and the employer is bound to pay; R. Co. (1872) 110 Mass. 240, 14 Am. Rep. besides that, neither party has parted 598; Knight v. Overman Wheel Co. with any of his rights. The employer (1899) 174 Mass. 455, 54 N. E. 890; has no more control over the person he *Union Stock-Yards Co.* v. *Goodwin* has employed outside of the service to (1898) 57 Neb. 138, 77 N. W. 357; be rendered, than he has over the per- O'Neill v. Chicago, R. I. & P. R. Co.

The use of this particular terminology in such a connection is, to say the least, somewhat unfortunate, as it brings into juxtaposition two distinct meanings of the words "assume" and "assumption." In enunciating the doctrine under this form, therefore, it appears to be decidedly preferable to employ the words "presume" and "presumption."

A third reason for the doctrine, which perhaps scarcely deserves notice in the present connection, is that which is given in a recent case, in which it was declared that a risk which results from the master's negligence is not assumed because it is not a natural and ordinary incident of the servant's work.<sup>5</sup> What is thus assigned as a reason is really, in a logical point of view, nothing more than a statement of the doctrine itself in another form. This assertion of the court can

ances with which to do the work assigned to them. It is also his duty to know what appliances are suitable and means of knowing whether any act will in common and ordinary use for the purpose. The employee has a right to assume that his employer will intelligently and faithfully discharge these duties. If the work in which he engages is new to him he should be instructed in it, and if he is not acquainted with the latent 13 Ky. L. Rep. 902, 18 S. W. 944. dangers incident to it they should be explained to him, that he may, so far as consistent with a proper performance of it, avoid them. In such case he is not presumed to know whether his employer has furnished appliances which are reasonably safe and in ordinary use, and he is not chargeable with an assumption of the risks involved in the failure to provide them." Bannon v. Lutz (1893) 158 Pa. 166, 27 Atl. 890.

"The servant has no control over the matter. He acts in subordination. He relies wholly on the judgment of the masters that suitable machinery and the needed requirements are supplied. He has not the means nor the opportunity of knowing whether those furnished may condition. Delude v. St. Paul City R. be safe. His attention is exclusively Co. (1893) 55 Minn. 63, 56 N. W. 461. due to the peculiar duties incident to Landgraf v. Kuh (1901) 188 Ill. his branch of the employment. He assumes the risk, more or less hazardous,

(1901) 62 Neb. 358, 86 N. W. 1098; of the service in which he is engaged; Rummel v. Dilworth (1889) 131 Pa. but he has a right to presume that all 509, 19 Atl. 345; Maguire v. Little proper attention shall be given to his (1887; R. I.) 13 Atl. 108; Noyes v. safety, and that he shall not be care-Smith (1856) 28 Vt. 59; Curtis v. Chicago & N. W. R. Co. (1897) 95 Wis. not necessarily resulting from his oction, 70 N. W. 665; O'Brien v. Sullivan cupation, and which might be prevented (1900) 195 Pa. 474, 46 Atl. 130. (1900) 195 Pa. 474, 46 Atl. 130. by ordinary care and precaution on the "The duty is on the employer to furnish his employees reasonably safe appli-R. Co. (1870) 46 Mo. 163, 2 Am. Rep.

> be attended with danger, or whether it is about to come upon the servant, then the latter has a right to rely upon the former's guarding against it, or warning him of it in time to escape it." Louisville & N. R. Co. v. Shivell (1892)

> In a Massachusetts case, Holmes, J., speaks of unusual dangers to which an employee who has not taken the risk of them with actual knowledge of their existence has a right to assume that he will not be exposed by entering an employment. Ryan v. New York, N. H. & H. R. Co. (1897) 169 Mass. 267, 47

> A jury is properly charged that, in the absence of notice of the defect in question, an employee has a right to assume, in the absence of evidence that dangerous machinery or appliances which he has in charge are defective, that the master has used due diligence to keep it in good order and in a safe

only be regarded as correct upon the hypothesis that the words "natural and ordinary incident" are to be understood in the technical and arbitrary sense which has been attached to them as a result of the operation of the doctrine. In no other sense can it be affirmed that these words are not as appropriate a description of risks caused by the master's negligence as they are of risks caused by a fellow servant's negligence, or any other of the risks commonly classed as ordinary.

274. Assumption of an extraordinary risk inferred from knowledge thereof.— The doctrine that a servant who has no knowledge, actual or constructive, of an extraordinary risk, is not chargeable with its assumption (see § 271, supra), is applied in every jurisdiction in which the principles of the common law are recognized. The logical converse of this doctrine, viz., that a servant is to be regarded as having assumed any extraordinary risk of which he had or ought to have obtained, knowledge, before his injury was received, was also applied universally until comparatively recent times (see § 280, infra), and is still the prevailing rule of law in the United States.1

The following list cites one or more as that doctrine, viz., the theory, that menced merely raises for the jury the terminology. question whether he was guilty of negligence in continuing to expose himself — Priestly v. Fowler (1837) 3 Mees. to the dangerous conditions, and that & W. 1, Murph. & H. 305, 1 Jur. 987; this question is primarily for the jury. Dynen v. Leach (1857) 26 L. J. Exch. But even in the states where this posi- N. S. 221; Ogden v. Rummens (1863) tion has been taken, the ordinary doc- 3 Fost. & F. 751; Saxton v. Hawkstrine on the subject can scarcely be said worth (1872) 26 L. T. N. S. 851; Skipp to have been at any time wholly extinct, v. Eastern Counties R. Co. (1853) 9 and some of the most recent decisions of the supreme court of Missouri, which has been the most prominent champion of the alternative doctrine, seem to indicate that the latter is in its turn being again superseded. (See this note, again superseded. infra.)

It should also be observed that a large number of decisions, many of them rendered by courts which have adopted the doctrine of a contractual assumption of extraordinary risks, embody a theory which, so far as the servant's right of action is concerned, produces virtually the same consequences (1893) 147 U. S. 238, 37 L. ed. 150. 13

specimen cases decided in every juris- a servant who goes on working with a diction where the doctrine has been ac-full comprehension of an abnormal peril tually recognized. It should be ob- may be declared, as matter of law, to served that, in some of the American be guilty of negligence. As the courts, courts, it has been entirely or partially when reviewing the evidence in the cases rejected in favor of an alternative doc- in which this theory has been applied, trine which will be treated at length have often spoken of the servant as havin chapter xvIII., post, viz., that eviing "assumed" the risk in question, dence which shows that the servant much confusion has resulted. See chapwent on working with knowledge of an ter XVIII., post, where the writer has abnormal risk which supervened after made some criticisms on what he rethe performance of the contract com- gards as a mischievous perversion of

> United Kingdom and British Colonies. Exch. 223, 3 C. L. Rep. 185, 23 L. J. Exch. N. S. 23; Assop v. Yates (1858) 2 Hurlst. & N. 768, 27 L. J. Exch. N. S. 158; Smith v. Dowell (1862) 3 Fost. & F. 238; Potts v. Plunkett (1859) 9 Ir. C. L. Rep. 290; McGee v. Eglinton Iron Co. (1883) 10 Sc. Sess. Cas. 4th series, 955; McTernan v. White (1890) 17 Sc. Sess. Cas. 4th series, 368; Crichton v. Keir (1863) 1 Sc. Sess. Cas. 3d

> Vict. L. Rep. (L.) 4. Federal courts. Kohn v. McNulta

> series, 407; Litton v. Thornton (1881) 7

The effect of the operation of this doctrine with reference to a servant's inability to maintain an action may be formally stated thus:

A servant who, either before or after he commences the performance of the contract of employment, has ascertained, or ought, in the exercise of proper care, to have ascertained, that the ordinary hazards

110, 50 U. S. App. 27, 79 Fed. 590.

& Electric Co. v. Allen (1892) 99 Ala. the risk, and the doctrine on the ground 359, 20 L. R. A. 457, 13 So. 8. There of contributory negligence. The former is much inaccuracy in the use of the doctrine is distinctly recognized in the chapter xvIII., post.

Arkansas.— Fordyce v. (1893) 57 Ark. 160, 20 S. W. 1090; St. tracted with reference to them, taking Lovis, I. M. & S. R. Co. v. Davis (1891) upon himself all responsibility." Chi54 Ark. 389, 15 S. W. 895; Emma Cot-cago & N. W. R. Co. v. Donahue (1874) ton Seed Oil Co. v. Hale (1892) 56 Ark. 75 Ill. 106. Other cases in which the

Min. Co. (1880) 55 Cal. 443; Sweency v. Central P. R. Co. (1880) 57 Cal. 15; Sanborn v. Madera Flume & Trading Co. (1886) 70 Cal. 261, 11 Pac. 710.

Colorado.—Burlington & C. R. Co. v. Liche (1892) 17 Colo. 280, 29 Pac. 175; Stiles v. Richie (1896) 8 Colo. App. 393, 46 Pac. 694.

Mfg. Co. (1861) 29 Conn. 548. Delaware.— Williams v. Walton & W. Delaware.— Williams v. Watton & m.

Co. (1892) 9 Houst. (Del.) 322, 32 Atl. Indiana.—Indianapolis & U. R. Co. v.

726; Diamond State Iron Co. v. Giles Love (1858) 10 Ind. 556; Indianapolis (1887) 7 Houst. (Del.) 556, 11 Atl. & St. L. R. Co. v. Watson (1887) 114

Co. Florian v. Pusey (1888) 8 Houst. Ind. 20, 15 N. E. 824; Louisville, N. A.

District of Columbia. — McDade v. Washington & G. R. Co. (1886) Mackey, 144.

Florida .- South Florida R. Co. v. Weese (1893) 32 Fla. 212, 13 So. 436.

Georgia.— Gunn v. Willingham (1900) 111 Ga. 427, 36 S. E. 804. Possibly Richmond & D. R. Co. v. Mitchell (1893) 92 Ga. 77, 18 S. E. 290, and *Chicago & I. Coal R. Co.* (1894) 139 Whatlay v. Block (1894) 95 Ga. 15, 21 Ind. 682, 39 N. E. 154. S. E. 985, may also be cited as embody-

Sup. Ct. Rep. 298; Valley R. Co. v. used is rather obscure, and these deci-Keegan (1898) 31 C. C. A. 255, 58 U. sions may merely furnish an instance of S. App. 377, 87 Fed. 849; Reed v. Stock- the confusion of that doctrine with that meyer (1896) 20 C. C. A. 381, 34 U. S. which infers negligence from the serv-App. 727, 74 Fed. 186; McPeck v. Cen- ant's continued exposure of himself to tral Vermont R. Co. (1897) 25 C. C. A. an abnormal risk. See chapter XXIII., post.

Alabama.—Bridges v. Tennessee Coal, Illinois.—In this state the courts I. & R. Co. (1895) 109 Ala. 287, 19 So. have oscillated between the doctrine that 495; Georgia P. R. Co. v. Davis (1890) the knowledge of the servant bars his 92 Ala. 300, 9 So. 252; Birmingham R. action on the ground of assumption of terms "assumption of risks" and "con- statement that the servant "had been tributory negligence" in this state. See there long enough to become familiar with all the dangers to which he was ex-Lowman posed, and it must be presumed he con-232, 19 S. W. 600; Little Rock, M. R. true doctrine of assumption of risks & T. R. Co. v. Leverett (1886) 48 Ark. seems to be recognized are Simmons v. 333, 3 S. W. 50.

Chicago & T. R. Co. (1884) 110 III. 340: Chicago & T. R. Co. (1884) 110 III. 340; California.— Sowden v. Idaho Quartz Peoria, D. & E. R. Co. v. Puckett in. Co. (1880) 55 Cal. 443; Sweeney (1893) 52 Ill. App. 223; Illinois C. R. Co. v. Swisher (1893) 53 Ill. App. 411. But this is one of the states in which the phrase "assumption of risks" is inaccurately used to express the conception that the conduct of the servant was negligent, and possibly the two last-cited cases may be merely illustrations of this Connecticut .- Hayden v. Smithville confusion. Other cases in which this inaccuracy is certainly found are col-

> d. C. R. Co. v. Sandford (1888) 117
> Ind. 267, 19 N. E. 770; Rogers v. Leyden (1890) 127 Ind. 50, 26 N. E. 210;
> Louisville, N. A. & C. R. Co. v. Corps (1890) 124 Ind. 429, 8 L. R. A. 636, 24 N. E. 1046; Jenney Electric Light & P. Co. v. Murphy (1888) 115 Ind. 566, 18 N. E. 30; Rictman v. Stolte (1889) 120 Ind. 314, 22 N. E. 304; Sheets v.

Iowa.— Lumley v. Caswell (1877) 47 ing the doctrine of assumption of risks Iowa, 159; Youll v. Sioux City & P. R. properly so called; but the language Co. (1885) 66 Iowa, 346, 23 N. W. 736;

of his environment have been augmented by abnormal conditions produced by the negligence of his master or of his master's representative, and has accepted or continued in the employment without making any objection and without receiving any promise that the abnormal conditions will be remedied, is deemed, as a matter of law, to

Wells v. Burlington, C. R. & N. R. Co. Donahue v. Washburn & M. Mfg. Co. (1881) 56 Iowa, 520, 9 N. W. 364; (1897) 169 Mass. 574, 48 N. E. 842; Greenleaf v. Illinois C. R. Co. (1870) Goldthwait v. Haverhill & G. Street R.

Kentucky.—Bogenschutz v. Smith (1886) 84 Ky. 330, 1 S. W. 578; Sullivan v. Louisville Bridge Co. (1872) 9 Bush, 81; Chesapeake, O. & S. W. R. Co. v. McDowell (1894) 16 Ky. L. Rep. 1, 24 S. W. 607; Needham v. Louisville d N. R. Co. (1887) 85 Ky. 423, 3 S. W. 797, 11 S. W. 306; Norton v. Louisville & N. R. Co. (1895) 16 Ky. L. Rep. 846, 30 S. W. 599; McGee v. Bell (1897) 19 Ky. L. Rep. 267, 39 S. W. 823, Reversing (1897) 38 S. W. 702.

Louisiana. Carey v. Sellers (1889) 41 La. Ann. 500, 6 So. 813; Satterly v. Morgan (1883) 35 La. Ann. 1166; Smith v. Scilers (1888) 40 La. Ann. 530, 4 So. 333; Tillotson v. Texas & P. R. Co. (1892) 44 La. Ann. 95, 10 So.

Maine.— Buzzell v. Laconia Mfg. Co. (1861) 48 Me. 113, 77 Am. Dec. 212; Mundle v. Hill Mfg. Co. (1894) 86 Me. 400, 30 Atl. 16; Conley v. American Exp. Co. (1895) 87 Me. 352, 32 Atl.

Maryland .- Pennsylvania R. Co. v. Wachter (1883) 60 Md. 395; Baltimore & P. R. Co. v. State (1892) 75 Md. 152, 23 Atl. 310; Baltimore & O. R. Co. v. State (1874) 41 Md. 268; Yates v. Mc-Md. 257, 34 Atl. 872.

144 Mass. 187, 10 N. E. 807; Leary v. that doctrine is unquestionably recog-Boston & A. R. Co. (1885) 139 Mass. nized in many other decisions. See Mc580, 52 Am. Rep. 733, 2 N. E. 115; Dermott v. Hannibal & St. J. R. Co.

Greenleaf v. Illinois C. R. Co. (1870)
Goldthwait v. Haverhill & G. Street R.
29 Iowa, 14, 4 Am. Rep. 181; Kroy v. Co. (1894) 160 Mass. 554, 36 N. E.
Chicago, R. I. & P. R. Co. (1871) 32 486; Feely v. Pearson Cordage Co.
Iowa, 357; Money v. Lower Vein Coal (1894) 161 Mass. 426, 37 N. E. 368;
Co. (1881) 55 Iowa, 671, 8 N. W. 652; Thain v. Old Colony R. Co. (1894) 161
Perigo v. Chicago, R. I. & P. R. Co.
Mass. 353, 37 N. E. 309; Allen v. G. W.
(1879) 52 Iowa, 276, 3 N. W. 43; & F. Smith Iron Co. (1894) 160 Mass.
Bryce v. Chicago, M. & St. P. R. Co.
557, 36 N. E. 581; Sullivan v. Fitchburg
(1897) 103 Iowa, 665, 72 N. W. 780.
Kansas.— St. Louis, Ft. S. & W. R.
751; Fisk v. Fitchburg R. Co. (1893)
Co. v. Irwin (1887) 37 Kan. 701, 16 158 Mass. 238, 33 N. E. 510; Bell v.
Pac. 146; Atchison, T. & S. F. R. Co.
New York, N. H. & H. R. Co. (1897)
v. Schroeder (1891) 47 Kan. 315, 27 168 Mass. 443, 47 N. E. 118; Daigle v.
Pac. 965; McQueen v. Central Branch
Lawrence Mfg. Co. (1893) 159 Mass.
Union P. R. Co. (1883) 30 Kan. 689, 1
Michigan.— Dunn v. Detroit & M. R.

Michigan.— Dunn v. Detroit & M. R. Co. (1870) 20 Mich. 105, 4 Am. Rep. 364; La Pierre v. Chicago & G. T. R. Co. (1894) 99 Mich. 212, 58 N. W. 60; Breig v. Chicago & W. M. R. Co. (1893) 98 Mich. 222, 57 N. W. 118; Eddy v. Aurora Iron Min. Co. (1890) 81 Mich. 548, 46 N. W. 17; Ragon v. Toledo, A. A. & N. M. R. Co. (1893) 97 Mich. 265, 56 N. W. 612; Richards v. Rough (1884) 53 Mich. 212, 18 N. W. 785.

Minnesota.— McLaren v. Williston (1892) 48 Minn. 299, 51 N. W. 373; Smith v. Winona & St. P. R. Co. (1889) 42 Minn. 87, 43 N. W. 968; Fleming v. St. Paul & D. R. Co. (1880) 27 Minn. 114, 6 N. W. 448; Clark v. St. Paul & S. City R. Co. (1881) 28 Minn. 128, 9 N. W. 581; Bengston v. Chicago, St. P. M. & O. R. Co. (1891) 47 Minn. 486, 50 N. W. 531; Russell v. Minneapolis & St. L. R. Co. (1884) 32 Minn. 230, 20 N. W. 147; Hungerford v. Chicago, M. & St. P. R. Co. (1889) 41 Minn. 444, 43 N. W. 324; Soutar v. Minneapolis International Electric Co. (1897) 68 Minn. 18, 70 N. W. 796; Anderson v. C. N. Nelson Lumber Co. (1896) 67 Minn. 79, 69 N. W. 630; Quick v. Minnesota Iron Co. (1891) 47 Minn. 361, 50 N. W. 244.

Missouri. - As stated above, the court Cullough Iron Co. (1888) 69 Md. 370, has rendered several decisions in which 16 Atl. 280; Wood v. Heiges (1896) 83 the doctrine, as usually understood, of assumption of abnormal risks, is repu-Massachusetts. - Hatt v. Nay (1887) diated (see chapter xvIII., post). But

have assumed the risk thus superadded, and to have waived any right which he might otherwise have had to claim an indemnity for injuries resulting from the existence of that risk. For various judicial statements of the doctrine, see next section.

The inability of the servant to recover being a peremptory infer-

(1885) 87 Mo. 285; Price v. Hannibal Young v. Irving (1896) 5 App. Div. & St. J. R. Co. (1883) 77 Mo. 508; 499, 38 N. Y. Supp. 1089; Carr v. North Devitt v. Pacific R. Co. (1872) 50 Mo. River Constr. Co. (1888) 48 Hun, 266; 302; Rains v. St. Louis, I. M. & S. R. Monaghan v. New York C. & H. R. R. Co. (1879) 71 Mo. 164, 36 Am. Rep. Co. (1887) 45 Hun, 113; Horrigan v. 459; Spira v. Osage Coal & Min. Co. New York C. & H. R. R. Co. (1896) 7 (1885) 88 Mo. 68; Steinhauser v. App. Div. 377, 39 N. Y. Supp. 938. Spraul (1893) 114 Mo. 551, 21 S. W. Ohio.—Mad River & L. E. R. Co. v. 515, 859, Affirmed in (1895) 127 Mo. Barber (1856) 5 Ohio St. 562, 67 Am. 541, 27 L. R. A. 441, 28 S. W. 620, 30 Dec. 312; Lake Shore & M. S. R. Co. v. S. W. 102; Epperson v. Postal Teleg. Cable Co. (1899) 155 Mo. 346, 50 S. W. 795, 55 S. W. 1050; Nugent v. Kauffman Mill. Co. (1895) 131 Mo. 241, 33 S. W. 428; Bridges v. St. Louis, I. M. & S. R. Co. (1879) 6 Mo. App. 389; Dale v. St. Louis, K. C. & N. R. Co. (1876) 63 Mo. 455.

Nebraska.— Missouri P. R. Co. v. Baxter (1894) 42 Neb. 793, 60 N. W. 1044; Malm v. Thelin (1896) 47 Neb. 686, 66 N. W. 650; Dehning v. Detroit Bridge & Iron Works (1895) 46 Neb. 556, 65 N. W. 186; Chicago, B. & Q. R. Co. v. McGinnis (1896) 49 Neb. 649, 68 N. W. 1057; Kearney Electric Co. v. Laughlin (1895) 45 Neb. 390, 63 N. W.

941.

New Hampshire. Foss v. Baker (1882) 62 N. H. 247; Leazotte v. Bos-Co. (1893) 67 N. H. 466, 30 Atl. 409.

(1896) 88 N. 1. 274; Freeman v. Glens Which rely on the latter defense. See Falls Paper Mill Co. (1893) 70 Hun, chapter XVIII., infra. 530, 24 N. Y. Supp. 403, Affirmed in Rhode Island.—McGrath v. New York (1894) 142 N. Y. 639, 37 N. E. 567; & N. E. R. Co. (1884) 14 R. I. 358 Knisley v. Pratt (1896) 148 N. Y. 372, (1885) 15 R. I. 95, 22 Atl. 927; Gaff-32 L. R. A. 367, 42 N. E. 986; De ney v. New York & N. E. R. Co. (1887) Vol. I. M. & S.—41.

Knittal (1878) 33 Ohio St. 468; Lake Shore & M. S. R. Co. v. Fitzpatrick (1877) 31 Ohio St. 479; Coal & Min. Co. v. Clay (1894) 51 Ohio St. 542, sub nom. Consolidated Coal & Min. Co. v. Floyd, 25 L. R. A. 848, 38 N. E. 610. Oklahoma.— Chaddick ν. (1897) 5 Okla. 616, 49 Pac. 940. Oregon. - Roth v. Northern Pacific

Lumbering Co. (1889) 18 Or. 205, 22 Pac. 842; Brown v. Oregon Lumber Co. (1893) 24 Or. 315, 33 Pac. 557; Stone v. Oregon City Mfg. Co. (1870) 4 Or. 52; Stager v. Troy Laundry Co. (1901) 38 Or. 480, 53 L. R. A. 459, 63 Pac.

645.

Pennsylvania. Brossman v. Lehigh Valley R. Co. (1886) 113 Pa. 490, 57 Am. Rep. 479, 6 Atl. 226; Barkdoll v. Pennsylvania R. Co. (1888; Pa.) 21 ton & M. R. Co. (1899) 70 N. H. 5, 45 W. N. C. 281, 13 Atl. 82; Beittenmiller Atl. 1084; Bancroft v. Boston & M. R. v. Bergner & E. Brewing Co. (1888; Co. (1893) 67 N. H. 468, 20 Atl. 400 Pa.) 11 Cent. Rep. 639, 12 Atl. 599; New Jersey.— Western U. Teleg. Co. Wannamaker v. Burke (1886) 111 Pa. v. McMullen (1895) 58 N. J. L. 155, 32 423, 2 Atl. 500; Kennedy v. Pennsyl-L. R. A. 351, 33 Atl. 384; Conway v. vania R. Co. (1889) 1 Monaghan, 271, Furst (1895) 57 N. J. L. 645, 32 Atl. 17 Atl. 7; Bemisch v. Roberts (1891) 380; Folcy v. Jersey City Electric Light 143 Pa. 1, 21 Atl. 998; Green & C. Co. (1892) 54 N. J. L. 411, 24 Atl. 487. Street Pass. R. Co. v. Bresmer (1881) New York.— Wright v. New York C. 97 Pa. 103; Diehl v. Lehigh Iron Co. R. Co. (1862) 25 N. Y. 562; Anthony (1891) 140 Pa. 487, 21 Atl. 430; Rumv. Lecret (1887) 105 N. Y. 591, 12 N. sey v. Delaware, L. & W. R. Co. (1892) E. 561; Kaare v. Troy Steel & I. Co. 151 Pa. 74, 25 Atl. 37; Kelly v. Balti-1803) 120 N. Y. 260, 24 N. F. 201. (1893) 139 N. Y. 369, 34 N. E. 901; more & O. R. Co. (1887; Pa.) 10 Cent. Gibson v. Erie R. Co. (1875) 63 N. Y. Rep. 56, 11 Atl. 659. A good deal of 449, 20 Am. Rep. 552; Crown v. Orr the verbal confusion between assumption (1893) 140 N. Y. 450, 35 N. E. 648; of risks and contributory negligence is Powers v. New York, L. E. & W. R. Co. apparent in the decisions in this state (1885) 98 N. Y. 274; Freeman v. Glens which rely on the latter defense. See

ence of law when it once appears that he understood the work, it follows that a declaration which shows on its face that the servant knew of the extraordinary risk, and yet went on working, is demurrable.2 Nor will a general verdict for the servant be allowed to stand where it is specially found that he was aware of the abnormal conditions and the danger created by them.<sup>3</sup>

15 R. I. 456, 7 Atl. 284; Kelley v. Silver Spring Bleaching & Dyeing Co. (1878) 12 R. I. 112, 34 Am. Rep. 615; Whipple v. New York, N. H. & H. R. Co. (1896) 19 R. I. 587, 35 Atl. 305; Crandall v. New York, N. H. & H. R. Co. (1896) 19 R. I. 594, 35 Atl. 307.

Tennessee.— East Tennessee, V. & G. R. Co. v. Duffield (1883) 12 Lea, 63, 47

Am. Rep. 319.

Texas. Galveston, H. & S. A. R. Co. v. Garrett (1889) 73 Tex. 262, 13 S. W. 62; Gulf, C. & S. F. R. Co. v. Brentford (1891) 79 Tex. 619, 15 S. W. 561; Nix v. Texas P. R. Co. (1891) 82 Tex. 473, 18 S. W. 571; Houston & T. C. R. 413, 18 S. W. 511; Houston & T. C. R. Co. v. Myers (1881) 55 Tex. 110; Missouri P. R. Co. v. Somers (1890) 78 Tex. 459, 14 S. W. 779; Texas & P. R. Co. v. French (1893) 86 Tex. 99, 23 S. W. 642; Texas & N. O. R. Co. v. Conroy (1892) 83 Tex. 216, 18 S. W. 609; Texas & P. R. Co. v. Bradford (1886) 66 Tex. 732, 59 Am. Rep. 739, 2 S. W. 595; Houston & T. C. R. Co. v. Barrager. 595; Houston & T. C. R. Co. v. Barrager (1890; Tex.) 14 S. W. 242; Mexican C. R. Co. v. Shean (1891; Tex.) 18 S. W. 151.

Utah.— A servant in this state is declared to be unable to recover if he continues work with knowledge of an extraordinary risk. M'Charles v. Horn Silver Min. & Smelting Co. (1894) 10 Utah, 470, 37 Pac. 733; Reese v. Morgan Silver Min. Co. (1899) 17 Utah, 489, 54 But it is not quite clear whether the court really intends to rely on the theory of an assumption of the risk, or of contributory negligence. In Fritz v. Salt Lake & O. Gas & E. L. Co. (1899) 18 Utah, 493, 56 Pac. 90, the phrase "assumption of risks" is used; but the risk in that case seems to be an ordinary one. See § 265, note 1, subd. p.

Vermont.— Carbine v. Bennington & R. R. Co. (1889) 61 Vt. 348, 17 Atl. 491; Dumas v. Stone (1893) 65 Vt. 442, 25 Atl. 1097; Latremouille v. Benning-

(1894) 90 Va. 621, 19 S. E. 166; Richmond & D. R. Co. v. Risdon (1891) 87 Va. 335, 12 S. E. 786; McDonald v. Norfolk & W. R. Co. (1897) 95 Va. 98, 27 S. E. 821. In Richmond & D. R. Co. v. Norment (1887) 84 Va. 172, 4 S. E. 211, the doctrine of the assumption of known risks, as an inference of law, seems to be rejected; but possibly this is one of several decisions by this court in which assumption of risks and contributory negligence are confused.

Washington.—Jennings v. Tacoma R. & Motor Co. (1893) 7 Wash. 275, 34 Pac. 937; Bullivant v. Spokane (1896) 14 Wash. 577, 45 Pac. 42; Week v. Fre-mont Mill Co. (1892) 3 Wash. 629, 29

Pac. 215.

Pac. 215.

West Virginia.— Williamson v. Newport News & M. Valley Co. (1891) 34

W. Va. 657, 12 L. R. A. 297, 12 S. E. 824; Woodell v. West Virginia Improv. Co. (1893) 38 W. Va. 23, 17 S. E. 386; Stewart v. Ohio River R. Co. (1895) 40 W. Va. 188, 20 S. E. 922; Riley v. West Virginia C. & P. R. Co. (1885) 27 W. Va. 146; Massie v. Peel Splint Coal Co. (1896) 41 W. Va. 620, 24 S. E. 644: Rerns v. Gaston Gas Coal Co. E. 644; Berns v. Gaston Gas Coal Co. (1885) 27 W. Va. 285, 55 Am. Rep. 304.

Wisconsin.—Peffer v. Cutler (1892) 83 Wis. 281, 53 N. W. 508; Schultz v. Chicago & N. W. R. Co. (1887) 67 Wis. 616, 58 Am. Rep. 881, 31 N. W. 321; Sweet v. Ohio Coal Co. (1890) 78 Wis. 127, 9 L. R. A. 861, 47 N. W. 182; Luebke v. Berlin Mach. Works (1894) 88 Wis. 442, 60 N. W. 711. In this state, assumption of risks is frequently confounded with contributory negligence. See chapter xvIII., infra.

<sup>2</sup> McGee v. Eglinton Iron Co. (1883) 10 Sc. Sess. Cas. 4th series, 955; Mc-Teernan v. White (1890) 17 Sc. Sess.

Cas. 4th series, 368.

<sup>8</sup> Chicago, B. & Q. R. Co. v. McGinnis (1896) 49 Neb. 649, 68 N. W. 1057; Lake Shore & M. S. R. Co. v. McCorton & R. R. Co. (1891) 63 Vt. 336, 22 mick (1881) 74 Ind. 440; Lynch v. Chi-Atl. 656. cago, St. L. & P. R. Co. (1894) 8 Ind. Virginia.—Clark v. Richmond & D. App. 516, 36 N. E. 44. It has, however, R. Co. (1884) 78 Va. 709, 49 Am. Rep. been held erroneous to override a gen-394; Chesapeake & O. R. Co. v. Hafner eral verdict for the plaintiff, merely on

The extent to which the defense of assumption of risks is a bar to an action where the negligence consists in the breach of a statutory duty is discussed in chapter xxxv., post.

274a. Judicial statements of this doctrine. This doctrine has probably been enunciated more frequently by courts than any other in the law of employers' liability, not excepting that which relates to the defense of coservice, and many pages might be filled with statements illustrative of the variations of phraseology which have resulted from considering it under different aspects and from different points of view. Of these statements the passages quoted below will serve as sufficiently representative specimens.

"When a servant enters on an employment, from its nature necessarily hazardous, he accepts the service subject to the risks incidental to it; or if he thinks proper to accept an employment on machinery defective from its construction or from the want of proper repair, and with knowledge of the facts enters on the service, the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment."1

"Before the employers' liability act there was this condition in the contract of hiring, that if there was a defect in the premises or machinery which was open and palpable, whether the servant actually knew it or not, he accepted the employment subject to the risk."2

"A servant cannot continue to use a machine which he knows to be dangerous, at the risk of his employer."3

"If a servant, in the face of a manifest danger, chooses to go on with his work, he does so at his own risk, and not at the risk of his master."4

"If the employee knew of the defect in the machinery from which the injury happened, and yet remained in the service and continued to use the machinery without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger rea-

was old and proceded enough to know the nature of his employment and the working of the machine, there being no finding that he knew or ought to have known of the defect which caused the injury. Quaid v. Cornwall (1878) 13 Bush, 601.

1 Cockburn, Ch. J., in Clarke v. Carnwall (1862) 7 Hurlst. & N. 937, 31 Shand's language in McGee v. Eglinton L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Weck. Rep. 405, quoted with approval in Gibson v. Erie R. Co. (1875) 63 N. Y. 449, 20 Am. Rep. 552.

sonably to be apprehended from such use, and is entitled to no rcovery."5

"An employee having knowledge cannot claim indemnity except under particular circumstances. He is not secretly or involuntarily exposed, and likewise is paid for the exact position and hazard he assumes,"6

"Though it is a part of the implied contract between master and servant (where there is only an implied contract) that the master shall provide suitable instruments for the servant with which to do his work, and a suitable place where, when exercising due care himself, he may perform it with safety, or subject only to such hazards as are necessarily incident to the business, yet it is in the power of the servant to dispense with this obligation. When he assents, therefore, to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such place might, with reasonable care and by a reasonable expense, have been made safe. His assent has dispensed with the performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected."

"It is now settled law in this state that, if a servant continues in the service of his employer after he has knowledge of any unsuitable appliances in connection with which he is required to labor, and it appears that he fully comprehends and appreciates the nature and extent of the danger to which he is thereby exposed, he will be deemed to have waived the performance of the employer's obligation to furnish suitable appliances, and to have voluntarily assumed all risks incident to the service under these circumstances."8

"If a servant has knowledge of the circumstances under which the employer carries on his business, and chooses to accept the employment, or continue in it, he assumes such risks incident to the discharge of his duties as are open or obvious. In such cases it is not a question whether the place prepared for him to occupy, and which

<sup>&</sup>lt;sup>6</sup> Washington & G. R. Co. v. McDade bering Co. (1889) 18 Or. 205, 22 Pac. (1890) 135 U. S. 554, 34 L. ed. 235, 10 842.

Sup. Ct. Rep. 1044. <sup>9</sup> Conley v. American Exp. Co. (1895) \*Haydon v. Smithville Mfg. Co. 87 Me. 352, 32 Atl. 965. See also, for (1861) 29 Conn. 548. <sup>7</sup> Sullivan v. India Ilfg. Co. (1873) Iron Works (1899) 92 Me. 501, 43 Atl. 113 Mass. 396. Similar language is 106. found in Roth v. Northern Pacific Lum-

he assents to accept, might, with reasonable care, have been made more safe. His assent dispenses with the performance on the part of the master of the duty to make it so."9

"If the servant sustaining an injury through the unskilfulness or insufficiency, in numbers or otherwise, of his fellow laborers, or defects in the machinery or conveniences furnished by his employer, has the same knowledge or means of knowledge of the unskilfulness and deficiencies referred to as his employer, he cannot sustain an action for the injury, but will be held to have voluntarily assumed all the risks of the employment, incurred, as they were, by the want of skill and incompetency of those employed with him, or the defective machinery used in the work." <sup>10</sup>

If the servant accepts service with knowledge of the character and position of structures from which employees might be liable to receive injury, he cannot call upon his master to make alterations, or, in case of injury from risks which were apparent, call upon him for indemnity.<sup>11</sup>

A servant "assumes, not only all the risks incident to such employment, but all dangers which are obvious and apparent. . . . If he voluntarily enters into or continues in the service without objection or complaint, having knowledge or the means of knowing the dangers involved, he is deemed to assume the risk, and to waive any claim for damages against the master in case of personal injury to him."

"It is, as a general rule, true that a servant entering into employment which is hazardous assumes the usual risks of the service, and those which are apparent to ordinary observation; and when he accepts or continues in the service, with knowledge of the character of structures from which injury may be apprehended, he also assumes the hazards incident to the situation." <sup>13</sup>

"If the employee had knowledge of the nature and degree of the peril when he entered the service, or continued in the service after such knowledge without protest and promise of amendment, the case is different [i. e., from one where the servant was ignorant]. The employer has no right to subject his employee to an unnecessary peril without his consent; but it is well settled in the courts of this country and in England that, if a servant chooses to enter into an employ-

Wood v. Heiges (1896) 83 Md. 257,
 2 Crown v. Orr (1893) 140 N. Y.
 34 Atl. 872.
 450, 35 N. E. 648.

<sup>&</sup>lt;sup>10</sup> Wright v. New York C. R. Co. <sup>13</sup> Davidson v. Cornell (1892) 132 N. (1862) 25 N. Y. 562. Y. 234, 30 N. E. 573.

<sup>&</sup>lt;sup>11</sup> Gibson v. Erie R. Co. (1875) 63 N. Y. 449, 20 Am. Rep. 552.

ment involving danger of personal injury which the master might have avoided, he takes upon himself the risk of all the hazards incident to the employment, the existence and nature of which were known to him when he entered the service, and which he had no reason to expect would be obviated or removed."14

"If an employee, after having a full and fair opportunity to become acquainted with the risk of his situation, makes no complaint whatever to his employer, as to the machinery which he knows to be wanting in appliances for safety, takes no precaution to guard against danger, but, accepting the risks, voluntarily continues in the performance of his duties, he cannot complain if he is subsequently injured by such exposure."15

"When a servant . . . plainly perceives the risks which he runs, and nevertheless remains performing the same services without complaint and without suggesting how his employment could be made less hazardous, he will be deemed to have undertaken to run the risks incident thereto."16

"If an employee knows that another employee is incompetent or habitually negligent, or that the materials with which he works are defective, and he continues his work without objection and without being induced by his employer to believe that a change will be made, he will be deemed to have assumed the risk of such incompetency, negligence, or defects, and cannot recover for an injury resulting therefrom." 17

"If a servant before he enters a service knows, or afterwards discovers, that the instrumentalities furnished for his use are defective, and understands, or by exercise of ordinary observation ought to understand, the risks to which he is thereby exposed, and if, notwithstanding such knowledge, he, without objection and without any promise on the part of the employer that such defects will be remedied, enters or continues in such service, he cannot recover for injuries resulting therefrom, but will be deemed to have assumed all the risks of the employment thus known." 18

"Where a party works with or in the vicinity of a piece of machinery insufficient for the purposes for which it is employed . . . with a knowledge or means of knowledge of its condition, he takes

<sup>17</sup> Kansus P. R. Co. v. Peavey (1885)

<sup>&</sup>lt;sup>14</sup> Brossman v. Lehigh Valley R. Co. 34 Kan. 472, 8 Pac. 780. See also, to (1886) 113 Pa. 490, 57 Am. Rep. 479, the same effect, Atchison, T. & S. F. R.

Co. v. Schroeder (1891) 47 Kan. 315, W. Rummell v. Dilworth (1886) 111 27 Pac. 965.

Pa. 343, 349, 2 Atl. 355.

Rummey v. Delaware, L. & W. R. Co. (1883) 31 Minn. 248, 47 Am. Rep. Co. (1892) 151 Pa. 74, 78, 25 Atl. 37. 785, 17 N. W. 378.

the risk incident to the employment in which he is thus engaged, and cannot maintain an action for injuries sustained, arising out of accidents resulting from the defective condition of the machinery." 19

"If the servant knows before he enters service, or discovers afterwards, that an instrument is unsafe or unfit in any particular, and, notwithstanding such knowledge voluntarily enters into or continues the employment without objection or complaint, he is deemed to assume the risk of the danger thus known, and to waive any claim for damages against the master in case it shall result in injury to him." 20

Where an employee, "when he enters upon his employment, knows or afterwards discovers that the machinery or the appliances he is called upon to use are defective or dangerous, and continues his employment without objection or complaint, he is deemed to have assumed the risk of the danger then known or discovered, and waives any claim for damage against his employer in case it shall result in injury to him." 21

"The doctrine . . . that, where one enters into the employ of another, he assumes, and he is presumed to have contracted with reference to, all the hazards and risks ordinarily incident to the employment, . . . applies also to perils and risks not incident to the service, of which the servant has notice." 22

<sup>21</sup> Sweet v. Ohio Coal Co. (1890) 78

obligation to continue working in a dan- known dangers or of obviously defective

19 McGlynn v. Brodie (1866) 31 Cal. gerous place or employment, and, if he 376, followed in Stone v. Oregon City does so, assumes the risk. Reese v.

 Mfg. Co. (1870) 4 Or. 52.
 Clark (1892) 146 Pa. 465, 23 Atl. 246.

 26 East Tennessee, V. & G. R. Co. v.
 Where an employee sues his master for Duffheld (1883) 12 Lea, 63, 47 Am. Rep. injuries alleged to have been sustained

 by reason of the master's negligence, and the evidence shows that, if the mas-Wis. 127, 9 L. R. A. 861, 47 N. W. 182. ter was negligent at all, the plaintiff <sup>22</sup> Little Rock & Ft. S. R. Co. v. Duf-knew of such negligence, and took the fey (1880) 35 Ark. 602. The following resulting risk, it is not error to grant a statements, which are not verbatim ex- nonsuit. Porter v. Ocean S. S. Co. tracts, but follow the judicial language (1901) 113 Ga. 1007, 39 S. E. 470. quite closely in all essential respects, The rule that the master is bound to use may also be referred to as illustrative of reasonable care to furnish a reasonably some other points of view besides those safe place for his servant to work in is exemplified in the above extracts. qualified by another rule that if the emplified in the above extracts. qualified by another rule that if the An intelligent man, with full knowl- master fails in this respect, and the edge of the character and quality of an servant, being fully advised of the danimplement furnished him for use, and gers, continues to work voluntarily in all of the facts and physical laws which the unsafe place, he takes the chances render its use dangerous, after having of the obvious danger. Pioneer Firevoluntarily accepted employment in a proof Constr. Co. v. Howell (1901) 189 hazardous business involving the use of Ill. 123, 59 N. E. 535, Affirming 90 Ill. such implements, cannot be heard to say App. 122. An employee who knows of that he did not know it was dangerous, defects, and attempts an act rendered that he did not know it was dangerous, defects, and attempts an act rendered but assumes the risk of injury from its dangerous thereby, assumes the risk of use, as a hazard of the employment, such danger. Louisville & N. R. Co. v. King v. Morgan (1901) 48 C. C. A. 507, Kemper (1897) 147 Ind. 561, 47 N. E. 109 Fed. 446. A servant is under no 214. A servant assumes the risk of the

275. Doctrine considered with reference to the comparative knowledge possessed by the master and servant.—The servant is frequently said to be incapable of maintaining the action where his knowledge of the risk which caused his injury was, as compared with the master's knowledge, either equal, or superior. But this form of expression is obviously of no special significance in a logical point of view. If the servant knew of and appreciated the risk in such a sense and to such an extent that he must be deemed to have accepted it as one of those incident to the employment, his inability to maintain the action is a necessary inference, irrespective of whether his master possessed the same or a less amount of information in regard to the subject-matter. As it is the knowledge of the servant which withholds from him a right of action, it is immaterial that the master also knows of the conditions which produce the injury.3

275a. Instructions should be conformable to the doctrine.— The doctrine, when considered with reference to the propriety of instructions in cases where there is evidence tending to show that the servant comprehended the risk to which an injury was due, involves the following consequences: that an instruction which correctly embodies the doctrine in language based upon any of the general statements quoted in § 274, supra, is not open to exception<sup>1</sup>; that it is error to give an instruction which by its express terms contravenes the doctrine; that, where an instruction is given which purports to include

conducted are assumed by an employee when he knows of them or they are apparent and obvious to persons of his experience and understanding. Union 525; Eddy v. Rogers (1894; Tex. Civ. App.) 31 S. W. Perience and understanding. Union 525; Eddy v. Rogers (1894; Tex. Civ. App.) 31 S. W. Stock-Yards Co. v. Goodwin (1898) 57 App.) 27 S. W. 295.

Neb. 138, 77 N. W. 357; Chicago, B. & Q. R. Co. v. McGinnis (1896) 49 Neb. Isomore from responsibility "in all cases where the risks are apparent and are voluntarily assumed by a person capable of understanding and appreciating them." Diamond State Iron Co. v. Southern Oregon Co. (1891) 20 Or. 591, Giles (1887) 7 Houst. (Del.) 557, 11 Atl. 189.

1 Cameron v. New York C. & H. R. R. Isomore (1894) 78 Hun, 560, 29 N. Y. Supp. 802; Smith v. Tromanhauser (1895) 63 Minn. 98, 65 N. W. 144; Pennsylvania Co. v. Lynch (1878)

implements, where the method of the 90 III. 333; Epperson v. Postal Teleg. use is within his control. Jenney Elec-Cable Co. (1899) 155 Mo. 346, 50 S. W. tric Light & P. Co. v. Murphy (1888) 795, 55 S. W. 1050; Lumley v. Caswell 115 Ind. 566, 18 N. E. 30. The risks (1877) 47 Iowa, 159; Fletcher v. Louisarising from defective appliances or ville & N. R. Co. (1899) 102 Tenn. 1, from the manner in which a business is 49 S. W. 739; Davis v. Detroit & M. R. conducted are assumed by an employee Co. (1870) 20 Mich. 105, 4 Am. Republic Management of them or they are an 364: Bonnet v. Galveston, H. & S. A. R.

all the elements necessary to be proved in order to warrant a recovery, it is erroneous if it leaves the jury in ignorance as to the effect of the doctrine; as, where it is laid down that the action is maintainable under such circumstances if the servant was injured without fault on his part; or where no reference is made to the consequences of the servant's knowledge as a circumstance which, if proved, prevents his maintaining the action.4 But in determining whether the jury was or was not misled, the whole charge will be considered together, and reversible error will not be predicated if it appears that, although the effect of the doctrine of assumption of risks was not specifically stated, the language of the trial judge indicated with sufficient clearness that no recovery could be had if the risk in question was appreciated.<sup>5</sup>

employee does not assume the risk of a Refrigerating Mach. Co. v. Stahl (1900) though known to him, unless it has been <sup>5</sup> In Bethlehem Iron Co. v. Weiss properly constructed. Peoria, D. & E. (1900) 40 C. C. A. 270, 100 Fed. 45, the R. Co. v. Puckett (1893) 52 Ill. App. court, in upholding such an instruction,

Chicago, R. I. & P. R. Co. v. Cleveland (1900) 92 Ill. App. 308.

\*Andrews v. Tamarack Min. Co. (1897) 114 Mich. 375, 72 N. W. 242; was inseparably connected by the Camp Point Mfg. Co. v. Ballou (1874) 71 Ill. 417: St. Louis & S. E. R. Co. v. Ballou (1874) 72 Ill. 256; William Graver Tank Works v. McGee (1895) to the peculiar risks of his employer as Graver Tank Works v. McGee (1895) to the peculiar risks of his employer as Graver Tank Works v. McGee (1895) to the peculiar risks of his employer as Graver Tank Works v. McGee (1895) to the peculiar risks of his employer as Hill. App. 251; Money v. Lower Vein and with the further question whether, Coal Co. (1881) 55 Iowa, 671, 8 N. W. if such instruction had not been given, the risks were obvious ones and such as Iowa, 159; Quinn v. Chicago, R. I. & P. were appreciated, or as ought to have R. Co. (1898) 107 Iowa, 710, 77 N. W. been appreciated, by the plaintiff. The 464; Aldridge v. Midland Blast Furnace (1898) were given to understand by the court Co. v. Mansell (1897; Tex. Civ. App.) 39 S. W. 913; Gulf, C. & S. F. R. Co. v. Mansell (1897; Tex. Civ. App.) 39 S. W. 967; Sonnefield v. Mayton (1897; were given to understand by the court Tex. Civ. App.) 39 S. W. 166: Texas Midland R. Co. v. Taylor (1898; Tex. Civ. App.) 39 S. W. 166: Texas Midland R. Co. v. Taylor (1898; Tex. Civ. App.) 61 S. W. 351. It is not error to give an instruction that unless plaintiff did not know, and by the use of ordinary care could not have known, of the defect in question, he could not recover, no matter how unpreciated to one declaring that he could not recover if he knew, or could known to the defendant, was reversible by the exercise of ordinary care have error, although the jury were also told known, of the defect. De La Vergne in the following paragraph that plain-

222. said: "It is true that the learned judge did submit to the jury the question whether or not the defendant had (1900) 25 Ind. App. 227, 57 N. E. 949; been the substance of the charge, with (1900) 92 Ill. App. 308.

\* Andrews v. Tamarack Min Co. v. True to the plantification or explanation, it would have been reversible error. But

is equivalent to one declaring that he to recover if the defect existed and was could not recover if he knew, or could known to the defendant, was reversible

As the inability to maintain an action is deducible from the mere fact that the servant knew of the extraordinary risk from which his injury resulted, it is a misdirection to charge the jury in words which may convey the impression that recovery is not barred unless there has been a special assumption of that risk.6

276. Rationale of the doctrine of the assumption of extraordinary risks.—As will be shown in chapter xx., post, there is some judicial authority for the theory that the doctrine of a servant's assumption of extraordinary risks which he comprehends is an application of the maxim, Volenti non fit injuria. But in view of the accepted principle that the rights and liabilities of the master and servant are, as between themselves, regulated entirely by the express or implied terms of their contract, the more correct theory would seem to be that his acceptance of or continuance in an employment with a full comprehension of an extraordinary risk justifies the inference of an implied agreement, voluntarily entered into at the time he attained a comprehension of the risk, that it was thenceforth to be included among those which were covered by the stipulated compensation.<sup>2</sup>

therein, he cannot maintain an action N. S. 851, per Willes J. against the defendant for the injury words, "and by means of some risk or danger assumed under the instructions herein." Guaranty Constr. Co. v. Broe-

tiff could not recover if he knew, or by his employer that the servant shall exthe exercise of ordinary care could have pose himself to such risks as he knows known, of the defect. But in view of are consistent with the employment." The principle stated in the text, it seems questionable whether the ruling is correct.

The servant "was aware of it [the risk], and took his wages on that footing, and it has been held that he has, under those circumstances no more claim. Thus an instruction that if the those circumstances, no more claim plaintiff knew the hazards of his em-than the soldier who takes the Queen's ployment as the business was conduct-shilling for danger in the service." ed, and was injured while engaged Saxton v. Hawksworth (1872) 26 L. T.

"It is a rule of good sense that, if a merely on the ground that there was a man voluntarily undertakes a risk for safer mode in which the business might a reward which is adequate to induce have been conducted, the adoption of him, he shall not, if he suffers from the which would have prevented the injury, risk, have a compensation for which he is correct, but is rendered erroneous by did not stipulate." Lord Bramwell in inserting after the word "therein" the Smith v. Baker [1891] A. C. 325, 344, Smith v. Baker [1891] A. C. 325, 344, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392.

"Except in regard to the danger of inherein." Guaranty Constr. Co. v. Broeker (1900) 93 Ill. App. 272.

1 Farwell v. Boston & W. R. Corp. (1842) 4 Met. 49, 38 Am. Dec. 339.

2 "The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself." Priestley v. Fowler (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987.

"If a servant enters into an employ-which are ordinarily incident to that "If a servant enters into an employ-which are ordinarily incident to that ment knowing there is danger, and is kind of business, but also those which satisfied to take the risk, it becomes grow out of the peculiar way in which part of the contract between him and his employer is conducting it, so far as In other words, the increased danger caused by the master's negligence becomes, when it is known, one of the ordinary incidents of the service, so far as the servant is concerned.3

The conception of the relinquishment of an inchoate right of

that way and those risks are obvious not, as he sees proper; and, having voiagrees to work in a business which he ment, he will be presumed to have conthe use of that machinery. By making ity of laborers have no choice in the mata contract to serve for pay where such ter. Courts, however, ought to act on dangers surround him, he exposes him-the legal presumption; for to ignore it

"The reason of the rule that the serv- (1893) 55 Mo. App. 491, 494. ant cannot recover damages if he continues to work with defective tools. Shaw (1861) 1 Best & S. 435, 446, 30 with full knowledge of the defects, is L. J. Q. B. N. S. 333, 7 Jur. N. S. 845, that, being a free agent, the law pre- per Blackburn, J.; Farwell v. Boston & sumes that he will refuse to work with W. R. Corp. (1842) 4 Met. 49, 38 Am. dangerous implements unless his compensation is proportioned to the risk." (1892) 96 Cal. 269, 31 Pac. 170; Foss East Tennessee, V. & G. R. Co. v. Duf- v. Baker (1882) 62 N. H. 247. field (1883) 12 Lea, 68, 47 Am. Rep. 319.

from a neglect whose risk they as be taken too literally. sumed." Devitt v. Pacific R. Co. The master "is example." (1872) 50 Mo. 302.

The servant "engages to bear the special perils which he knows actually to assumes it, the master is relieved. The exist in his particular service, as well parties change positions; the employee as the dangers generally appertaining to assumes the risk that, if it were not for such business. . . . Îf he would his knowledge, his employer would be have the visible or known risks borne compelled to assume." Louisville, N. by his employer, he should insist upon A. & C. R. Co. v. Sandford (1888) 117 an express stipulation to that effect in Ind. 267, 19 N. E. 770. the contract; no such stipulation can reasonably be inferred." Fifield v. traordinary risks, they "may assume in

the legal presumption that the servant ditional grounds for recovery in the is at liberty to engage in the work or event of injuries received." Alcorn v.

when he makes his contract. If he untarily elected to enter the employknows is carried on with machinery tracted in reference to obvious condimuch more dangerous than that comtions. This presumption, as a practical monly used in that kind of business, he and every-day question, is a mere ficassumes the obvious risks incident to tion, for the reason that a great majorself to the danger voluntarily." Ma- would produce confusion and uncertainhoney v. Dore (1892) 155 Mass. 518, 30 ty in the administration of the law." Moore v. St. Louis Wire Mill Co.

For similar language see Mellors v.

The following passage is apparently inconsistent with the cases above cited, "Much of the work of the country is in so far as it seems to exclude the thedone without the employment of the ory of a contractual assumption of ex-best machinery or the most competent traordinary risks. "When a person enmen, and it would be disastrous if those ters upon a dangerous employment, ne prosecuting it were held to insure the not only assumes the risks ordinarily safety of all who enter their service. incident thereto, but also the risk he If persons are induced to engage, in ig-may incur from manifest perils. The norance of such neglect, and are injured former are the risks which enter into in consequence, they should be entitled his contract of employment; the latter to compensation; but if advised of it, are those which he voluntarily accepts they assume its risk. They contract when he knows of their existence." with reference to things as they are Gaffney v. New York & N. E. R. Co. known to be, and no contract is violat- (1887) 15 R. I. 456, 7 Atl. 284. But ed and no wrong is done if they suffer perhaps the expressions used should not

<sup>3</sup> The master "is exonerated because the employee himself assumes the danger as increased, and, as he voluntarily

Where the servant knows of the ex-Northern R. Co. (1860) 42 N. H. 225. legal effect the shape and proportions "The doctrine of the foregoing cases of only ordinary and incidental perils, [to the effect that the servant assumes adding nothing to the liability of the all risks which he appreciates] rests on master, and affording the servant no adaction, which is involved in this theory, finds expression in the statements, so frequently found in the reports, that the servant who accepts or continues in an employment with knowledge of an abnormal risk dispenses with the duty of the master to take the precautions which were neglected; 4 or that he waives his right to exact damages from the master; or that he acquiesces in the conditions of danger produced by the master's negligence.6

277. Application of doctrine in cases where the injury is caused by a defective instrumentality.— In the subjoined note are collected numerous decisions in which the doctrine now under discussion has been affirmed in relation to injuries caused by the abnormally dangerous qualities of the instrumentalities themselves. The nature of the accident is indicated by a brief memorandum wherever it seems desirable, for any reason, to specify the facts more particularly than is done by the headings themselves. In chapter xxi., infra, will be found a large number of other decisions which assume the existence of the doctrine, and deal merely with the question whether the risk was comprehended by the servant.1

Chicago & A. R. Co. (1891) 108 Mo. 227, 30 N. W. 25; Mundle v. Hill Mfg. 81, 18 S. W. 188, per Sherwood, Ch. J. Co. (1894) 86 Me. 406, 30 Atl. 16; Gil-To the same effect see Carbine v. Bennington & R. R. Co. (1899) 61 Vt. 348, 17 Atl. 491 (arguendo).

\*\*Sullivan v. India Mfg. Co. (1873) W. 581; Shields v. Robins (1896) 3 113 Mass. 396, 398; Coombs v. New App. Div. 582, 38 N. Y. Supp. 214; Bedford Cordage Co. (1869) 102 Mass. Porter v. Western N. C. R. Co. (1887) 572, 3 Am. Rep. 506; Leary v. Boston 97 N. C. 63, 2 S. E. 580; Mad River & A. R. Co. (1885) 139 Mass. 580, 584, L. E. R. Co. v. Barber (1856) 5 Ohio 52 Am. Rep. 733, 2 N. E. 115; Fitzger- 8t. 541, 67 Am. Dec. 312; Lake Shore ald v. Connecticut River Paper Co. & M. S. R. Co. v. Knittal (1878) 33 (1891) 155 Mass. 161, 29 N. E. 464; Ohio St. 468; Brossman v. Lehigh Val-Wood v. Heiges (1896) 83 Md. 257, 34 ley R. Co. (1886) 113 Pa. 490, 57 Am. Atl. 872; Emma Cotton Seed Oil Co. v. Rep. 479, 6 Atl. 226; South Florida R. Hale (1892) 56 Ark. 232, 19 S. W. 600. Co. v. Weese (1893) 32 Fla. 212, 234, 6 Clarke v. Holmes (1862) 7 Hurlst. 13 So. 436; Kelley v. Silver Spring & N. 937, 31 L. J. Exch. N. S. 356, 8 Bleaching & Dyeing Co. (1878) 12 R. I. Jur. N. S. 992, 10 Week. Rep. 405; 112, 34 Am. Rep. 615; Fordyce v. Low-Woodley v. Metropolitan Dist. R. Co. (1892) 96 Cal. 269, 31 Pac. 170; 213, 65 Fed. 952; Chicago, B. & Q. R. Illinois C. R. Co. v. Svisher (1893) 53 Co. v. Merckes (1893) 36 Ill. App. 195. \*\*Galtimore & O. R. Co. v. Camp (1895) 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952; Chicago, B. & Q. R. Co. v. Merckes (1889) 36 III. App. 195.

Co. (1892) 96 Cal. 269, 31 Pac. 170; 213, 65 Fed. 952; Chicago, B. & Q. R. Illinois C. R. Co. v. Swisher (1893) 53 Co. v. Merckes (1889) 36 Ill. App. 195. Ill. App. 411; Louisville, N. A. & C. R. (a) Railway track unsafe for train-Co. v. Sandford (1888) 117 Ind. 267, 19 men.—Moss v. Johnson (1859) 22 Ill. N. E. 770; Chicago & E. R. Co. v. Lee 633; Little Rock, M. R. & T. R. Co. v. (1897) 17 Ind. App. 215, 46 N. E. 543; Leverett (1886) 48 Ark. 333, 3 S. W. Youll v. Sioux City & P. R. Co. (1885) 50; Indianapolis & C. R. Co. v. Love 66 Iowa, 346, 23 N. W. 736; Gorman v. (1858) 10 Ind. 554; Chicago & E. R. Des Moines Brick Mfg. Co. (1896) 99 Co. v. Lee (1897) 17 Ind. App. 215, 46 Iowa, 257, 68 N. W. 674; Bogenschutz N. E. 543; McCauley v. Springfield v. Smith (1886) 84 Ky. 330, 1 S. W. Street R. Co. (1897) 169 Mass. 301, 47 578; Burns v. Chicago, M. & St. P. R. N. E. 1006 (conductor of trolley car Co. (1886) 69 Iowa, 450, 58 Am. Rep. thrown off by jolt); Hewitt v. Flint &

## 278. Application of doctrine in cases where the injury is caused by a faulty system of work.—In a large number of decisions recovery has

P. M. R. Co. (1887) 67 Mich. 66, 34 N. caused by want of blocking at frogs and

caught in a trestle, while the train was which belongs to the ordinary class. running, under orders of despatcher, at See §§ 69, c, and 264, ante. a dangerous rate, he being fully aware (d) Railway track unsafe for other of the order and the condition of the employees.—South Florida R. Co. v. track); Magee v. North Pacific Coast Weese (1893) 32 Fla. 212, 13 So. 436 R. Co. (1889) 78 Cal. 430, 21 Pac. 114 (no ash pit); Seldomridge v. Chesc-(fence out of repair); Sweeney v. Cenpeuke & O. R. Co. (1899) 46 W. Va. tral P. R. Co. (1880) 57 Cal. 15 (fence 569, 33 S. E. 293 (no ash pit). out of repair); Fleming v. St. Paul & D. R. Co. (1880) 27 Minn. 111, 6 N. W. way tracks.—Kelly v. Baltimore & O. 448 (breach of statutory duty to build R. Co. (1887; Pa.) 10 Cent. Rep. 56, fence); Quill v. Houston & T. C. R. Co. (1900) 93 Tex. 616, 57 S. W. 948, Affirming (1900; Tex. Civ. App.) 55 S. W. 1126 (fence out of repair). By S. C. R. Co. (1881) 28 Minn. 129, 9 N. some courts the failure to build fences is held not to be negligence at common law. See § 72, ante.

(turntable with hole in it); Needham path used by switchman); Arnold v. been decided against the servant on the Louisville & N. R. Co. (1900) 22 Ky. ground that the risk imported no negli-L. Rep. 511, 58 S. W. 370 (defective gence on the master's part. See § 70, rail caught brakeman's foot); West v. Southern P. Co. (1898) 29 C. C. A. 219, 56 U. S. App. 323, 85 Fed. 392 (uncovered culvert); Ragon v. Toledo, A. A. & N. M. R. Co. (1892) 91 Mich. 379, 51 N. V. 1004 (hole in side track); Way v. Chicago & N. W. R. Co. (1888) 76 Iowa, 393, 41 N. W. 51 (ice allowed to accumulate where car

P. M. R. Co. (1887) 67 Mich. 66, 34 N. caused by want of blocking at frogs and W. 659 (side track so constructed on a guard rails: Rush v. Missouri P. R. Co. grade that cars were liable to run away (1887) 36 Kan. 129, 12 Pac. 582; Rice and escape onto the main track); Baltive v. New York C. & H. R. Co. (1900) more & P. R. Co. v. State (1892) 75 55 App. Div. 339, 67 N. Y. Supp. 136; Md. 152, 23 Atl. 310 (tunnel not properly proved against trespassing animals.—

(b) Railway track not properly protected against trespassing animals.—

Tillotson v. Texas & P. R. Co. (1892) Co. v. Morrissey (1891) 45 Ill. App. 44 La. Ann. 95, 10 So. 400 (conductor killed by the overturning of an engine condition of the track does not import which came into collision with a cow which came into collision with a cow negligence, and therefore creates a risk

(e) Dangerous objects close to rail-11 Atl. 659; Gibson v. Erie R. Co. (1875) 63 N. Y. 449, 20 Am. Rep. 552 (projecting roof); Clark v. St. Paul & W. 581 (roof or awning projecting from an elevator over a side track); Perigo v. Chicago, R. I. & P. R. Co. (1879) 52 (c) Railway track unsafe as a foot- Iowa, 276, 3 N. W. 43 (platform only a way for servants handling cars.— few inches from cars); Satterly v. Mor-Cowles v. Chicago, R. I. & P. R. Co. gan (1883) 35 La. Ann. 1166 (piling (1897) 102 Iowa, 507, 71 N. W. 580 was placed near track); Woodell v. was placed near track); Woodell v. West Virginia Improv. Co. (1893) 38 W. v. Louisville & N. R. Co. (1887) 85 Ky. Va. 23, 17 S. E. 386 (projecting bough 423, 3 S. W. 797, 11 S. W. 306 (hole in of tree). Many cases of this type have b, ante.

(f) Dangerous objects above railway tracks .- Williams v. Delaware, L. & W. R. Co. (1889) 116 N. Y. 628, 22 N. E. 1117; Owen v. New York C. R. Co. (1869) 1 Lans. 108; Pittsburgh & C. R. Co. v. Sentmeyer (1879) 92 Pa. 276, 37 Am. Rep. 684; Brossman v. Lehigh Valley R. Co. (1886) 113 Pa. 491, 57 Am. Rep. 479, 6 Atl. 226; Devitt v. Pacific (ice allowed to accumulate where car lcy K. Uo. (1886) 113 Fa. 491, 51 Am. repairers work); Chicago & W. I. R. Rep. 479, 6 Atl. 226; Devitt v. Pacific Co. v. Massig (1893) 50 III. App. 666 R. Co. (1872) 50 Mo. 302; Rains v. St. (planking on track defective); Hender-Louis, I. M. & S. R. Co. (1879) 71 Mo. son v. Coons (1888) 31 III. App. 75 164, 36 Am. Rep. 459; Carbine v. Ben-(brakeman fell into dangerously placed nington & R. R. Co. (1889) 61 Vt. 348, cattle guard); Missouri, K. & T. R. Co. 17 Atl. 491; Clark v. Richmond & D. R. v. Wood (1896; Tex. Civ. App.) 35 S. Co. (1884) 78 Va. 709, 49 Am. Rep. W. 879 (brakeman fell while coupling 394; Chesapeake & O. R. Co. v. Hafner (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. 621 19 S. E. 166; Willey Co. V. Massign (1894) 90 Va. rs). (1894) 90 Va. 621, 19 S. E. 166; Wil-In the following cases the injury was liamson v. Newport News & M. Valley

been denied on the assumption that abnormal risks caused by the improper manner in which the instrumentalities are used are as much within the scope of the general doctrine enunciated in §§ 274,

Co. (1891) 34 W. Va. 657, 12 L. R. A. the defective lever of a handcar); Gann 297, 12 S. E. 824. For cases in which v. Nashvule, C. & St. L. R. Co. (1898) the maintenance of low overhead bridges 101 Tenn. 380, 47 S. W. 493 (defective has been held not to be evidence of neg-brake). ligence, see § 71, b, ante.

Defective' of locomotive was unusually high and Louisville Bridge Co. (1872) 9 Bush dangerous for trainmen having occasion 81 (laborer on railway construction to use it); Monaghan v. New York C. work injured by fall of temporary foot & H. R. R. Co. (1887) 45 Hun, 113 bridge due to defective timber); Conley (leaking throttle and valve and defect- v. American Exp. Co. (1895) 87 Me. ive brake); Wabash, St. L. & P. R. Co. 352, 32 Atl. 965 (sliding door of ware-

pocket drawhead; brakeman caught be- the arch of an oven which he was cleantween drawhead and drawbar): Box v. ing out); Russ v. American Cereal Co. Chicago, R. I. & P. R. Co. (1899) 107 (1900) 110 Iowa, 743, 81 N. W. 796 Iowa, 660, 78 N. W. 694 (drawbars of (servant fell through a trap door which discarded type); Shackelton v. Manis-slipped, owing to its hinges being untee & N. E. R. Co. (1895) 107 Mich. 16, fastened); Healey v. Smith (1892) 43 64 N. W. 728 (freight conductor in N. Y. S. R. 804, 17 N. Y. Supp. 851 jured through want of handrail); Mc- (chute for removal of débris from a Laren v. Williston (1892) 48 Minn. 299, 51 N. W. 373 (drawbar of cars so low as to pass under the engine); Thompson v. Missouri P. R. Co. (1897) 51 Neb. 527, 71 N. W. 61 (combination of ordinary and Miller couplings); Arnold v. Delaware & H. Canal Co. (1890) nold v. Delaware & B. Canut Co. (1990) location and the Management of 125 N. Y. 15, 25 N. E. 1064 (car out of protection of persons having occasion repair); Windover v. Troy City R. Co. to pass over it); Kolb v. Sandwich En-(1896) 4 App. Div. 202, 38 N. Y. Supp. terprise Co. (1890) 36 Ill. App. 419 591 (defective brake); Missouri, K. & (servant killed by falling through a 591 (defective brake); Missouri, K. & (servant killed by falling through a T. R. Co. v. Wood (1896; Tex. Civ. trap door the position of which he knew, App.) 35 S. W. 879 (defective coupand which he understood was as likely lings); McDonald v. Norfolk & W. R. as not to open at any time of the day); Co. (1897) 95 Va. 98, 27 S. E. 821 Wanamaker v. Burke (1886) 111 Pa. (mismatched couplings).

(i) Defective hand cars.—Burlington & C. R. Co. v. Liehe (1892) 17 Colo. 280, 29 Pac. 175 (section hand injured

(j) Defective structures.-Perry v. (g) Defective locomotives.—New Marsh (1854) 25 Ala. 659 (building York, L. E. & W. R. Co. v. Lyons fell in which the servant was doing (1888) 119 Pa. 324, 13 Atl. 205 (step some work on a furnace): Sullivan v. v. Kastner (1898) 80 Ill. App. 572 (no house stuck when pushed back); Munhandhold); Chicago & G. W. R. Co. v. dle v. Hill Mfg. Co. (1894) 86 Me. 400, Travis (1892) 44 Ill. App. 466 (no 30 Atl. 16 (defective floor); Ames v. handrail); Fifield v. Northern R. Co. Quigley (1897) 75 Ill. App. 446 (floor (1860) 42 N. H. 225 (engine exploded). of horse's stall broke and caused servant (h) Defective railway cars.—Cresto fall under the feet of a horse); Nawell v. Wilmington & N. R. Co. (1899) son v. West (1886) 78 Me. 253, 3 Atl. 2 Penn. (Del.) 210, 43 Atl. 629 (single 911 (servant injured by the collapse of building under demolition fell).

(k) Want of safeguards to prevent servant from falling into various danplaces .- Anthony v. Leeret gerous (1887) 105 N. Y. 591, 12 N. E. 561 (trap door left open; employee knew its location and the arrangements for the Wanamaker v. Burke (1886) 111 Pa. 423, 2 Atl. 500 (hole in floor near where plaintiff was working); Schwartz v. Cornell (1891) 36 N. Y. S. R. 646, 13 N. Y. Supp. 355 (servant selected by the breaking of an iron rod which position for work near an opening in communicated motion from the lever to the floor, and fell into it); Balle v. Dethe wheels of a handcar); McGhee v. troit Leather Co. (1889) 73 Mich. 158, W. 823, Reversing on Rehearing 1897) through stumbling against a box the 38 S. W. 702 (lever of handcar was position of which he knew perfectly worm-eaten); Norton v. Louisville & well); Kinnare v. Chicago (1897) 70 N. R. Co. (1895) 16 Ky. L. Rep. 846, Ill. App. 106, Affirmed in (1898) 171 30 S. W. 599 (section hand injured by Ill. 332, 49 N. E. 536 (want of fence to

prevent falling from roof of house); Whatley v. Block (1894) 95 Ga. 15, 21 of fire.—Marsden v. Haigh (1884) 14 S. E. 985 (elevator well without rail- W. N. C. 526. See § 13, ante. ing). In some jurisdictions, facts like those stated in these cases are held not man v. Michigan C. R. Co. (1896) 109 to import negligence at all. See §§ 80 Mich. 251, 67 N. W. 118. and 264, ante.

(1) Defective machinery.—Birmingham v. Pettit (1892) 21 D. C. 209 (boiler exploded); Breig v. Chicago & W. M. R. Co. (1893) 98 Mich. 222, 57 N. W. 118 (emery wheel burst); Camp Point Mfg. Co. v. Ballou (1874) 71 Ill. 417 (emcry stone burst owing to imperfection in the governor); Murtaugh v. S. W. 700 (roof of drift). New York C. & H. R. R. Co. (1888) 49 (1894) 90 Iowa, 689, 57 N. W. 619 (em- handling glass). ployee familiar with the fact that an him, as a preliminary to starting it); the risk of raising it in the manner em-Poll v. Hewitt (1893) 23 Ont. Rep. 619 ployed. McLaughlin v. Camden Iron (injury caused by the giving way of a Works (1897) 60 N. J. L. 557, 38 Atl. string by which a brake was applied au- 677. tomatically to a machine).

App. 20, 49 Fed. 111 (hand caught in cogs of winch); Swoboda v. Ward (1879) 40 Mich. 420; Schroeder v. Michigan Car Co. (1885) 56 Mich. 132, 22 N. W. 220; King v. Ford River Lumber Co. (1892) 93 Mich. 172, 53 N. W. Dyeing Co. (1878) 12 R. I. 112, 34 Am. Rep. 615; Roth v. Northern Pacific Lumbering Co. (1889) 18 Or. 205, 22 gence. See §§ 76 and 264, ante.

(n) Want of means of egress in case

(o) Defective oil for lantern.-Huff-

(p) Defective appliances for dealing withwith explosives.—King v. Morgan (1901) 48 C. C. A. 507, 109 Fed. 446.

(q) Defective roof in mines.-Massie v. Peel Splint Coal Co. (1896) 41 W. Va. 620, 24 S. E. 644 (timbering of drift); Breckinridge & P. Syndicate v. Murphy (1897) 18 Ky. L. Rep. 915, 38

(r) Lack of customary appliances for Hun, 456, 3 N. Y. Supp. 483 (emery various purposes.—Quick v. Minnesota wheel not truly balanced); Becker v. Iron Co. (1891) 47 Minn. 361, 50 N. W. Baumgartner (1892) 5 Ind. App. 576, 244 (want of means to signal engineer 32 N. E. 786 (want of shifter for a when miners are about to cross the belt); Slattery v. Walker & P. Mfg. shaft in which a cage works); Hunt v. Co. (1901) 179 Mass. 307, 60 N. E. 782 Kile (1899) 38 C. C. A. 641, 98 Fed. 49 (check-valve of air hoist was too weak (no checks furnished to prevent piles to withstand the pressure put upon it); which were being loaded on cars by Gunn v. Willingham (1900) 111 Ga. means of skids, from slipping back in 427, 36 S. E. 804 (derrick gave way ow- case the tackle broke); Southern Kaning to the fact that the stay ropes were sas R. Co. v. Moore (1892) 49 Kan. 616, too small and had been corroded by be- 31 Pac. 138 (plaintiff's foot crushed by ing left in a cellar where there was an a rail which a gang adjoining his own accumulation of acid); Alexander v. were unloading, he being aware of the Tennessee & L. C. Gold & S. Min. Co. want of the usual appliances for secur-(1884) 3 N. M. 255, 3 Pac. 735 (hoisting safety in such work, and also of the ing machinery in a mine); Morris v. absence of the foreman); Myers v. W. C. Gleason (1879) 4 Ill. App. 395 (explo- DcPauw Co. (1894) 138 Ind. 590, 38 sion of boiler); Scott v. Darby Coal Co. N. E. 37 (no gauntlets furnished for

An employee injured by the fall, engine used by his employer used to get through lack of bracing, of a large "on centre," and that the engineer em- frame which such employee and others ployed to operate did not keep it "off were raising by hand, cannot recover on centre" as well as some other engineers, the ground that it was usual to have was injured by its being moved in the work of that kind done by a rigger with direction opposite to that ordered by derrick and appliances, as he assumed

servants.—McPeck (s) Incompetent (m) Unquarded machinery.—The Ma- v. Central Vermont R. Co. (1897) 25 C. harajah (1891) 1 C. C. A. 181, 1 U. S. C. A. 110, 50 U. S. App. 27, 79 Fed. 590 (servants on a certain train habitually omitted to give proper notice of its approach at the crossing where the injured servant, a section foreman, was run over); Illinois Steel Co. v. Paschke (1893) 51 Ill. App. 456; St. Louis Press 10; Kelley v. Silver Spring Bleaching & Brick Co. v. Kenyon (1893) 57 Ill. App. 640; Lake Shore & M. S. R. Co. v. Stupak (1886) 108 Ind. 1, 8 N. E. 630; Chicago & E. I. R. Co. v. Beatty (1895) Pac. 842. In many jurisdictions the 13 Ind. App. 604, 40 N. E. 753, 42 N. E. want of guards does not import negli- 284; Kansas P. R. Co. v. Peavey (1885) 34 Kan. 472, 8 Pac. 780; Hatt

275, ante, as those caused by the defective quality or attributes of the instrumentalities themselves.<sup>1</sup>

Cas. 4th Series, 368.

quite illogical.

(t) Insufficient number of servants. -Skipp v. Eastern Counties R. Co. (1853) 9 Exch. 223, 23 L. J. Exch. N. S. 23, 3 C. L. Rep. 185; Saxton v. Hawksworth (1872) 26 L. T. N. S. 851; P. R. Co. v. Minnick (1893) 6 C. C. A. 387, 13 U.S. App. 520, 57 Fed. 362 (engineer knew there were no track walk-210, 43 Atl. 629; Richmond & B. R. Co. Wilson V. Boyle (1890) 17 Sc. Sess. Cas. v. Mitchell (1893) 92 Ga. 77, 18 S. E. 4th Series, 62 (horse insufficiently 290; Schnibbe v. Central R. & Bkg. Co. trained).
(1890) 85 Ga. 592, 11 S. E. 876; Swift (v) Breach of statutory duty.—White & Co. v. Rutkowski (1897) 167 Ill. 156, v. Wittemann Lithographic Co. (1892) 47 N. E. 362, Reversing (1896) 67 Ill. 131 N. Y. 631, 30 N. E. 236 (unguarded App. 209; Pointon v. St. Louis, A. & T. machinery).

II. R. Co. (1900) 90 Ill. App. 623 (train An employee of one who conducts without a conductor): Way y. Chicago, his business in a way more bagardous.

v. Nay (1887) 144 Mass. 186, 10 N. E. v. Fitzpatrick (1877) 31 Ohio St. 479 807; Daris v. Detroit & M. R. Co. (want of watchman to prevent collision (1870) 20 Mich. 105, 4 Am. Rep. 364; of engines at turntable); Mad River & MeDermott v. Hannibal & St. J. R. Co. L. E. R. Co. v. Barber (1856) 5 Ohio (1885) 87 Mo. 285; Haskin v. New York C. & H. R. R. Co. (1873) 65 Barb. Delaurare, L. & W. R. Co. (1892) 151 129, Affirmed (1874) in 56 N. Y. 608; Pa. 74, 25 Atl. 37 (crossing not proGulf, C. & S. F. R. Co. v. Schwabbe tected by watchman); Gulf, C. & S. F. (1892) 1 Tex. Civ. App. 573, 21 S. W. R. Co. v. Harriett (1891) 80 Tex. 73, 15 706; B. Lantry Sons v. Lowrie (1900; S. W. 556; Robinson v. Houston & T. C. Tex. Civ. App.) 58 S. W. 837; R. Co. (1877) 46 Tex. 540; Eddy v. M'Charles v. Horn Silver Min. & Smelting Co. (1894) 10 Utah, 470, 37 Pac. 733; Latremouille v. Bennington & R. R. Co. (1891) 63 Vt. 336, 22 Atl. 656; R. Co. (1891) 63 Vt. 336, 22 Atl. 656; M'Ternan v. White (1890) 17 Sc. Sess. (want of watchman to guard car under Waterman v. White (1890) 17 Sc. Sess. (want of watchman to guard car under was the agent of the master in respect 807; Daris v. Detroit & M. R. Co. (want of watchman to prevent collision was the agent of the master in respect In Chambers v. Willey (1872) 3 Vict. to seeing that a sufficient number of L. Rep. (L.) 17, the court drew a disservants was provided under the given tinction between an incompetent and a circumstances, his failure to perform that careless servant, holding that a fellow duty properly is an additional reason servant who remained at work with the for declaring the action not to be mainformer kind of servant, knowing his in-tainable. Texas & P. R. Co. v. Smith competency, did so at his own peril, but (1895) 31 L. R. A. 321, 14 C. C. A. 509, that, in the case of a careless servant, 30 U. S. App. 176, 67 Fed. 524 (train such continuance of work was not a bar on which railway official charged with to his action. No authorities are cited care of bridges fell through a burning for this distinction, which is clearly bridge. Held that, as he knew there was no watchman at the bridge, there could be no recovery for his death, both because he assumed the risk and was at fault in not stationing a watchman at the bridge).

(u) Vicious or otherwise dangerous Slavens v. Northern P. R. Co. (1899) animals.—Farley v. Picard (1894) 78 38 C. C. A. 151, 97 Fed. 255; Texas & Hun, 560, 29 N. Y. Supp. 802 (servant bitten by vicious dog); Fraser v. Hood (1887) 15 Sc. Sess. Cas. 4th Series, 178 (servant kicked by vicious horse); ers or night watchmen at a bridge); Green & C. Street Pass. R. Co. v. Bres-Long v. Coronado R. Co. (1892) 96 Cal. mer (1881) 97 Pa. 103 (same facts); 269, 31 Pac. 170; Creswell v. Wilming-Crichton v. Keir (1863) 1 Sc. Sess. Cas. ton & N. R. Co. (1899) 2 Penn. (Del.) 3d Series, 407 (old and wornout horse); 210, 43 Atl. 629; Richmond & D. R. Co. Wilson v. Boyle (1890) 17 Sc. Sess. Cas.

M. R. Co. (1900) 90 III. App. 623 (train 'An employee of one who conducts without a conductor); Way v. Chicago his business in a way more hazardous & N. W. R. Co. (1888) 76 Iowa, 393, 41 than other ways adopted by other em-N. W. 51; Atchison, T. & S. F. R. Co. ployers assumes the risk of the more v. Schroeder (1891) 47 Kan. 315, 27 hazardous method, when he knows the Pac. 965; Southern Kansas R. Co. v. danger attendant upon such manner of Drake (1894) 53 Kan. 1, 35 Pac. 825; prosecuting the work. Reed v. Stock-Boltimore & O. R. Co. v. State (1874) meyer (1896) 20 C. C. A. 381, 34 U. S. 41 Md. 268; Lake Shore & M. S. R. Co. App. 727, 74 Fed. 186; Bonnett v. Gal-

279. Limits of the doctrine.—(See also §§ 284-289, infra.)—It is obvious that the appropriate domain of the doctrine, as applied in cases of a class discussed in § 278, supra, may often be extremely difficult to define with reference to the area of facts within which the principle that a servant does not assume the risk of any given

because of seams therein and the hammering upon the wedges at the top).

On this ground the action has been held not warrantable under the follow-

ing circumstances:

(a) Habitual violation of statutory duty.—Bengtson v. Chicago, St. P. M. & O. R. Co. (1891) 47 Minn. 486, 50 N. W. 531 (trackman aware of the habitual transgression of an ordinance as to

speed of trains).

(b) Defective or improper rules.—
Georgia R. & Bkg. Co. v. Rhodes (1876)
56 Ga. 645; Wright v. New York C. R.
Co. (1862) 25 N. Y. 562; Baltimore &
O. R. Co. v. State (1874) 41 Md. 268
(conductor injured by a collision due to regulations which provided for an inadequate number of men on trains of a particular class); McGrath v. New York & N. E. R. Co. (1884) 14 R. I. 358 (1885) 15 R. I. 95, 22 Atl. 927 (section hand got on a hand car without objection, knowing that no flags had been sent out to signal coming trains, and that under the rules of the company a train might be expected in either direction without signals being shown for it); Peoria, D. & E. R. Co. v. Puckett (1892) 42 Ill. App. 642 (rules requirdangerous manner).

(c) Habitual violation of rules.— Lake Shore & M. S. R. Co. v. Knittal (1878) 33 Ohio St. 468; Louisville & N. competent evidence to prove an assumption of the additional risk thereby incurred, a compliance with an exceptional order which is suddenly made, and which merely constitutes a departure pro hac vice from the rule, does not con-

gency in guestion.—Haskin v. New site effect held erroneous). Vol. I. M. & S—42

veston, H. & S. A. R. Co. (1895) 89 York C. & H. R. R. Co. (1873) 65 Barb. Tex. 72, 33 S. W. 334 (stone inside 129, Affirmed in (1874) 56 N. Y. 608 which servant was drilling fell on him (no provisions to protect servants in (no provisions to protect servants in freight yards against moving trains); Little Rock & M. R. Co. v. Barry (1898) 43 L. R. A. 349, 28 C. C. A. 644, 56 U. S. App. 37, 84 Fed. 944 (rules did not provide for notice to trainmen of the movements of other trains, risk of the movements of other trains; risk of the movements of other trains; risk of meeting trains assumed); Illinois C. R. Co. v. Neer (1887) 26 Ill. App. 356 (1889) 31 Ill. App. 126 (general practice of company was not to notify engineers as to the position of trains ahead of them); Gulf, C. & S. F. R. Co. v. Williams (1897; Tex. Civ. App.) 39 S. W. 967.

(e) Dangerous methods of moving railway cars.—Kelley v. Chicago, M. & St. P. R. Co. (1881) 53 Wis. 74, 9 N. W. 816 (custom of permitting cars to run on the tracks of a yard without a brakeman on them); Fordyce v. Lovman (1893) 57 Ark. 160, 20 S. W. 1090 (injury caused by known custom of pushing flat cars ahead of the engine); Carr v. North River Constr. Co. (1888) 48 Hun, 266 (injury caused by fact that the cars of a construction train had no check chains, and that the train was backed); Kennedy v. Pennsylvania K. Co. (1889) 1 Monaghan, 271, 17 Atl. 7 (1892) 42 Ill. App. 642 (rules requir- (trackman struck by gravel train ing brakeman to disconnect cars in a which, like many others he had seen, was pushed with engine reversed):
Lake Shore & M. S. R. Co. v. Knittal
(1878) 33 Ohio St. 468 (custom of making "flying switches"); Youll v. Sioux City & P. R. Co. (1885) 66 Iowa, 346, 23 N. W. 736 (same risk; brakeman in-

making a coupling which is unusually dangerous, assume the risk attending the making of it without signals, merely because he has the right to reduce the danger to a minimum by giving signals to the engineer, where he gives the proper signals and they are not heeded. 

defect of which he has no knowledge, actual or constructive, shall be treated as controlling. The cases bearing upon the question thus indicated are not harmonious.

There is not, and can scarcely be, any dispute as to the correctness of the position that the rule laid down as to the effect of the servant's

collisions between trains and vehicles at crossings.—Bancroft v. Boston & M. R. Co. (1893) 67 N. H. 466, 30 Atl. 409 railway tracks.—Gaffney v. New York (freight cars were left, as was customary, on a siding in such a position as to Atl. 284 (pile of lumber); Bengtson v. obstruct the view of a crossing, the re-Chicago, St. P. M. & O. R. Co. (1891) sult being that a switchman while rid-47 Minn. 486, 50 N. W. 531 (pile of ing on an engine came into collision logs prevented trackman's getting out with a cart which had stopped on the of way of train). crossing); Rumsey v. Delaware, L. & W. R. Co. (1892) 151 Pa. 74, 25 Atl. 37 (same accident).

(g) Lack of cautionary signals to (g) Lack of cautionary signals to Protect employees working on railway R. Co. (1894) 56 Mo. App. 630 (untracks.—O'Korke v. Union P. R. Co. usual and extra-hazardous method of (1884) 22 Fed. 189 (no flag set; secloading ties); Cleveland, C. C. & St. L. tion man on truck injured); Marean v. R. Co. v. Carr (1901) 95 Ill. App. 576 New York, S. & W. R. Co. (1895) 167 (rails loaded on moving car).

Pa. 220, 31 Atl. 562 (no signals furnished to protect car inspector).

(h) Custom of leaving cars on sidings without stop blocks.—Hewitt v. Mass. 110, 44 N. E. 122 (tank slipped Flint & P. M. R. Co. (1887) 67 Mich. (i) Dangerous customs in regard to cushed the hand of a servant who had entire charge of the car); Schultz v.

coupling cars.—Kroy v. Chicago, R. I. & cars in motion). The fact that the plaintiff was not turnished, as required by the rules of the company, with a (n) Heavy objects test in a possible to the coupling stick, will not entitle him to where they are likely to be knocked down.—Assop v. Yates (1858) 2 Hurlst. plaintiff was not furnished, as required to load it). ing a coupling by hand, where that is & N. 768, 27 L. J. Exch. N. S. 156 (mathe ordinary practice of the employees. chine left where it was likely to be Louisville & N. R. Co. v. Bryant (1893) struck down by passing vehicles). 15 Ky. L. Rep. 181, 22 S. W. 606.

sumption). See also *Williams* v. *St. Louis & S. F. R. Co.* (1893) 119 Mo.
316, 24 S. W. 782 (car repairer had worked in the particular yard for some banks of earth, etc.—Simmons v. Chi-years, and knew that, in repairing cars, cago & T. R. Co. (1884) 110 Ill. 340 small pieces of wood and iron were apt (dangerous method of taking down a

(f) Arrangements creating a risk of to fall upon the roadbed and become

concealed in the grass).

(k) Dangerous objects deposited near & N. E. R. Co. (1887) 15 R. I. 456, 7

(1) Improper methods of getting loads onto railway cars.—Illinois C. R. Co. v. Reardon (1894) 56 Ill. App. 542; Claybaugh v. Kansas City, Ft. S. & M.

(i) Dangerous customs in regard to entire charge of the car); Schultz v. upling cars.—Kroy v. Chicago, R. I. & Chicago & N. W. R. Co. (1887) 67 Wis. P. R. Co. (1871) 32 Iowa, 357 (plaintiff 616, 58 Am. Rep. 881, 31 N. W. 321 had himself actively contributed to the (trackman injured by piece of coal establishment of the custom of coupling which fell from an overloaded tender. where he knew that it was customary so

(o) Heavy objects carelessly piled .-(j) Custom of allowing loose objects Brinkley Car Works & Mfg. Co. v. to remain on a railway track.—An as-Levis (1900) 68 Ark. 316, 57 S. W. sumption of the risk is inferred where 1108 (plaintiff himself had testified a brakeman who knew that it was the that he knew the danger of the method custom to leave ashes upon the track for of piling adopted by the employer); some time before clearing them away McFadden v. Campbell (1895) 13 Misc. stumbled on them. Hughes v. Winona 158, 34 N. Y. Supp. 136 (plaintiff himde St. P. R. Co. (1880) 27 Minn. 137, 6 self testified that he knew that the man-N. W. 553 (evidence, however, was here ner in which a tier of bales of rope had held not to justify inference of such asbeen piled was unsafe); Sonnefield v. been piled was unsafe); Sonnefield v.
Mayton (1897; Tex. Civ. App.) 39 S.
W. 166 (lumber negligently piled).
(p) Improper methods of excavating

knowledge of the methods of work does not govern the case, merely because it is shown that the master or his representative had previously been, to the servant's knowledge, guilty of several acts of negligence similar to that which caused the injury, and that to entail a disability to recover on this ground the acts must, at all events, have been repeated so often and under such circumstances as to establish what may reasonably be described as a customary method of doing business, and the servant must have had notice of such customary method.2

bank); Naylor v. Chicago & N. W. R. required of firemen, and when his unfit-Co. (1881) 53 Wis. 661, 11 N. W. 24 ness was known, or should reasonably (similar facts); Larsson v. McClure have been known, to the representative (1897) 95 Wis. 533, 70 N. W. 662 (ex- of the company). perienced employee excavating at the (t) System exposing servant to inperienced employee excavating at the (t) System exposing servant to inbottom of a frozen sand bank assumes jury from falling or flying objects.—the risk of injury by its falling down Planters' Oil Co. v. Mansell (1897; upon him, where he knows that blasting Tex. Civ. App.) 43 S. W. 913 (servant ferent ground, see § 269, ante.

(q) Trenches not shored.—Regan v. Palo (1898) 62 N. J. L. 30, 41 Atl. 364 (soil was of a kind likely to slip, if not

shored).

A laborer employed in digging a sewer trench through made ground, which was shored up by the workmen to keep it from falling, cannot recover for injuries sustained by a cave-in and the fallfailure to drive piling down to the bottom of the trench, because of the stone, which might have been removed, where he continued to work with knowledge. ing on him of a large stone projecting from the side of the trench, due to the failure to drive piling down to the bot-

when laborer went back to work).

incompetent management, only when master ought not to be permitted to go his fitness was below what ought to be free from liability on the ground that

has been resorted to, to break down the injured by a bale of cotton thrown from bank, and has witnessed and under-stands the effect produced by such blast-ing in shattering the bank). For other injured by the want of a guard to arrest decisions involving similar facts, but flying pieces of iron around a place denying the right of recovery on a dif-where iron castings were broken by the fall of a heavy weight).
(u) Custom of leaving hatches open

on ships .- A longshoreman who knows that it is customary to leave the hatches of ships open when they are coaling takes the risk of being injured by that open condition. The Saratoga (1898) 87 Fed. 349, Reversed in 36 C. C. A. 208, 94 Fed. 221, but not on this

point.

he continued to work with knowledge of workmen could not hear the signals the facts. Golden v. Sieghardt (1898) which were necessary for the safe per-33 App. Div. 161, 53 N. Y. Supp. 460. formance of their work of loading iron), (r) Careless methods of doing work the court said: "When the cause of the which requires the use of explosives.— injury is the direct act of the master, Allard v. Hildreth (1899) 173 Mass. 26, or his representative, it cannot be said 52 N. E. 1061 (unexploded charge left that the servant's remaining in the employment is the proximate cause of the (s) Custom of certain employees to injury, even though the servant may leave their work temporarily to substi- have known that the master or his reptutes.—Louisville & N. R. Co. v. Kelly resentative had frequently done the (1894) 11 C. C. A. 260, 24 U. S. App. same or similar acts which imperiled his 103, 63 Fed. 407 (brakeman knowing of a prevailing custom of engineers to causes the injury is the wrongful act leave the firemen in charge of their en- of the master or of his representative, gines when switching or similar work is the result of the exercise of the will of to be done, held entitled to recover from the one or the other, and hence the proxthe company for injury by a fireman's imate cause of the effect from which the

But even in cases where such a customary method is deducible from the evidence, it seems necessary, in order to prevent a dangerous interference with the operation of the generic principle which imposes upon the master the duty of providing and maintaining proper instrumentalities, to hold that an action founded on the existence of a defect which constantly remains as a possible source of injury to certain servants, as long as the conditions which constitute the defect are left unremedied, cannot be barred by showing that the master had habitually failed to exercise a proper supervision over the class of instrumentalities to which the one in question belongs. For this position there is the high authority of the Supreme Court of the United States, which has emphatically declared that "no reason can be found for, and no authority exists supporting, the contention that an employee, either from his knowledge of the employer's methods of business, or from a failure to use ordinary care to ascertain such methods, subjects himself to the risks of appliances being furnished which contain defects that might have been discovered by reasonable inspection."3 Similarly, it has been denied that a servant's assump-

with this principle was held to have been rightfully refused in the case of on the part of the master, will not cast a brakeman injured by the want of on the employee the risk of subsequent blocking in one of the frogs in a particular yard, the court said: "If the "Texas & P. R. Co. v. Archibald ticular yard, the court said: "If the defendant's habit, custom, or mode of doing business at that yard was to protect the frogs by blocks,—if that was the rule of its conduct,—Sherman had a to rest on the assumption that appliantice to the contrary, that such mode or tice to the contrary, that such mode or coverable by proper inspection, and is custom had been followed in respect to not submitted to the danger of using any particular frog. He had a right to appliances containing such defects, be-assume, in the absence of such notice, cause of his knowledge of the general to the general rule adopted by it for its carrying on his business, or because by business, although he may have known ordinary care he might have known of some instances in which it had not done the methods, and inferred therefrom so. The omission at that yard to put in that danger of unsafe appliances might the blocks, not as a general rule, but in

the servant knew he had, before the ployee, by continuing in the employment the servant knew he had, before the ployee, by continuing in the employment happening of the injury, done acts such as that from which the injury resulted, ise on the part of the master to change but still remained in his service."

In Sherman v. Chicago, M. & St. P. to that mode of doing the business. A R. Co. (1885) 34 Minn. 259, 25 N. W. single instance, or any number of inspart of the principle was held to have mode of business, of culpable negligence.

that the defendant had acted according methods adopted by the employer in arise. The employee is not compelled to the blocks, not as a general rule, but in arise. The employee is not compelled to isolated instances, would not make out a case like that of the *Hughes Case* [1880] 27 Minn. 137, 6 N. W. 553, their adequacy. He has a right to as (see note 1, subd. (j) supra)], of an sume that the employer will use reasonunsafe and careless custom or habit of able care to make the appliances safe, doing business, known, or which by the and to deal with those furnished relyuse of his senses ought to be known, to ing on this fact, subject, of course, to an employee; in which case the emther the exception which we have already tion of the risk of a latent defect is a necessary inference from the fact that he knew that the defective appliance had not been inspected.4

On the other hand, the supreme court of New Hampshire has not shrunk from facing the consequences of the opposite view, and has recently denied recovery on the specific ground that the servant must be taken to have assumed the risk of a certain defect, for the reason that he was familiar with the employer's system of inspection, and understood the danger arising from such a defect as that which existed as a result of the failure to inspect the appliance in question

stated, by which, where an appliance is to the business, but of the harm possibly to result from the employer's neglectful method." It was accordingly deemed to 910. any defect in said car."

In Texas it has been held proper to furnished an employee, in which there refuse a requested instruction that the exists a defect known to him or plainly servant—a car repairer—took the posiobservable by him, he cannot recover for tion subject to all risks pertaining to an injury caused by such defective ap- the service, and, if he knew of the cuspliance, if, with the knowledge above tom or manner in which entry was made stated, he negligently continues to use upon the repair tracks, he assumed all it. In assuming the risks of the parrisks incident to that custom. Texas ticular service in which he engages, the & P. R. Co. v. Eberheart (1897) 91 Tex. employee may legally assume that the 321, 43 S. W. 510, Affirming (1897; employer, by whatever rule he elects to Tex. Civ. App.) 40 S. W. 1060. Comconduct his business, will fulfill his legal duty by making reasonable efforts not assume the risks incident to the negal duty by making reasonably safeligent inspection of cars even they be a furnish appliances reasonably safeligent inspection of cars even they be here. to furnish appliances reasonably safe ligent inspection of cars, even though he for the purposes for which they are inmay know that such is the manner of tended; and whilst this does not jusinspection (Missouri, K. & T. R. Co. v. tify an employee in using an appliance Chambers [1897] 17 Tex. Civ. App. 487, which he knows to be defective, or re-lieve him from observing patent defects the injured servant knew that a railtherein, it obviously does not compel road company had no car inspector in a him to know or investigate the employ-large town does not charge him with an er's modes of business, under the penalty, if he does not do so, of taking the the want of inspection (Missouri, K. & risk of the employer's fault in furnish-risk of the employer's fault in furnish-ing him unsafe appliances. . . . In-deed, the ultimate result of the argu-ment of the plaintiff in error is to en-tirely absolve the employer from the discovered if a proper inspection had duty of endeavoring to supply safe ap- been made, an instruction on the theory pliances, since it subjects an employee to of assumed risk, which excluded his reall risks arising from unsafe ones, if covery if he knew that the car had been the business be carried on by the eminspected in the same manner in which ployer without reasonable care, and the the cars of other roads were inspected, employee knew, or by diligence could regardless of whether or not such inhave known, not of the dangers incident spection was sufficient, was properly refused. Galveston, H. & S. A. R. Co. v. Nass (1900; Tex. Civ. App.) 57 S. W.

be proper to strike out the italicised \*Union Stock-Yards Co. v. Goodwin words from a requested instruction to (1898) 57 Neb. 138, 77 N. W. 357 the effect that if the jury believed "it (brakeman here was not under any duty was the custom of defendant company to inspect the defective brake which not to inspect or repair [foreign] cars caused his injury). The court distin-when thus brought over to be loaded guished Arnold v. Delaware & H. Canal and returned, and the plaintiff knew Co. (1890) 125 N. Y. 15, 25 N. E. 1064, this custom, or could have known it by on the ground that the defect (a broken the exercise of ordinary care, then he drawhead) was obvious, and that the assumed the risk of being injured by plaintiff's business was to handle damaged cars.

with sufficient closeness.<sup>5</sup> This conclusion was arrived at without any consideration, so far as the report shows, of the authorities which look in the opposite direction. The present writer regards the case as one of very pernicious tendency, which should not be followed.

There is some authority for the view that a mere knowledge of the existence of certain dangerous conditions will not prevent recovery, where the servant had no reason to anticipate that he would ever be brought into such local relations with them as to be exposed to the risk of injury; 6 or where the occurrence which eventually caused the injury was one which was so unlikely that he was under no obligation to anticipate it.7

The only logical ground on which these decisions seem to be sustainable is that it could not be said, as a matter of law, that the

he ought to have quit the defendant's any, was immaterial. service. The case does not call for any Though a trackman knows that a mate, or remote cause. Here all the of the cars, he is not bound to antici-

\*Leazotte v. Boston & M. R. Co. after learning of a defect in the brake (1899) 70 N. H. 5, 45 Atl. 1084 (de- of a hand car, has himself changed to fective brake rod on foreign car; defect another, does not, as matter of law, aswas not easily discoverable by servant, sume the risk of injury upon the latter who knew that the inspectors only excar from being run into by the former amined brakes on foreign cars to the exbecause of such defect. International tent of seeing that the chains were attached to the rods).

A. G. N. R. Co. v. Williams (1896; Tex. Civ. App.) 34 S. W. 161. This appears <sup>6</sup> A miner is not prevented from recov- to be rather a dubious application of the ering for injuries from props not prop- principle of the case last cited, if we erly set and fastened, and knocked down suppose that the servant knew that the by an unruly and vicious mule coming hand car still remained in use. The dein contact with them, by continuing to cision seems to be inconsistent with an-work in the place, with knowledge of other rendered by the same court in the character of the mule, without obthe same year,—Texas & P. R. Co. v. jection or complaint, where he had no Johnson (1896; Tex. Civ. App.) 34 S. jection or complaint, where he had no Johnson (1896; Tex. Civ. App.) 34 S. charge or care of the mule. Western W. 186, where it was held error to in-Coal & Min. Co. v. Ingraham (1895) struct a jury that a freight conductor 17 C. C. A. 71, 36 U. S. App. 1, who continued in the service of the company after learning of the incompetency would require a great stretch of the range of an extra freight conductor did not rule [as to assumption of known risks] assume the risk of colliding with a train . to say the plaintiff should have anticipated that this mule might at own, provided he did not know, actually some time be brought to the room in the mine where the plaintiff was at work, and that while there the mule would come in contact with the timbers which 89 Tex. 519, 35 S. W. 1042. But the supported the roof of the mine, and ground assigned for the reversal was supported the roof of the mine, and ground assigned for the reversal was knock them down because they were in- merely that there was no evidence to securely set, and that as a result of all show that the servant was aware of the this the roof would fall and he might be incompetency, and that for this reason injured, and that, anticipating all this, the error of the trial judge, if there was

discussion of what is a primary, proxi- track is so rough as to cause a swaying causes of the accident, whether remote pate the contingency of being struck by or proximate, were the result of the defendant's negligence, which the plaintiff
was not required to anticipate."

It has been held by the Texas court
of appeals that a section hand who, App. 242, 45 Pac. 112.

servant possessed that full comprehension of the risk which must be established in order to let in the defense that it was assumed.

279a. Assumption of risk not predicable from knowledge of the conditions alone.—(Compare § 241, ante, and §§ 296-298a, 319, 320, 372, post.)—To bring a case within the scope of the doctrine now under discussion, it must be shown that the servant possessed a sufficiently exact appreciation of the nature and extent of the danger in question to enable him to estimate the possibilities of his environment in so far as they affected his bodily safety. The absence of that appreciation is logically incompatible with the hypothesis that, in undertaking or continuing in the employment, he exercised that intelligent and deliberate consent which is one of the essential elements involved in the conception of an assumption of a risk.1

The first step in the process of establishing this appreciation is to show that the servant was chargeable with a knowledge of the material conditions which were the immediate cause of his injury. Manifestly, he cannot be held to have assumed a risk where he was ignorant of the facts on which a proper appreciation of the risk depended.<sup>2</sup>

he should have known of it).

A railroad brakeman does not, by failure to object to the substitution of the absence of knowledge to the contrary. fireman for the engineer, assume additional hazards on account of such substitution, where there is no evidence to show that the plaintiff had reason to (1896) 4 App. Div. 202, 38 N. Y. Supp.

1 "When we say that a man apprebelieve the fireman to be incompetent. ciates a danger, we mean that he forms Nicholaus v. Chicago, R. I. & P. R. Co. a judgment as to the future, and that (1894) 90 Iowa, 85, 57 N. W. 694. An his judgment is right." McKee v. employee who does not know of the ex-Tourtellotte (1896) 167 Mass. 69, 48 L. istence of a trap door in the floor of a R. A. 542, 44 N. E. 1071. building in which she works does not "One does not voluntarily assume a summe the risk from the door being risk, within the meaning of the rule left open without notice or warning to that debars a recovery, when he merely her. Hogarth v. Pocasset Mfg. Co. knows there is some danger, without (1897) 167 Mass. 225, 45 N. E. 629. appreciating the danger. Nor does he, Where a telegraph pole on which an empty he other hand precessarily feel to pleave were preceded. on the other hand, necessarily fail to ployee was engaged fell from a cause appreciate the danger because he hopes, which could not have been reasonably and even expects, to encounter it with- anticipated by the plaintiff, a contention out injury. If he comprehends the na- that the rule as to the employer's furture and the degree of the danger, and nishing a safe place was inapplicable, voluntarily takes his chance, he must because, the line being decayed, the abide the consequences, whether he is employee was engaged in a known danfortunate or unfortunate in the result gerous work, cannot prevail. Riker v. of his venture." Mundle v. Hill Mfg. New York, O. & W. R. Co. (1901) 64
Co. (1894) 86 Me. 405, 30 Atl. 16. App. Div. 357, 72 N. Y. Supp. 168. A

2 Breen v. Field (1892) 157 Mass. 277, locomotive engineer does not assume the 31 N. E. 1075 (trench had recently be- risk of the fall of a sufficient amount of come unsafe owing to a washout); Texas shale from an overhanging bluff to de-& P. R. Co. v. Crow (1893) 3 Tex. Civ. rail the train, because he knows that App. 266, 22 S. W. 928 (spout of rail-small quantities not sufficient to endanway tank out of repair; nature of server ger the train sometimes fall on the ant's work rendered it doubtful whether track; and he has the right to assume

If the conditions are such as to show more than one distinct breach of duty on the master's part, and consequently the existence of more than one prima facie cause of action, his knowledge of each and all the abnormal conditions must be established in order to bar the servant's claim. A servant does not, because he knows of one defect, take the risk of another of which he has no knowledge, and if both concur in producing his injury, he is entitled to recover if the accident would not have happened but for the unknown defect.3

591, where a motorman did not know imperfect action of the slide of a coal that the reversal of the motor and the chute, and partly by a defect in the application of the brakes were insuf- apron, where there is no evidence that ficient to prevent an electric car from the servant had knowledge of the latter running away, it was held error to re- defect. Great Northern R. Co. v. Kaject evidence showing that a "sandman" sischke (1900) 43 C. C. A. 626, 104 Fed. was not supplied, and that the motor- 440. Knowledge of a railway employee man was not aware of the risk arising run over by cars switched in upon a

from this circumstance.

Co. (1900) 175 Mass. 496, 56 N. E. 704; done, will not preclude recovery for in-Missouri P. R. Co. v. Somers (1890) 78 juries inflicted, unless he also knew that Tex. 439, 14 S. W. 779 (arguendo); adequate warning of their approach Thompson v. Missouri P. R. Co. (1897) would not be given. International & 51 Neb. 527, 71 N. W. 61 (known danger of attaching ordinary car to one 623, 18 S. W. 681. A railroad brakewith Miller coupling increased by proparation of the man's knowledge of a custom to load jecting bolt not known to servant); cars with machinery without providing Coughlan v. Cambridge (1896) 166 footboards to pass over them does not Mass. 268, 44 N. E. 218 (workman employed on a railroad track which is, to his knowledge, in a rough condition, place such cars in a position in the train

specific defect in its material. Mexican was unaware of its approach. C. R. Co. v. Murray (1900) 42 C. C. A. An injury received by a section hand 334, 102 Fed. 264. The defense of assumption of risks is not a bar to an car off the track when a train suddenly action for injuries caused partly by the appeared around a curve a short dis-

side track where he was painting cars, <sup>3</sup> Packer v. Thomson-Houston Electric that such switching would probably be Co. (1900) 175 Mass. 496, 56 N. E. 704; done, will not preclude recovery for inployed on a railroad track which is, to risk therefrom, where it is not usual to his knowledge, in a rough condition, place such cars in a position in the train does not assume the risk caused by run- where brakemen are required to pass ning the train at an unreasonable over them. Hosic v. Chicago, R. I. & speed); Lawhorn v. Millen & S. R. Co. P. R. Co. (1888) 75 Iowa, 683, 37 N. (1895) 97 Ga. 742, 25 S. E. 492 (sim- W. 963. A section hand familiar with ilar decision as to brakeman); W. C. the fact that trains are habitually run De Pauw Co. v. Stubblefield (1892) 132 at an unlawful speed at a certain place Ind. 182, 31 N. E. 796 (heavy truck assumes the risks resulting from that which servant was wheeling broke rate of speed; but he does not assume through the cover of a pit; servant the risk due to the failure of the engiknew of the pit; he did not know of the neer to give him a signal which pecuweakness of the cover); Moran v. Har- liar circumstances may require. Schulz ris (1884) 63 Iowa, 390, 19 N. W. 278 v. Chicago, M. & St. P. R. Co. (1894) (assumption of the risk of defects in 57 Minn. 271, 59 N. W. 192. There it machinery does not necessarily imply was held to be error to take the case an assumption of the risk of carelessness in its operation).

A workman assisting in raising a the noise of which might have prevented bridge span by means of loops of track the injured servant from hearing the steel assumes the risk of one of them approach of that which struck him, and breaking by reason of its insufficient it was therefore an open question wheth-strength, where he has already seen er the persons operating the latter train, two of them break, but does not assume if they had been using due care, would the risk of its breaking by reason of a not have discovered that the deceased

The second step in the demonstrative process is to establish the servant's appreciation of the danger produced by the abnormal condi-

brakeman, killed while the train was 894, 38 S. E. 91. passing under a bridge, relied upon the An employee killed while at work in Co. (1901) 167 N. Y. 208, 52 L. R. A. matter of law, assume the risk of barof a collapse of the sides of a trench, precipitated down the elevator shaft. owing to the weakness of underlying The case was sent back for trial, and on strata, he does not assume the danger the second appeal-(1893) 70 Hun, 530,

tance away is not due to an assumed the existence of which he has no opporrisk, where the accident occurred by reatunity to ascertain. Banks v. Effingson of the fact that the colaborer beham (1895) 63 Ill. App. 223. A servcame frightened and let go his hold. ant who is unable to recover, because That he should thus take fright was of his knowledge of the animal's disponot an event which the injured servant sition, for injuries caused by a vicious was bound to anticipate. International horse, may recover on the theory that a & G. N. R. Co. v. Newburn (1900; Tex. proper harness to drive such a horse Civ. App.) 58 S. W. 542, Judgment Af- was not supplied, and that he did not firmed (1901) 94 Tex. 310, 60 S. W. 429 know that the harness actually supplied (only questions of practice discussed). was unsafe and unsuitable. Cooper v. It is a question for the jury whether a Portner Brewing Co. (1900) 112 Gz.

bridge guard to warn him, and therefore a shaft, by the fall of a car from above, did not assume the risk as an incident of was not chargeable with knowledge of his employment, where the jury might the danger, although he may have find from the evidence that he mounted known that the track leading to the the car before reaching the bridge guard, mouth of the shaft was down grade, and, receiving no warning from it, did that the car was not locked when not in not change his position prior to the use, and that the stop block at the end accident. Hardy v. Boston & M. R. Co. of the track was insufficient, when it is (1896) 68 N. H. 523, 41 Atl. 179. The not shown that he knew that children court pointed out that the risk assumed frequently rode down the grade on the by the servant was not that of passing car, which was the cause of the acciby the servant was not that of passing car, which was the cause of the acci-under the bridge without any means for dent. Knight v. Sadtler Lead & Zino reminding him of its proximity, but Co. (1898) 75 Mo. App. 541. Where an that of passing under the bridge pro-employee's eye was injured by a twig tected by a guard such as he knew the projecting from débris loaded on a truck one in question to be. A railroad brake- in a dark hall through which he had to man does not assume the risk of coming pass in going from his work, and such in contact with an overhead bridge employee knew that trucks were placed while his back is turned toward it, in in the hall, but did not know that they applying the brakes in discharge of his were loaded with  $d\acute{e}bris$  every evening, duty in an effort to stop the train, and never had seen them at the place of where the train would stop before the accident, and employees were forit reached the bridge if the brakes bidden to bring matches into the buildwere in good order, and he is ignorant ing, or to leave before dismissal bell of their inefficiency. Beard v. Chesa-rang, before which the lights in the hall peaks & O. R. Co. (1893) 90 Va. 351, were usually turned out, the evidence 18 S. E. 559. The fact that a lineman was not sufficient to show an assumption knew that a pole which he was about of risk by the servant, as a matter of to use did not belong to the telephone law. *Dorney* v. *O'Neill* (1901) 60 App. company by which he was employed did Div. 19, 69 N. Y. Supp. 729. In *Free*-not relieve the company from liability man v. Glens Falls Paper Mill Co. for defects in such pole, where the line- (1891) 61 Hun, 125, 15 N. Y. Supp. man was not chargeable with notice of 657, it was held that a servant who an arrangement by which his employer went on working with knowledge that did not have the right to inspect or re- there were no automatic doors to an pair the poles. McGuire v. Bell Teleph. elevator in the building did not, as a 437, 60 N. E. 433, Affirming (1900) 66 rels being left, without his knowledge, N. Y. Supp. 1137. Although a servant on the upper floor in such a position may understand and assume the danger that they were liable to be loosened and of such collapse at a particular place 53 N. Y. Supp 786 (1894) 142 N. Y. where there are deposits of quicksand 639, 37 N. E. 567)—judgment was en-

tions in question. That this is the alternative and crucial element upon which the defense depends is sufficiently apparent from the terminology by which it is described.4 In the subjoined note are cited a large number of cases in which the courts have applied or recognized the principle that the servant's knowledge of a defect is a bar to his action only when it also appears that he understood the risk created by that defect.<sup>5</sup> Others which are virtually based upon

In Beardsley v. Minneapolis Street R. Co. (1893) 54 Minn. 504, 56 N. W. 176, of what is apparent, but not necessarily where a car "bucked" and threw the that the apparent is dangerous." Penndriver over the dashboard, it was contended by defendant's counsel that the Ill. App. 626. trial judge erred in refusing to charge left out of account the defective condi- 19. tion of the car which caused it to buck, or, if not, assumed that the deceased knowledge that a master is not disknew of that condition, and of the risks charging his duty in making safe the incident thereto. The dasher might have place where he requires his employees been of sufficient height had the car not to work will defeat a recovery by an bucked, and the deceased might have employee injured by the master's neglect assumed any risk incident thereto, with

In Rummell v. Dilworth (1885) 111 Pa. 343, 2 Atl. 355, 363, the plaintiff Rogers v. Leyden (1890) 127 Ind. 50, had to close a gate by reaching over 26 N. E. 210. cogwheels in rapid motion. The court pointed out that the danger to be apstances, but upon the degree of exertion

tered for the defendant on the ground be utterly ignorant of the risks." Byles, simply of the plaintiff's knowledge of J., in Clarke v. Holmes (1862) 7 Hurlst. the want of doors. The ruling on the & N. 937, 31 L. J. Exch. N. S. 356, 8 first appeal was not referred to.

Jur. N. S. 992, 10 Week. Rep. 405.

"A servant is chargeable with notice sylvania Coal Co. v. Kelly (1894) 54

"The difference is between going into that, in determining the question of de- the service, or continuing in it, knowfendant's negligence, all evidence reing that the instrumentalities employed garding the height of the dashboard are unsafe and dangerous,' and knowing should be disregarded, the argument be-that defects exist, but not that they ing that the driver was aware of its necessarily render the employment of a height. But the court said: "The vice perilous character." Galveston, H. & in the instruction asked for was that it S. A. R. Co. v. Lempe (1883) 59 Tex.

the car otherwise in order, and yet not be also inferable that the breach of duty have assumed a risk incident to that in augmented the dangers of the service. have assumed a risk incident to that in augmented the dangers of the service. conjunction with a defect which alone An employee may know that the emrendered the height of the dashboard ployer is not performing his duty, and unsafe and exceedingly dangerous. It yet not know that the perils of his serv-was not claimed that the height of the dashboard of itself caused the accident, necessary that the fact that the perils of the dashboard of itself caused the accident, necessary that the fact that the perils but that it was caused by its insuffi- of the service were increased should be ciency, coupled with the bucking of the established by direct evidence; it is sufficient if there be evidence from which that fact can be reasonably inferred."

"The general rule undoubtedly is that a person cannot be said to take a risk prehended did not depend wholly upon unless he knows not only the condition the patent fact that the cogwheels had of things, but also that danger exists to be reached over under these circumin such condition." Anderson v. Clark (1892) 155 Mass. 368, 29 N. E. 589.

which it might be necessary to put forth our or or of the state of the gate; and, as this would C. C. A. 433, 10 U. S. App. 439, 53 Fed. wary according to circumstances, it was 65: Blumenthal v. Craig (1897) 26 C. only by actual experiment that the serv-C. A. 427, 55 U. S. App. 8, 81 Fed. 320; ant could ascertain the degree of peril Davis v. St. Louis, I. M. & S. R. Co. which he assumed. (1890) 53 Ark. 117, 7 L. R. A. 283, 13

4"A servant knowing the facts may S. W. 801; Magee v. North Pacific Coast the same conception have been cited in discussing the circumstances under which a master is bound to instruct a servant. See § 241, ante.

R. Co. (1889) 78 Cal. 430, 21 Pac. 114; 106 Mass. 282 (servant knew that floor Pitts v. Florida C. & P. Co. (1896) 98 was decayed, but could not have ascer-Ga. 655, 27 S. E. 189; Faren v. Scllers tained the existence of actual danger (1887) 39 La. Ann. 1011, 3 So. 363; without examining the under side); Myhan v. Louisiana Electric Light & Sanborn v. Madera Flume & Trading P. Co. (1889) 41 La. Ann. 964, 7 L. R. Co. (1886) 70 Cal. 261, 11 Pac. 710 A. 172, 6 So. 799; Frye v. Bath Gas & Gervant in sawmill injured by a de-Electric Co. (1900) 94 Me. 17, 46 Atl. fective appliance which caused the saw 804; Doyle v. St. Paul, M. & M. R. Co. to throw a heavy object against him (1889) 42 Minn. 83, 43 N. W. 787; while working in a part of the mill Sneda v. Libera (1896) 65 Minn. 337, some considerable distance from the 68 N. W. 36; Stiller v. Bohn Mfg. Co. (1900) 80 Minn. 1, 82 N. W. 981; Roth covery); Union Show Case Co. v. Blind v. Northern Pacific Lumbering Co. auer (1898) 75 Ill. App. 358, Affirmed from a defect in the flange of a wheel); the dangerous character of which the Goins v. Chicago, R. I. & P. R. Co. servant did not know).

(1889) 37 Mo. App. 221 (inexperienced youth injured in handling a defective knew that the brake would not properly car coupling); Griffin v. Ithaca Street control the motion of the car without R. Co. (1901) 62 App. Div. 551, 71 N. applying unusual force did not conclu-Y. Supp. 140 (motorman directed to sively charge him with notice that intake a light passenger car and draw a jury might be expected from use of the heavily loaded car which, as he was brake. Newhart v. St. Paul City R. Co. aware, had no brakes, to a place where (1892) 51 Minn. 42, 52 N. W. 983. In it was necessary to stop on a steep a case where a brakeman is injured by grade; accident caused by the fact that slipping on ice which has formed on the grade; accident caused by the fact that shipping on ice which has formed on the the setting of the brakes on the passenend gate of a coal car as it lies on an ger car would not prevent the other car incline, an instruction to the effect that from sliding); Johnston v. Oregon Short he assumed, among other risks of the Line R. Co. (1892) 23 Or. 94, 31 Pac. service, those arising from ice and snow, 283 (switch target known to be near should not be given without a modificathe track); Gulf, C. & S. F. R. Co. v. tion making such assumption depend on Harriett (1891) 80 Tex. 73, 15 S. W. the plaintiff's knowledge of the danger resulting from the ice and snow in that number of fellow servants not assumed particular situation. McDermott v. unless danger of doing so is under-lova Falls & S. C. R. Co. (1891; Iowa) stood); Demars v. Glen Mfg. Co. (1892) 47 N. W. 1037. The mere fact that an 67 N. H. 404, 40 Atl. 902 (inexperiemployee injured in digging a trench enced servant injured while attempting for a sewer knew the manner in which

(1900) 80 Minn. 1, 82 N. W. 981; Roth covery); Union Show Case Co. v. Blindv. Northern Pacific Lumbering Co. auer (1898) 75 Ill. App. 358, Affirmed (1889) 18 Or. 213, 22 Pac. 842; Schall in 175 Ill. 325, 51 N. E. 709 (error to v. Cole (1884) 107 Pa. 1; Bonner v. charge jury that the plaintiff should Moore (1893) 3 Tex. Civ. App. 416, 22 have stopped his elevator on discovers. W. 272; Stomne v. Hanford Produce ing that the brake was out of order); Co. (1899) 108 Iowa, 137, 78 N. W. Wuotilla v. Duluth Lumber Co. (1887) 841: Lee v. Southern P. R. Co. (1894) 37 Minn. 153, 33 N. W. 551 (danger of 101 Cal. 118, 35 Pac. 572 (jolting working near unboxed gearing not, as caused by uneven side track shook matter of law, comprehended by combrakeman's foot off the pilot of an enmon laborer); Christianson v. Northgine where he was standing to make western Compo-Board Co. (1901) 83 gine where he was standing to make western Compo-Board Co. (1901) 83 a coupling, and, the space between the Minn. 25, 85 N. W. 826 (servant after ties being unballasted, he was caught operating a saw for three days lost his by his foot and thrown off and run balance and fell against another saw over); St. Louis & S. F. R. Co. v. Mc-close by); Chilson v. Lansing Wagon Clain (1891) 80 Tex. 85, 15 S. W. 789 Works (1901) 128 Mich. 43, 87 N. W. (fireman did not anticipate any danger 79 (single saw replaced by double saw,

to push with a stick an old and badly the trench was braced will not prevent worn belt upon a driving pulley); Hud- a recovery for an injury to him because dleston v. Lowell Machine Shop (1871) of the insufficient bracing of the trench,

Any charge which may lead the jury to suppose that the defense of assumption of risks is available to the master if the servant was

master, as such knowledge is not neces- incident to such a practice.

of an arm of a derrick under which he was working, after the lowering of a the special verdict, where the latter verstone by it, although he knew of its dedict, although it states that the plainfective condition, where he did not know tiff was acquainted with the operation or anticipate that there was any danger of the appliance, does not show that that the arm would fall after the stone she knew, or by the exercise of ordinary had reached the ground and the derrick care might have known, that it was dewas no longer in operation. Julian v. fective. C Stony Creek Red Granite Co. (1899) 71 Bush, 601. Conn. 632, 42 Atl. 994.

Co. (1884) 32 Minn. 230, 20 N. W. 147, where a brakeman was injured in atamount of lateral motion; also that 82 Mo. App. 175. there was no goose-neck or wooden buf-

unless he also knew that it was danger- the ordinary skill and experience of ous, and continued to work thereafter. brakemen, it does not appear-certainly Donahoe v. Kansas City (1897) 136 Mo. not conclusively—that he by the exer-657, 38 S. W. 571. The mere fact that cise of ordinary observation ought to an employee in a paper mill knew that have understood the risks to which he there was some danger in going into a was exposed by using such couplers. He blowpit while there was a valve leaking was not bound to be an experienced main the blowpipe will not, of itself, where chinist or car builder. It does not aphe did not appreciate the risk, bar his pear that he knew, or by the exercise Fickett v. Lisbon Falls Fibre of ordinary observation ought to have Co. (1898) 91 Me. 268, 39 Atl. 996. The known, that the lateral motion of the general knowledge of the danger of oil- Miller coupler was sufficient to permit ing a machine while in motion, pos- it to slip past the end of the drawhead sessed by an inexperienced employee of on the tender. It does not appear that tender years, does not necessarily pre- the use of these two kinds of couplers vent recovery for personal injuries sus- together in this way was usual or comtained by him while oiling the machine mon so that brakemen generally would in obedience to the directions of the or should understand fully the dangers sarily inconsistent with the failure to from the evidence, it is to be presumed appreciate and realize the real danger of that prudent railroad companies do not obeying the master's order. B. F. Avery ordinarily adopt any such practice. & Son v. Meek (1898; Ky.) 45 S. W. Plaintiff had been using them on this 355, former appeal (1894) 96 Ky. 192, train for some time, and it does not ap-28 S. W. 337. An experienced employee pear that he had ever seen the two does not, as a matter of law, assume the couplers slip past each other before,—a risk of using a "bolting saw" without a fact which distinguishes this case from carriage attachment, by using the saw Toledo, W. & W. R. Co. v. Asbury for three weeks without such an atfor three weeks without such an attachment, where none has been on it at any time while he has used the same. Thing would be likely to occur except olmscheid v. Nelson-Tenney Lumber Co.

A stone cutter may recover for personal injuries received from the falling A general verdict for the plaintiff.

will not be set aside as inconsistent with fective. Quaid v. Cornwall (1878) 13

A complaint alleging that a hand car In Russell v. Minneapolis & St. L. R. used by plaintiff was defective, and unsafe for use, which was known to plaintiff, but that he did not know, with his taching a car with a "Miller" coupling limited experience, that such defects to one with an ordinary coupling, the would cause the car to jump the track, court said: "In this case plaintiff un- but believed that by the use of ordinary doubtedly knew the character of these care it could be used with safety, is not two couplers. He knew that one was a insufficient, as showing conclusively that Miller and the other a common one. He plaintiff had assumed the risk. Compalso knew that the former had a certain ton v. Omaha, K. C. & E. R. Co. (1899)

No recovery, of course, can be had fers on the tender. But conceding this, where the servant has himself admitted and assuming that he must be held to i. his testimony that he knew himself aware merely of the existence of certain abnormal conditions is a misdirection.6

The inference that the danger was not appreciated is sometimes deemed an allowable inference from the fact that the servant had been assured by his superiors that there was no danger.<sup>7</sup>

If the servant understood, or ought to have understood, that the existence of certain abnormal conditions exposed him to the risk of injury, he cannot recover damages for an injury actually received, although he did not fully realize the extent or character of the injury which might be sustained,8 or did not appreciate every particular of the risk,9 or all the possible consequences of the risk.10

to be in danger from the existence of cause of the possibility of having his the conditions complained of. Mielke v. arm caught). Chicago & N. W. R. Co. (1899) 103 Wis. 1, 79 N. W. 22; McFadden v. Campbell (1895) 13 Misc. 158, 34 N. Y. Supp. 136.

<sup>6</sup> Nofsinger v. Goldman (1898) 122 Cal. 609, 55 Pac. 425; Galveston, H. & S. A. R. Co. v. Smith (1900) 24 Tex. Civ. App. 127, 57 S. W. 999; Galveston, H. & S. A. R. Co. v. Hughes (1899) 22 Tex. Civ. App. 134, 54 S. W. 264 (un-

blocked frog).

A request to instruct in substance that when a party works with or in the vicinity of machinery insufficient for the purpose for which it is employed, for any reason unsafe, and with knowledge, or the means of knowledge, of its condition, he assumes the risk incident to the employment, and cannot maintain an action for injuries,-is properly refused. Sanborn v. Madera Flume & Trading Co. (1886) 70 Cal. 261, 11 Pac.

<sup>7</sup> Stomne v. Hanford Produce Co. (1899) 108 Iowa, 137, 78 N. W. 841. See, generally, chapter xxiv., post.

\* Detroit Crude-Oil Co. v. Grable (1899) 36 C. C. A. 94, 94 Fed. 73, where one of several bolts which projected from a fly wheel struck a water pipe which the vibration of the machinery was shaking so violently as to bring it a fragment which struck the engine.

The other cases exemplifying the doctrine in the text are Feely v. Pearson Cordage Co. (1894) 161 Mass. 426, 37 N. E. 368 (servant fell into well near N. E. 368 (servant fell into well near place of work); Downey v. Sawyer (1892) 157 Mass. 418, 32 N. E. 654 are reasonably likely to occur in the (boy injured in putting a belt on a shaft course of a brakeman's duties are prenear a gearing, he having testified that sumed to be appreciated by him, where he dreaded performing this work be- he is familiar with us position and the

<sup>9</sup> Connelly v. Hamilton Woolen Co. (1895) 163 Mass. 156, 39 N. E. 787, where it was held that a workman who voluntarily undertakes the dangerous work of whitewashing the ceiling of a card room in a mill while the machinery is in motion, and who has been specially cautioned to look out for the pulleys and shafting, cannot recover for injuries received by coming in contact with a revolving shaft, apparently as a result of losing his balance and falling from the scaffold on which he was working, although he may not have known of the existence of a keyway on the shaft, which increased the probability of his clothes being caught if he should come in contact with the shaft.

Stuart v. West End Street R. Co. (1895) 163 Mass. 391, 40 N. E. 180, where it was held that the jury should have been directed to return a verdict for the defendant in an action for injuries caused by the plaintiff's allowing his hand to be drawn into the knives of a hay-cutting machine which he was feeding. "It may be," said the court, "that no one could tell the exact degree of the force with which the hay would move forward with the traction of the knives, nor just how great the danger was until ascertained by actual experiwithin reach of the bolts, and broke off ment; but anybody could see at once that there was danger in doing the work unless care was used to avoid letting the fingers be drawn forward to the knives."

279b. Comprehension of risk usually inferable from knowledge of conditions.— The practical importance of the principle stated in the last section is considerably diminished by a fact which is sufficiently obvious, viz., that circumstances which would justify a jury in finding that a servant, although aware of the abnormal conditions, did not comprehend the risks resulting therefrom, are of much more rare occurrence than circumstances in which his comprehension of the risks is an unavoidable inference as soon as it is established that he knew of the abnormal conditions. In the majority of instances, therefore, it will be found that the courts treat the servant's assumption of the risk as an immediate consequence of his knowledge of the conditions of which that risk was an incident. The rationale of these decisions is not that proof of the servant's comprehension of the risk is unnecessary, but simply that, upon the facts in evidence, any person of average intelligence who was aware of the conditions must either have understood, or have been chargeable with negligence in not understanding, the hazards to which these conditions exposed him.<sup>1</sup> But although one step of the deductive process is thus taken

other elements of danger. Coombs v. be shown." Anderson v. Clark (1892) Fitchburg R. Co. (1892) 156 Mass. 200, 155 Mass. 368, 29 N. E. 589; Watson v. 30 N. E. 1140, where it was denied that Kansas & T. Coal Co. (1893) 52 Mo. an action could be maintained by a App. 366. brakeman familiar with flying switches, In Appel v. Buffalo, N. Y. & P. R. Co. who was injured while making one at a (1888) 111 N. Y. 553, 19 N. E. 93, the switch which he had frequently turned, court said: "We feel quite sure that

time. Ely v. San Antonio & A. P. R.

30 N. E. 81 (servant's hand drawn beer behind the rollers, which he had seen at rest, and which he knew revolved in close proximity to the rollers).

edge of the condition of things need only oughly established in the law that a

though not for a flying switch, and one who worked among these rails daily which from its proximity to an abut- for months and years necessarily was ment required him to stand between the familiar with their shape and general track and the switch. A railroad employee assumes the risk the difficulty of removing a foot caught of coupling cars while an iron rail is in the space between the rails, and the projecting from one of the cars to his danger of the situation arising there-knowledge, although the danger therefrom. We cannot believe that anyone from is increased by an inequality in could thus work and yet, while familiar the height of the two cars to be coupled, with the frog, its purpose, and use, and of which he had no knowledge at the with its apparent form and condition, and that it was unblocked (with all of Co. (1897) 15 Tex. Civ. App. 511, 40 which knowledge the learned court below correctly charged the deceased), 10 Pratt v. Prouty (1891) 153 Mass. could still be ignorant that there was 333, 26 N. E. 1002 (boy's hand drawn danger to be apprehended by getting his into a machine and against a knife, he foot caught between the rails, and that having been warned that he would be there was a liability to have it thus hurt if he got his fingers in); De Souza caught. Such liability is seen upon the v. Stafford Mills (1892) 155 Mass. 476, slightest inspection of the frog, when coupled with knowledge (which we between two rollers from which he was re- lieve is in the possession of every man) moving cotton which had clogged them, that the rail of a railroad as it rests and maimed by a rapidly revolving beat- upon the ground is wider at the top and bottom than in the center."

In Scharenbroich v. St. Cloud Fiber-Ware Co. (1894) 59 Minn. 116, 60 N. "If the danger is obvious, knowl- W. 1093, the court said: "It is thorwithout the aid of any specific testimony, there is a manifest impropriety in giving an abstract statement of the rule as to assumption of risks in terms which ignore the circumstance that this step must be accounted for.2 It can scarcely be doubted that instructions such as those pronounced in the last section to be incorrect (see note 6) are often explicable as being simply an indiscriminating reproduction of incautiously broad language of this tenor.

In order to exemplify the circumstances under which courts will treat the servant's knowledge of abnormal conditions as a situation involving the consequence that he is chargeable with an assumption of the risk incident to those conditions, a number of cases have been collected in the subjoined note.3 That this consequence is assumed

use. In this case it is undisputed that the plaintiff knew the exact nature of the situation. He knew that the floor was wet; that this made the floor slippery; that there was nothing except the smooth floor against which to brace his smooth noor against which to brace his feet when turning the lever; that if his foot slipped there was nothing to prevent it from coming in contact with, and being caught by, the revolving pinion; and that if it did it would be injured. It required no special skill to understand these things, as they were patent to the sense upon the most ordinary observation. Indeed he admits nary observation. Indeed, he admits that he was aware of all this. His only excuse is that he did not think of his foot slipping. But in view of the situ-

servant does not necessarily assume the risks incident to the use of unsafe machinery; and where he knows of the chinery because he knows its character and condition. He must also have understood, or by the exercise of ordinary observation ought to have understood, Ragon v. Toledo, A. A. & N. M. R. Co. the risks to which he is exposed by its (1893) 97 Mich. 265, 56 N. W. 612. use. In this case it is undisputed that "While the servant is not bound to the plaintiff knew the exact nature of the situation. He knew that the floor notice of those which are open to his observation. notice of those which are open to his observation and of which he has knowledge; and if, with such information, he continues to use the implement, he does so at his own risk as to injuries arising from such known defects." Covey v. Hannibal & St. J. R. Co. (1885) 86 Mo.

But a statement that the servant assumes the risks of using appliances that are "obviously defective and dangerous"

satisfies every logical requirement. Kearney Electric Co. v. Laughlin (1895) 45 Neb. 390, 63 N. W. 941.

In Yates v. McCullough Iron Co. (1888) 69 Md. 370, 16 Atl. 280, the court, while conceding that, in cases where a knowledge of defects does not recessarily carry with it knowledge foot slipping. But in view of the situation—the floor being wet, and he in
court, while conceding that, in cases
the act of applying force to turn the
lever—he must, or ought in the exernecessarily carry with it knowledge
cise of ordinary intelligence, to have
necessarily carry with it knowledge
of the resulting dangers, it is propunderstood that there was increased liability of his foot slipping, as this was
a matter of ordinary experience and in
accordance with the most simple and
clared that the case under review was
familiar laws of nature. It is impossible to conceive of anything which anyone could have told him, about either
the situation or the risks incident to it,
which was not perfectly patent to the
the defects could possibly warrant any which was not perfectly patent to the defects could possibly warrant any senses in the exercise of common obser- other conclusion than that the risk was vation by an adult of ordinary intellivoluntarily incurred. It was accordence." <sup>2</sup> Such statements as the following are covery where a man employed in hanwanting in logical precision and com-dling charcoal by using a bucket atpleteness: "It is a doctrine as well estached to a yoke hanging on a wheel tablished as any in the books, that an which ran on an overhead track uneven

to follow in many other instances will be apparent from an examination of the cases which deal with the subject of the servant's constructive knowledge of a danger. See chapter xxi., infra. As will be seen, the inquiry in those cases is usually directed merely to the settlement of the question whether the servant knew or ought to have known of the conditions which caused his injury. Many of the cases cited in §§ 277, 278, supra, may also be referred to as illustrations of the manner in which a knowledge of the conditions is viewed as carrying with it a knowledge of the attendant risks.

280. Doctrine that the servant's knowledge of an extraordinary risk does not charge him, as a matter of law, with its assumption.— (Compare § 241, ante, and §§ 297, 320, post.)—In all the English cases decided before the passage of the employers' liability act of

noxious gases in a still house are apparent, a servant employed therein as-Atl. 803. A locomotive engineer is pre-

and depressed at the joints of the rails, App. 492, 82 Fed. 550 (hand hold of which wheel was not secured so it could switch was so twisted that it rested on which wheel was not secured so it could switch was so twisted that it rested on not leave the track, and who knew the the end of a tie); Chicago, B. & Q. R. difficulty of pushing the wheel over the Co. v. McGinnis (1896) 49 Neb. 649, joints, was injured by its fall occa- 68 N. W. 1057 (brakeman crushed by sioned by the wheel running off the track.

The risk of slipping into a tank unguarded by a railing is presumed to be Cent. Rep. 56, 11 Atl. 659 (brakeman understood by a servant who knows that while coming down from a car was it is unguarded. Thomas v. Quarterapulation of the coming down from a car was it is unguarded. Thomas v. Quarterapulation of the coming down from a car was it is unguarded. Thomas v. Quarterapulation of the coming down from a car was it is unguarded. Thomas v. Quarterapulation of the coming down from a car was it is unguarded. Thomas v. Quarterapulation of the track).

So L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, A brakeman assumes the risk of in-35 Week. Rep. 555. 51 J. P. 516. Where jury from a defective coupling on a car

35 Week. Rep. 555, 51 J. P. 516. Where jury from a defective coupling on a car which he has habitually handled for a long time with knowledge of the defect. sumes the risk therefrom. Meany v. Thompson v. Missouri P. R. Co. (1891) Standard Oil Co. (1900; N. J. L.) 47 51 Neb. 527, 71 N. W. 61. A servant injured while working at the bottom of an sumed to know that a defective boiler unguarded elevator shaft, by a plank may explode. Ford v. Fitchburg R. Co. which fell out upon him, cannot recover. (1872) 110 Mass. 243, 14 Am. Rep. 598. Alford v. Metcalf Bros. & Co. (1889) A brakeman cannot recover for an in- 74 Mich. 369, 42 N. W. 52. The servjury caused by brakes of a peculiar con- ant's knowledge of a defective system struction, where the differences were has been considered to require the inopen and obvious, and any perils arisference that the resulting risk was asing from their use were such as the sumed. Little Rock & M. R. Co. v. Barbrakeman knew, or, by reason of his ex- ry (1898) 43 L. R. A. 349, 28 C. C. A. perience, ought to have known. *Phil*- 644, 56 U. S. App. 37, 84 Fed. 944. An perience, ought to have known. Phil- 644, 56 U. S. App. 37, 84 Fed. 944. An addelphia & R. R. Co. v. Hughes (1888) experienced brakeman is presumed to 119 Pa. 301, 13 Atl. 286. A servant understand the danger incident to coupwho has observed that the fastenings ling cars with projecting loads. Mexiof a belt have partially given way ascan C. R. Co. v. Shean (1891; Tex.) 18 sumes the risk of its breaking apart. S. W. 151. A laborer who, seeing that Anderson v. H. C. Akeley Lumber Co. the horses in a team drawing a wagon (1891) 47 Minn. 128, 49 N. W. 664. load of bricks to a building where he is The risk arising from the closeness of a working for a contractor are restless, structure to a railway track is presented. structure to a railway track is presents of a working for a contractor are restless, structure to a railway track is presents planks across the gap between the sumed to be understood by a brakeman wagon and the platform over which the who knows of such closeness. Dorsey v. bricks are to be passed into the build-Phillips & C. Constr. Co. (1877) 42 ing, and proceeds, while standing on the Wis. 583 (cattle chute); Peirce v. Claplanks, to receive the bricks as they are vin (1897) 27 C. C. A. 227, 53 U. S. tossed to him by the teamster, is 1880 (see § 274, note 1, supra), the courts proceeded upon the hypothesis that an assumption of an extraordinary risk was properly inferred, as a matter of law, from the mere fact that the servant accepted or continued in his employment with a knowledge of its existence and a full comprehension of the enhanced danger to which he was exposed. Some of these cases rely upon the theory of an implied stipulation on the servant's part to assume the risk, as explained in § 276, supra. In others the decision was based explicitly upon the principle embodied in the maxim, Volenti non fit injuria. But so far as appears from the language of the judges, it was regarded as a matter of indifference whether the servant's rights were referred to the one or to the other of these conceptions. In either case his inability to maintain the action was regarded as a necessary inference as soon as his knowledge, actual or constructive, was established.

As will be explained in chapters xxxv., xxxvii. post, the employers' liability act of 1880 was so worded as to preclude the master from putting forward the plea of a contractual assumption of a risk; the result being that it soon became a practical question whether, in actions brought under the act, the servant's consent to take the risk, within the meaning of the maxim, was or was not an inference of law to be drawn by a court upon satisfactory proof given it. After some wavering of opinion (see chapters xx., xxxv., post) it has been definitely settled that such proof is not enough to bar the servant's action, and that his consent to assume the risk must be established as an independent conclusion of fact. This doctrine is also held, as will be shown in the same chapters, to be applicable not only to those statutory actions with regard to which the question was first noticed,

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charged with a full appreciation of the risk that as the team starts suddenly he will be thrown to the ground, and cannot recover from the teamster's master for injuries caused by such an accident. Goddard v. McIntosh (1894) 161 Mass. 253, 37 N. E. 169 (Knowlton, J., Gildersleeve (1876) 33 Mich. 133 (car dissented on the special ground that the evidence did not, as matter of law, show that the danger was fully appreciated in all its elements; that there was nothing to show that he understood the temper of the horses or that the restlessness was more than momentary).

See also Powers v. New York, L. E. See also Powers v. New York, L. E. (E. W. R. Co. (1895) 98 N. Y. 274 (plaintiff used a crowbar as a substitute for the broken handle of the walking beam of a hand car, the result being that the beam was broken off by the increased leverage, and the plaintiff was thrown Vol I. M. & S.—43.

but also to common-law actions. To this extent, accordingly, the earlier cases to the contrary effect, which have just been mentioned, are necessarily overruled.

In view of the result thus arrived at, it seems to be extremely doubtful whether the alternative doctrine of a contractual assumption of risks, which is still available in common-law actions, would now be applied by the English courts in the same form as in the earlier cases. The evidential elements from which the assumption of the risk is deduced, as a matter of implied agreement, are essentially identical with those which are considered when the propriety of admitting the maxim as a defense is in question. It seems, therefore, to be a reasonable argument from analogy that a court which holds that the servant's knowledge and appreciation of a risk do not necessarily require the conclusion that he consented to assume it, within the meaning of the maxim, cannot consistently hold that this consent is a peremptory inference where that knowledge and appreciation are established in actions in which the master relies upon the theory of a contractual assumption of the risk. So far as the writer is aware, however, this precise point has not been discussed in any reported decision in England. In North Carolina the doctrine of the English cases which turned upon the effect of the maxim has been applied in a case where the phrase "assumption of risk" is possibly used in its ordinary sense of a contractual assumption.<sup>2</sup> On the other hand, that doctrine has been rejected by a Federal court of appeal.<sup>3</sup> In

Atl. 596 (servant put his foot on the clude a recovery, but it is in every case bars of a gate, and it went through and an important factor. Lake Shore & M. was struck by the machinery which he S.R. Co. v. Pinchin (1887) 112 Ind. 592, knew to be underneath); Berning v. 13 N. E. 677, citing a large number of Medart (1894) 56 Mo. App. 443 (danger from the bursting of an inadequate-

Iv guarded emery wheel).
In Texas & P. R. Co. v. Rogers (1893)
6 C. C. A. 403, 13 U. S. App. 547, 57
Fed. 378, it was said that the insuffi-6 C. C. A. 403, 13 U. S. App. 541, 51 is operating a machine which he knows Fed. 378, it was said that the insufficiency of the number of servants was a have come into general use), citing "patent defect," the risk of which was Smith v. Baker (1891) A. C. 325, 60 L. assumed by any servant who engaged in J. Q. B. N. S. 683, 40 Week. Rep. 392, the work. St. Louis, A. & T. R. Co. v. 65 L. T. N. S. 467, 55 J. P. 660.

Lemon (1892) 83 Tex. 143, 18 S. W.

\*\*McPeck v. Central Vermont R. Co. (1897) 25 C. C. A. 110, 50 U. S. App. (1897) 25 C. C. A. 110, 50 U. S. App.

where the injured person is a stranger, cases is not that which is accepted by the fact that he has knowledge of a danthe American courts. As shown in § ger that he will encounter if he pursues 276, supra, the actual doctrine of these his way does not always necessarily pre- courts is one which predicates a con-

<sup>2</sup> Lloyd v. Hanes (1900) 126 N. C. 359, 35 S. E. 611 ("assumption of risk" not implied merely because an employee is operating a machine which he knows

Lemon (1892) 83 1ex. 143, 18 S. W. McPeck V. Central Vermont R. Co. 331; Southern Kansas R. Co. v. Drake (1897) 25 C. C. A. 110, 50 U. S. App. (1894) 53 Kan. 1, 35 Pac. 825; Atchi-27, 79 Fed. 590. There, however, the son, T. & S. F. R. Co. v. Schroeder court seems not to have appreciated the (1891) 47 Kan. 315, 27 Pac. 965; Mad limited scope of the English decisions River & L. E. R. Co. v. Barber (1856) under the employers' liability act, as it 5 Ohio St. 541, 67 Am. Dec. 312. <sup>1</sup> It is not amiss to mention that, signed to show that the doctrine of those

one Virginia case the court disapproved, in the most emphatic terms, of an instruction that an employer was released from liability, if the injured servant continued to work after he had ascertained the negligent and dangerous manner in which the business was conducted.4 But it is not very clear from the report whether the theory of the instruction was that the servant had assumed the risk, or that he was negligent. If the former is the correct construction, the decision is in conflict with others in this state. See § 274, note 1, supra.

In New York a decision has been rendered which draws a distinction between the defective quality of appliances used by the plaintiff for the purposes of his work, and those in other parts of the employer's establishment; the knowledge of the servant that appliances of the latter class are defective being declared not to involve, as a matter of law, the conclusion that he has assumed the resulting risks.<sup>5</sup> This distinction does not seem to have been recognized by any other court, and has apparently no logical basis. The phrase "assumption of risk," however, may have been used to express the predicament to which the description of contributory negligence is more usually and more properly applied. See chapter xvIII., post.

In some jurisdictions the doctrine that known risks are assumed, as matter of law, has been abrogated by statutes. See chapter xxx., post.

281. Temporary forgetfulness of a known danger at the time of the accident.—It would clearly be inconsistent with the rationale of the defense of assumption of risks to regard it as being applicable in cases where, through mere inadvertence at the time of the accident, the servant failed to recollect or to observe the existence of a risk previously known to and appreciated by him. Accordingly, forgetfulness of and inattention to such a risk, when they are not brought

tractual assumption of risks, and not an assumption based upon a maxim which is independent of the existence of contractual relations. If it was intended to argue on the hypothesis that the servant's rights are determinable by the same standard, whether the maxim or sturtevant Co. (1900) 43 C. C. A. 527, an implied contract be relied upon,—

104 Fed. 276.

2 Position which the present writer here. a position which the present writer believes to be the correct one,—so important an element should have been explicitly mentioned. Having omitted to refer to it, the court has laid itself open to the charge that, in thus repudication is selected. 216.

\* Richmond & D. R. Co. v. Norment (1887) 84 Va. 167, 4 S. E. 211 (car repaired injured by lack of proper signal-sign system). to the charge that, in thus repudiating 186 (boy of nineteen employed in an up-a doctrine formulated as to the effect of per story of a factory from which, as the maxim, for the reason that that doctrine is in conflict with one formulated sufficient in case of fire). with reference to the theory of an im-

about by any cause which the average man would consider adequate to justify the mental states thus designated, are universally regarded as insufficient reasons for excluding the defense. A lapse of memory, or the inaction of the faculties of observation, under such circumstances, may fairly be regarded as a conclusive proof of negligence, the result being that the servant is incapacitated from recovering. either on that ground or on the ground that he was constructively chargeable with a knowledge of the risk during the fatal period of forgetfulness or inattention, and that his responsibility for such injuries as might result from that risk was continuous and uninterrupted. Even if the servant was entirely free from blame as regards the action which was the immediate occasion of his receiving the injury, he cannot recover if it appears that that action was due to an extrinsic cause for which the employer was in no wise responsible.2

A more difficult situation is presented when the servant's failure to recollect or observe a previously ascertained risk is due to the fact that he was engaged in some pressing duty; and the courts have arrived at different conclusions with regard to the juridical consequences of such a situation. Some reference to cases of this type was necessitated by the course of the discussions in an earlier part of this treatise (§ 63, ante), and it will now be requisite to revert to the subject once more in the present connection.

<sup>1</sup> In Pingree v. Leyland (1883) 135 not pay any attention to whether the gence. Truntle v. North Star Woolen-pointer which injured him was going or Mill Co. (1894) 57 Minn. 52, 58 N. W. not. In Clark v. St. Paul & S. C. R. 832. Co. (1881) 28 Minn. 131, 9 N. W. 581, recovery was denied where a brakeman, after he had been struck by a projecting Mass. 296, 37 N. E. 175, where a servroof and knocked off a car, said in an- ant, while passing through an alley beswer to the question whether he did not tween moving machines, suddenly know the roof was there, "Yes; but I dropped his hands upon hearing an outdid not think of it at the time."

That a boy attending a machine hav-Mass. 398, where a man who had for seving unguarded cogwheels allowed his eral hours run a winch with uncovered hand to slip into them, because of his gearing, and was then injured by coming inadvertence or inattention caused by into contact with it, the doctrine was watching another boy who was near by, laid down that, where the servant is so gives him no right of recovery against fully cognizant of the character and condition of a machine that he feels it advised by the complete of the character and continuous continuous care than ordinary care U. S. App. 74; 79 Fed. 900. In a case in converting it he cannot recover for whom a how tensor such that are in operating it, he cannot recover for where a boy unnecessarily put his arm an injury which he receives, in a mointo a dangerous position with regard ment of inadvertence, from the very to moving machinery, it was laid down source of danger to which he sees him that the fact that a servant had forself to be exposed. In *Palmer v. Harrison* gotten about a previously known dan-(1885) 57 Mich. 182, 23 N. W. 624, the ger, and omitted to adopt the suggested action was held not to be maintainable precaution to avoid it, would not relieve where the plaintiff testified that he did him of the charge of contributory negli-

See also note 9, infra.

<sup>2</sup> Cheney v. Middlesex Co. (1894) 161 cry, and was caught in the gearing.

The effect of several New York decisions with regard to one particular class of accidents is that a railway servant cannot be declared negligent, as a matter of law, simply because the location of the structures above or alongside the track, and their relation to his own personal safety and that of the train which he is assisting to operate, are temporarily forgotten by him, owing to his absorption in his duties, or to some extrinsic event which suddenly diverts his attention at a critical moment.3 According to the supreme court, these decisions may be abstracted from the facts involved and treated as having established the general principle that "a servant is not bound at all times and under all circumstances to be mindful of the dangers

<sup>8</sup> A brakeman is not, as matter of constructive knowledge of the conditions been over the road many times and lished. knows of the existence of the bridge, where at the time of the accident he is upon a long train, intent upon the discharge of his duty, with his face toward the rear, in a position most effectually thin v. New York C. & H. R. R. Co. to discharge such duty and has no warn (1897) 24 App. Div. 303, 48 N. Y. Supp. 192 of the bridge Wellage W. Gertagle 503 (telegraph pells need track). Recent knows of the existence of the bridge, matter of law, where a brakeman, know-

law, guilty of negligence contributing was a question for the jury. The risk to his being struck by a low bridge over assumed was that of low bridges with the track and injured thereby, in failant efficient warning signal, not that of ing to take notice of the fact that he is bridges without them, unless his knowlapproaching the bridge, although he has edge of this particular risk was estab-

ing of the bridge. Wallace v. Central 503 (telegraph pole near track); Brown Vermont R. Co. (1893) 138 N. Y. 302, v. New York C. & H. R. R. Co. (1899) 33 N. E. 1069, Reversing (1892) 43 N. 42 App. Div. 548, 59 N. Y. Supp. 672 Y. S. R. 639, 18 N. Y. Supp. 280. The (mail crane); McGovern v. Standard decision in Williams v. Delaware, L. & Oil Co. (1896) 11 App. Div. 588, 42 N. W. R. Co. (1889) 116 N. Y. 628, 22 N. Y. Supp. 595 (brakeman struck by E. 1117, where the court uses language cross-bar extending across an opening which is apparently susceptible of the in a fence through which a siding construction that it intended to apply passed, held not to be, as matter of law, the doctrine that a brakeman is, as a guilty of contributory negligence in failmatter of law, negligent if, in the ab-sence of anything to divert his atten-tion, he does not observe the proximity ascertaining its position and the dan-of a bridge, the position of which he has ger created by it, his attention, as he previously ascertained, was explained as approached the bar, was drawn away having really decided no more than that by the cries of a person close by). In contributory negligence is inferable, as another case the court refused to say, as a matter of law, that when approaching that he is approaching an overhead ing a highway crossing an engineer bridge, and that it is dangerously low, must bear in mind the precise location turns his back to it. It is worthy of and character of every switch in the observation that, on the facts, the Wal-immediate vicinity, while he is running  $lace\ Case$  is not inconsistent with those an express train at 40 miles an hour. cited in the latter part of this section, Young v. Syracuse, B. & N. Y. R. Co. as there were "tell-tales" placed at most (1899) 45 App. Div. 296, 61 N. Y. of the bridges in accordance with the Supp. 202. There the engineer of a or the bridges in accordance with the Supp. 202. There the engineer of a statutory requirement, and the warning train ran into a switch unnecessarily signal at the particular bridge which caused the injury was out of repair. danger signal on it could be seen only Clearly, therefore, the position might 60 feet away. The case was declared to have been taken that, in view of the befor the jury, though he knew of the bridge being an exception to the general switch, and though rules of the compractice of the company, the servant's pany, of which he knew, required engiwhich surround him while engaged in the performance of his duty, even though he may be well aware of their existence." The corollary of this rule is considered to be that, if a jury is justified in finding that the servant was not negligent in failing to observe the risk, it cannot be declared that the risk was assumed.3a

A similar, though less pronounced, trend of judicial opinion is observable in some cases decided in other courts.4

To the present writer it seems that the doctrine embodied in the decisions cited is erroneous, except in so far as it may be considered merely an assertion of the narrow principle that, if an employer has elected under such circumstances as those presented to rely specifically upon the defense that the servant was negligent in failing to protect himself at the time of the accident, the case must be sent to the jury, for the reason that his forgetfulness of or inattention to the danger may possibly have been excusable owing to the engrossing nature of his duties. (See §§ 350, 440d, post.) But if the employer has taken his stand upon the defense of an assumption of the risk continuing from the time the servant ascertained its existence up to the time when he was injured, it is not easy to see on what logical grounds the temporary ignorance of the servant, resulting from his absorption in his work, can prevent that defense from operating as a bar to the action.<sup>5</sup> The theory under which the

Supp. 202.

<sup>4</sup> In West v. Southern P. Co. (1898) 29 C. C. A. 219, 56 U. S. App. 323, 85 the principle that a master may be liaby the proximity of an uncovered culunknown to him at the time of the accident, or, although it was exposed to manent conditions on the master's premview, so that if thoughtful and observises. Disano v. New England Steam ant he might have seen and avoided it, Brick Co. (1898) 20 R. I. 452, 40 Atl. 7. yet by reason of his intentness upon the

that he was ordered to make the coup-first sight to be somewhat inconsistent. ling when a passenger train was due in In Greenleaf v. Dubuque & S. C. R. Co. a few moments, the court said that in (1871) 33 Iowa, 52, where a brakeman

neers to approach switches with great using the defective drawbar he did not care, having their trains, if possible, waive his right of action for the injury under such control as to be able to stop received. He would not be justified in them from running into an open switch. disobedience to orders at such a critical <sup>3</sup>a Young v. Syracuse, B. & N. Y. R. moment. Strong v. Iowa C. R. Co. Co. (1899) 45 App. Div. 296, 61 N. Y. (1895) 94 Iowa, 380, 62 N. W. 799. But see note 5, infra, as to the Iowa doctrine.

In another case, the absence of an exi-Fed. 392, the court recognizes, arguendo, gency or unusual circumstances demanding the servant's exclusive attention, ble to a brakeman for an injury caused rapidity, or promptness of action was by the proximity of an uncovered cul- adverted to as evidence corroborating the vert to a switch, where its presence was conclusion that the servant had assumed obvious risks arising from certain per-

<sup>5</sup> The contrasted situations indicated work in hand, his attention was for the in the text-which, it will be noticed, moment diverted.

In another case, where it was contended that a brakeman assumed the risk of coupling by reason of his knowledge of the character and condition of the drawford a basis upon which it is easy to bar of a certain engine, and it appeared the the was calculated to reconcile two Iowa cases which seem at first girls to be converted to the content of the servant's assumption of a risk superadded to his employment by the master's negligence is implied on the ground of a supposed stipulation not to hold the master responsible for such injuries as may subsequently result from the existence of that risk, and the theory that the servant's forgetfulness of the defective conditions at the time of the accident injects into the case a differentiating factor which will enable him to maintain an action, cannot stand together without the aid of the hypothesis that the contract into which the servant is thus supposed to have entered is suspended for the moment, whenever his thoughts and attention happen to be excusably diverted to such an extent that he fails to remember the danger to which the contract relates. Such a hypothesis introduces into the law of contracts a conception not admitted in any other class of cases, and no valid reason has ever been suggested why it should be admitted in the class now under discussion.6

of waiver was explicitly relied upon, ligence of the employee. It is a conand the court accordingly held that the tract exemption absolute." servant's absorption in his duties did in note 4, supra.

is an affirmative one, which must be the end of a bridge along which he was raised by the employee, a complaint is making his way to shut off escaping not demurrable which alleges that the steam after an explosion. The accident injury was received in consequence of had filled the room with vapor, and there injury was received in consequence of had filled the room with vapor, and there its being impossible to stop the train as quickly with the defective brakes furnished as if they had been in good condition, and that the servant, while attempting to stop the train, was carried against a low overhead bridge which he failed to observe, owing to his being busily engaged in his duties. Beard v. Chesapeake & C. R. Co. (1893) 90 Va. Gibson v. Erie R. R. Co. (1875) 63 N.

was struck by the waterspout of a tank, the defense raised was contributory negligence. The court refused to say that this was available, as a matter of law, in his dissenting opinion: "If the docremarking that, if the service to be perturned of the assumption of obvious risks formed was of a character to require has any vital force, how can it matter that his exclusive attention should be whether or not the servant has in mind fixed on it, and that he should act with the danger? This fact clearly nas sigrapidity and promptness, it could hard-nificance if the question be one of conly be expected that he should bear in tributory negligence. If it be one of mind the existence of the defect and be the assumption of obvious risks, it is prepared at all times to avoid it. In clearly immaterial. Under that doctrine Perigo v. Chicago, R. I. & P. R. Co. the master is absolutely relieved from (1879) 52 lowa, 276, 3 N. W. 43 (1880) liability resulting from that risk. There 55 lowa, 326, 7 N. W. 627, the defense is no question of the care or the neg-

A similar doctrine is involved in a not excuse his failure to remember the decision by the supreme court, of later dangerous conditions. See note 9, infra. date than this one. Rohan v. Metro-The latter case is, however, apparently politan Street R. Co. (1901) 59 App. inconsistent with the Strong Case Div. 250, 69 N. Y. Supp. 570, where an (1895) 94 Iowa, 380, 62 N. W. 799, cited employee in a boiler room was injured by falling through a space which he As the defense of assumption of risks knew to exist between the boilers and

These considerations seem to be decisive in favor of the theory adopted by the courts of several states, that an action for an injury caused by the master's negligence is barred by evidence which shows that the servant had, before the accident, attained a full comprehension of the risk created by that negligence, although it may also be apparent that, at the time of the accident, he was giving such close attention to matters connected with his duties that he had temporarily forgotten or did not observe the existence of the risk. That is to say, the defense of an assumption of the risk operates as a bar to the action, irrespective of whether the servant was or was not negligent in the premises. (Compare §§ 306-308, post.) Or, as the situation is also stated, the question of the servant's waiver cannot be affected by the rapidity or promptness with which he may have been required to act when the risk was encountered.7 This result may be viewed as a simple deduction from the axiomatic principle that, if the facts of a case are such as to enable the person sued to rely on two or more defenses at his option, and one of those indisputably furnishes a perfect bar to the action, he cannot be precluded from availing himself of its protection, merely because the intervention of a jury is necessary to determine whether the other defense is also open to him. Or the conception may be entertained that the possibility of the servant's forgetting a risk which has been previously accepted is an incidental hazard embraced by the implied stipulation upon the subject.8

Y. 450, 20 Am. Ren. 552, on the ground not based on this ground; that in his that, when struck, the plaintiff was not preoccupation with his other duties he in the earlier decision was wholly im-

Perigo v. Chicago, R. I. & P. R. Co. (1879) 52 Iowa, 276, 3 N. W. 43 (1880) 55 Iowa, 326, 7 N. W. 627 (brakeman was injured by a structure near the

where the injury was caused by a low dark at the time and he did not know overhead bridge, the court in answer to that the car he was coupling was the the suggestion that, as the servant's one without the spring. Houston & T. attention might have been diverted to C. R. Co. v. Barrager (1890; Tex.) 14 other duties, he might not have been S. W. 242. wanting in due care, said that its decision against the right of recovery was

engaged in any duty which distracted might have been free from blame in loshis attention from the danger which ing sight of the danger which threat-confronted him, is an attempt to perened him; but that his inability to mainform the impossible by converting into tain the action was a necessary result a differentiating factor a detail which of the fact that the danger was obvious and therefore assumed by him.

A brakeman who knew that a spring <sup>7</sup>Brossman v. Lehigh Valley R. Co. attached to a drawhead to prevent the (1886) 113 Pa. 490, 57 Am. Rep. 479, cars from coming dangerously close to-6 Atl. 226 (low bridge; dark night); gether had been lost, and who himself replaced the drawhead without the spring, and who was injured later dur-ing the run while coupling that car to another, by the cars being driven so close together as to crush him, cannot, on ac-In Baltimore & O. R. Co. v. Stricker count of his having assumed the risk, (1878) 51 Md. 47, 34 Am. Rep. 291, recover of the company, although it was

See also the following notes.

\*The situation is thus stated in a

So far as regards its effect in barring the servant's action, this theory is virtually equivalent to one which is asserted more or less distinctly in several cases; viz., that, when a servant has once obtained notice of an abnormal risk, his failure to observe it and protect himself on all subsequent occasions must be treated as negligence per se, and that he cannot claim any special indulgence on the ground that his attention was diverted by the necessity of attending closely to his duties at the particular moment when the injury was received.9

As to the conception that a master is guilty of negligence if his instrumentalities or methods are of such a nature that a momentary and excusable diversion of the servant's attention from his environment owing to his absorption in his duties is likely to cause injury, see §§ 31, 66, ante.

282. Failure of the servant to notify the master as to the existence of the dangerous conditions.— (Compare §§ 303, 303a, post.)— The failure of the servant to report to the master the existence of the dangerous conditions which caused the injury in suit is frequently referred to as a circumstance which corroborates the conclusion that the responsibility for any injuries which the servant might receive by

case where the confusion of mind result- risk of such emergencies. He did not the presence of a pile of lumber close of things he was liable to be placed to the track where he was working. in these situations that were full of The court considered that the possibility that the pile might prevent his escaping in time or cause him to stumble (1888) 87 Ala. 708, 4 L. R. A. 710, 6 was one of the risks assumed by him, So. 277, where the servant was injured unless, as was suggested, the train was

ing from being suddenly called upon to stipulate that there should be no exiget out of the way of an approaching gencies or unexpected demands upon him train caused a section man to forget for services, and in the ordinary course

by a low overhead bridge, the court said: running at a rate greater than he had reason to anticipate. Bengtson v. Chiplaintiff was sufficiently notified or cago, St. P. M. & O. R. Co. (1891) 47 warned, and from inattention, indiffer-Minn. 487, 50 N. W. 531. Similarly in ence, absentmindedness, or forgetfulness, Baylor v. Delaware, L. & W. R. Co. he failed to inform himself, or failed to (1878) 40 N. J. L. 23, 29 Am. Rep. 208 take necessary steps to avoid the injury, (low bridge case) the court argued this was proximate, contributory neglithus: "Nor does there seem any weight gence, and is also a complete answer to thus: "Nor does there seem any weight in the suggestion that the plaintiff was the action. He must avail himself of called upon suddenly to take part in the operation of switching off these cars at the time in question. There was nothing count the surroundings and perils attenusual in this act; it was part of the ordinary duty of the brakeman to perform it. As to the pretext that the call care, watchfulness, and caution as orupon the plaintiff to perform this service was sudden, and that he was thrown off his guard, it is certainly a conclu-under like circumstances. There are off his guard, it is certainly a conclu-sive answer to say that it was a part of perils in the very nature of such service, his bargain when he undertook this busi-ness, that he subjected himself to the guard. Of these the employee takes the reason of those conditions was assumed by him. The alternative open to the servant is said to be that he may either notify the master or remain silent and take the risk.2 The rule is declared to be founded on justice and good sense, for the reason that, in a large majority of cases, employees are better informed than their employers as to the safety of machinery in use by them, as they have better means of information.3

It seems a reasonable inference from the language in which the servant's omission to report a defect is referred to in the cases so far cited, that he was considered to be subject to a specific duty in this regard, a breach of which would have rendered him guilty of contributory negligence, if there had been any object in mentioning that defense as an additional bar to the action. In fact, the failure to inform the master of an abnormal risk which has supervened is some-

risk. He is guilty of contributory negliin § 30a, ante, some of which exhibit a similar standpoint, even though the servant's absorption in his duties may not have been explicitly adverted to. Some remarks on the absurdity and injustice of this assumption have been offered in

"It has been repeatedly held—in fact there is no conflict of authority upon this question—that where an employee has knowledge of machinery being defective and dangerous, and in the course 7 Vict. L. Rep. (L.) 4. of his employment continues to use it in case of injury from such cause, recome the intoxication before it came to cover damages." Mansfield Coal & Coke the master's notice). Co. v. McEnery (1879) 91 Pa. 185, 36 Am. Rep. 662.

This omission on the servant's part is gence if in his care, diligence, and watchalso mentioned as a material factor in
fulness he falls below the standard numerous other cases, of which it will
stated above." For other decisions be sufficient to cite the following:
which, on the facts, virtually involve the Washington & G. R. Co. v. McDade fulness he falls below the standard stated above." For other decisions be sufficient to cite the following: which, on the facts, virtually lavolve the assumption that trainmen can always, (1890) 135 U. S. 554, 34 L. ed. 235, by taking adequate care, protect them10 Sup. Ct. Rep. 1044; Baltimore & O. selves from injury under these or similar R. Co. v. Baugh (1893) 149 U. S. 368, circumstances, whether there is or is 37 L. ed. 772, 13 Sup. Ct. Rep. 914; not some pressing duty to perform, see Hough v. Texas & P. R. Co. (1879) 100 Baylor v. Delaware, L. & W. R. Co. U. S. 213, 224, 25 L. ed. 612, 617; Mc- (1878) 40 N. J. L. 23, 29 Am. Rep. 208 Queen v. Central Branch Union P. R. (low bridge); Illick v. Flint & P. M. Co. (1883) 30 Kan. 691, 1 Pac. 139; R. Co. (1888) 67 Mich. 632, 35 N. W. Pollich v. Sellers (1890) 42 La. Ann. 708 (side of bridge near track struck 623, 7 So. 786; Lake Shore & M. S. R. brakeman while climbing a car to set Co. v. Conway (1897) 169 Ill. 505, 48 brakes which had been signated for); N. E. 483; Illinois C. R. Co. v. Jones and the cases mentioned in notes 7 and (1882) 11 Ill. App. 324; New York, L. 8, supra. Compare also the cases cited E. & W. R. Co. v. Lyons (1888) 119 Pa. in § 30a, ante, some of which exhibit a 324, 13 Atl. 205; Wannamaker v. Burke 324, 13 Atl. 205; Wannamaker v. Burke (1886) 111 Pa. 423, 2 Atl. 500; Hatt v. Nay (1887) 144 Mass. 186, 10 N. E. No. No. 144 Mass. 100, 10 N. E. 807; Davis v. Detroit & M. R. Co. (1870) 20 Mich. 105, 4 Am. Rep. 364; Mad River & L. E. R. Co. v. Barber (1856) 5 Ohio St. 541, 67 Am. Dec. 312; East Tennessee, V. & G. R. Co. v. Charles, 1883) 12 Jon. 46. Executive (1883) 12 Jon. 46. Executive (1883) Gurley (1883) 12 Lea, 46; Knoxville 5 S. W. DCR; Litton v. Thornton (1881) Iron Co. v. Smith (1887) 86 Tenn. 45,

<sup>2</sup> The Antonio Zambrana (1898) 89 without notifying his employer of such Fed. 60 (seaman, knowing of the intoxidefect and asking him to repair, he vol- cation of the mate, concealed the fact untarily accepts the risks, and cannot, from the master, and endeavored to over-

<sup>3</sup> New York, L. E. & W. R. Co. v. Lyons (1888) 119 Pa. 336, 13 Atl. 205.

times adverted to as a circumstance furnishing such a bar.4 there is high judicial authority for a different theory. In a leading English case Lord Watson expressed the opinion that the provision in the English employers' liability act of 1880 (see chapter xxxvII., post), by which the servant is declared incapable of suing under the statute if he has failed to give his superiors notice of a defect known to him, but not to them, has put the servant in a more favorable position than he occupied under the common law; 5 and his view has been adopted by the supreme court of Canada.6 But with all defer-

(1886) 108 Ind. 1, 6 N. E. 630. The the proper person to receive a comfailure to report is treated as contrib-plaint; (2) that the defendant did not utory negligence in *Powers* v. *New* know of the defect; (3) that the mem-York, L. E. & W. R. Co. (1885) 98 N. ber of the defendant firm who was him-Y. 274.

(1882) 11 Ill. App. 324.

authority respecting the point now under discussion, it is perhaps not amiss to offer a few criticisms upon the reasoning of this case. The exposition of principles appears to be singularly unsatisfactory,—more particularly when it is considered with reference to the special findings which are set out in the record. The answers of the jury to the trial judge were to this effect: (1) That the plaintif and comply indeed of the declare or assume that liability on the master's part is negatived by his ignorance of the defect only where three of the questions propounded by it appears that such ignorance was extensively and the record. The answers of the jury to be his ignorance of the defect only where three of the questions propounded by it appears that such ignorance was extensively and the record. The answers of the jury to be his ignorance of the defect only where the trial judge were to this effect: (1) That the plaintif and complying the argument of counsel that an allegation that an instrumentality was though to be in an unsafe condition is established by proof that he "ought to have known" that it cases which declare or assume that liability on the master's part is negatived by his ignorance of the defect only where the plaintif and complying the argument of counsel that an allegation that an instrumentality was allegat

Lake Shore & M. S. R. Co. v. Stupak defect to the person who appeared to be self acting as manager ought to have "All the employees are presumed to been cognizant of the defect. In view be faithful to the interest of the em- of the first of these findings it is not ployer, as well as careful of their own apparent why the effect of the failure of ployer, as well as careful of their own apparent why the effect of the failure of safety, and it is reasonable to say that the servant to notify the master of the they shall promptly report any defect defect should have been regarded as a likely to endanger their lives or the property under their control. If they no intimation that the evidence was inmake no such complaint, it is fair to infer that they regard the appliances rived at by the jury, nor that the notingly accept the risk involved in the master with knowledge, for the reason service." Illinois C. R. Co. v. Jones that it was made to a mere fellow servent. So far as the report shows if ant. So far as the report shows, it 6 So Emith v. Baker (1891) A. C. 325, may have been made to the manager of 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. the concern, who, as already stated, was 467, 40 Week. Rep. 392, 55 J. P. 660, one of the partners in the defendant where, in the course of his comments firm. But even if we assume that this on the provision, he remarked: "I think finding could not be treated as an elethe object and effect of the enactment ment in the case for some reason, eviis to relieve the employer of liability for dential or doctrinal, which is not disinjuries occasioned by defects which closed, there still remains the difficulty were neither known to him nor to his that the jury also declared that this delegates down to the time when the inmanaging partner "ought to have been jury was done. At common law his ig-cognizant" of the defect. That this findnorance would not have barred the work- ing was, so far as the defendant's liaman's claim, as he was bound to see that bility was concerned, equivalent to a his machinery and works were free from finding, is indisputable, both on princidefect, and so far the provision operates in favor of the employer."

\*Webster v. Foley (1892) 21 Can. S. C. 580. In view of the paucity of direct Rep. 748, where Blackburn, J., remarked authority respecting the point now unduring the argument of counsel that an

ence to this very distinguished jurist, it seems open to doubt whether this theory is correct. There is, it is true, no English decision which in terms lavs down the rule that a servant who learns of a defect is bound to communicate his knowledge to his master, and that his failure to give such information constitutes a breach of a specific duty which of itself is enough to prevent his recovering for any injury that he may thereafter receive owing to the existence of the defect. But the reason for the lack of direct authority on the point is sufficiently obvious. In all the cases decided under common-law doctrines up to the time when Lord Watson delivered this opinion, the circumstances were necessarily such as to bring them within the scope of the principle that the servant's action was absolutely barred whenever it was shown that he went on working with a full appreciation of a risk resulting from the master's negligence. The natural result was that, although the failure of the servant to

land (1866) L. R. 2 Q. B. 33, 36 L. J. is undoubtedly the import of the words, Q. B. N. S. 14, 15 Week. Rep. 151, 7 shows that the court intended, at all Best & S. 676; Paterson v. Wallace events, to assert the doctrine that the (1854) 1 Macq. H. L. Cas. 748; Roberts servant did not forfeit his right of acv. Smith (1857) 2 Hurlst. & N. 213, tion by not giving notice of a defect 26 L. J. Exch. N. S. 319, 3 Jur. N. S. which was known to him. But it may 469; Webb v. Rennie (1865) 4 Fost. & be desirable to advert, in passing, to F. 608. For the American decisions to the ambiguity of phrase "had no notice," the same effect see chapter x., ante. In which, so far as the words themselves view of this doctrine the finding in gues- are concerned, may also be taken to

Thus far we have been discussing the case on the assumption that the court,

view of this doctrine, the finding in ques- are concerned, may also be taken to tion manifestly put the master in the mean "had no actual knowledge." The same position as if notice of the defect significance of this fact when considered had actually been given by the servant, with reference to the substance of the and rendered it a mere matter of super- findings above referred to is obvious. erogation to inquire whether or not be Such a construction of the phrase would was relieved from liability by the serv-render Mr. Justice Strong's remarks apant's failure to give notice. The defend-plicable to the second of those findings, ant firm was plainly answerable on the and upon this circumstance, taken in simple ground that one of its members connection with the further circumhad been personally negligent in not stance, already commented upon, that remedying a defect of which he had conthe findings as to the complaint made the findings as to the complaint made structive knowledge. See Mellors v. by the servant, and the master's possesshaw (1861) 1 Best & S. 437, 30 L. J. sion of constructive knowledge of the Q. B. N. S. 333, 7 Jur. N. S. 845, 9 defect, a plausible argument might be Week. Kep. 748; Ashworth v. Stanwix (1861) 3 El. & El. 701, 30 L. J. Q. B. N. S. 183, 7 Jur. N. S. 467, 4 L. T. N. S. the existence or absence of actual is the existence or absence of actual knowledge that determines whether the master is or is not liable. Such a doccase on the assumption that the court, in deciding that a judgment for the plaintiff should not be set aside for the mere reason that the defendant "had no notice" of the defect, used the phrase in the sense of "had received no notification from the servant." This is the cation from the servant." This is the construction put upon the decision in pects of a case which, to say the very the reporter's headnote, and the reliance least, is neither a model of lucid state-placed by Strong, J., upon the passage ment nor a favorable exemplification of from Lord Watson's opinion, where this the manner in which a court of review trine, as is very plainly shown by the from Lord Watson's opinion, where this the manner in which a court of review

report or complain of a defect was mentioned in some of the cases,7 this fact was never treated as a material element in the case, the master's defense being regarded as complete without any reference to the question whether the servant had communicated his knowledge. In none of these cases was the evidential significance of the servant's silence considered in any other point of view than as a circumstance tending to show his acquiescence in the conditions,—that is to say, as a circumstance corroborating a presumption, already absolute, that the risks in question had been accepted. Such being the state of the authorities, the mere fact that the existence of a duty on the servant's part to notify his master of a defect was never affirmed cannot fairly be adduced as a ground for denying that there was such a duty. When subjected to the test of general principles, the correctness of Lord Watson's theory seems to be equally disputable. It is impossible to adopt it without accepting the conclusion that if a jury has, in a common-law action, found that the servant was, under the particular circumstance of the case, guilty of contributory negligence in failing to give notice of the defect which caused his injury, and it is clear that the verdict was based on the hypothesis that there was a legal duty incumbent on the servant to give the notice, a court of review would be constrained to set the verdict aside. Such a proposition seems too preposterous to entertain. The extreme improbability of such a verdict's even being rendered may be readily conceded, but this practical consideration is immaterial in a discussion of the abstract point of law which is involved.

Inasmuch as a servant frequently finds himself relegated to his common-law rights, owing to his failure to give due notice that the injury was sustained, or to bring the action within the statutory period, the true doctrine on this subject is still a question of more than theoretical interest in England and her colonies, where it has not yet been determined how far the doctrine enunciated in Smith v. Baker 8 may, when the question arises, be held to have modified, in common-law cases, the theory of the older decisions that the servant's acceptance of a risk is to be inferred, as a matter of law, from his continuance in work with a knowledge of its existence. (See § 280, supra.) In Massachusetts it seems to be immaterial, in this point of view, whether the action is brought at common law or under the statute, as the English doctrine that the servant's assumption of risks

<sup>\*\*</sup>Should deal with the special findings of a jury in actions of this sort.

\*\*Tor example, Skipp v. Eastern Counties R. Co. (1853) 9 Exch. 223, 3 C, I4, Rep. 185, 23 L. J. Exch. N. S. 23.

is a question for the jury where the statute is relied upon has been definitely repudiated in recent decisions.9

A case in which there is obviously no obligation to notify the master as to a superadded risk is presented where that risk is created by a change in the position of the appliances by or under the authority of the master. Under such circumstances the master is chargeable with all the knowledge which the servant can impart to him. 10

283. Servant's position the same whether the risk existed when he began work, or supervened afterwards.—(Compare the discussion of this element in § 384, post.)—It has never been questioned, and there are numerous cases expressly or impliedly deciding, that the doctrine of assumption of risks is a bar to the action whenever the abnormal danger was known, actually or constructively, to the servant at the time when he entered the employment.<sup>1</sup>

O'Maley v. South Boston Gaslight Shaw (1861) 1 Best & S. 435, 446, 30
Co. (1893) 158 Mass. 135, 47 L. R. A. L. J. Q. B. N. S. 333, 7 Jur. N. S. 845.
161, 32 N. E. 1119; Davis v. Forbes 9 Week. Rep. 748, per Blackburn, J. (1898) 171 Mass. 543, 47 L. R. A. 170, (arguendo). 51 N. E. 20.

the want of proper repair, and with tracting for himself, and with full no-knowledge of the facts enters on the tice of the risk which he assumes, service, the master cannot be held liachooses to undertake a hazardous emble for injury to the servant within the ployment, to put himself in a dangerous scope of the danger which both the conposition, or to work with defective or tracting parties contemplated as inci- unsuitable tools, machinery, or applidental to the employment." Clarke v. ances, no such implied contract arises."

Holmes (1862) 7 Hurlst. & N. 943, 31 Coombs v. New Bedford Cordage Co.

L. J. Exch. N. S. 356, 8 Jur. N. S. 992, (1869) 102 Mass. 572, 3 Am. Rep. 506 10 Week. Rep. 405, per Cockburn, Ch. J.

"If the servant enters into an employhis employer that the servant shall exare consistent with the employment."

and the danger is so normal that it is the employment to which he voluntarily in the ordinary course of the employ and intelligently consents, and, while orment; in that case the servant cannot dinarily he is to be subjected only to complain of an injury which he has sustained, because he undertook the employment, if he knows that proper ployment with that risk." Mellors v. precautions have been neglected, and

"The implied contract to have the ma-10 Fairbank v. Haentzsche (1874) 73 chinery in such a safe and proper condition as not to expose the servant to <sup>1</sup> If the servant "thinks proper to acunnecessary risk is the foundation of cept an employment on machinery dethe master's liability. If the servant, fective from its construction or from being fully capable of choosing and con-(uncovered cogs).

"Obvious imperfections in methods or ment knowing there is danger, and is machinery, existing at the time of the satisfied to take the risk, it becomes employment, cannot be made the basis part of the contract between him and of a liability in favor of an employee who suffers an injury in the course of pose himself to such risks as he knows his employment, for the reason that the employer has a right to have and use Saxton v. Hawksworth (1872) 26 L. T. imperfect methods and tools, and to ask Saxton v. Hawksworth (1872) 26 L. T. Imperiect methods and tools, and to ask N. S. 851, 853, per Willes, J. Imperiect methods and tools, and to ask others to enter his employ to aid him in such use, and that in so doing he does not undertake to insure the employee." his negligence, viz., "where [he] the master has furnished instruments or matchinery which are dangerous, but the servant knows that they are dangerous. "The servant assumes the dangers of the danger is so normal that it is the employment to which he voluntarily

In some of the cases which exemplify this aspect of the rule the risks involved were created by a condition of the plant which was essentially permanent, and for that reason would doubtless be assigned by some courts to the ordinary class.2 Compare §§ 55-57, and 263, 264, ante. In others the risks arose from the imperfection of the arrangements and methods adopted in the conduct of the business.<sup>3</sup>

risk to which he will be exposed thereby, assumes the risk of falling into the

chooses to enter into an employment in- the place where the injury was received volving dangers of personal injury which was more than usually hazardous, the the master might have avoided, he takes theory being that knowledge of this in-128, 9 N. W. 581.

the defendant, and was in plain sight, ters v., vII., ante. and had been passed by him day after slippery floor, across a space about 16 the train, the number of trainmen hav-

still knowingly consents to incur the inches wide along the edge of a vat, his assent dispenses with the duty of the vat); French v. Columbia Spinning Uo. master to take such precautions." Leary (1897) 169 Mass. 531, 48 N. E. 269 v. Boston & A. R. Co. (1885) 139 Mass. (plaintiff injured through stepping too 580, 52 Am. Rep. 733, 2 N. E. 115 (jolting of locomotive in passing over illegaching forward to clean a coupling); constructed frogs threw servant off footboard).

(1893) 57 Ark. 377, 21 S. W. 886 (ties country and England that if a servent filled, plaintiff recovered only because country and England that, if a servant filled; plaintiff recovered only because the master might have avoided, he takes theory being that knowledge of this inupon himself the risk of all the hazards creased risk could not be imputed to 
incident to the employment, the existence and nature of which were known Co. (1886) 101 N. Y. 520, 54 Am. Rep. 
to him when he entered the service, and T22, 5 N. E. 358 (old pattern of a mawhich he had no reason to expect would 
be obviated or removed." Clark v. St. vice); Crichton v. Keir (1863) 1 Sc. 
Paul & S. C. R. Co. (1881) 28 Minn. 
Sess. Cas. 3d Series, 407 (servant ininved by reason of the age and fackle jured by reason of the age and feeble <sup>2</sup> By the courts referred to, a consid-condition of a horse); Long v. Coronado erable part of the subjoined decisions R. Co. (1892) 96 Cal. 269, 31 Pac. 170 would be based upon the conception that (car so constructed that there was no there was no negligence on the master's space to go between it and the car to part. Anthony v. Leeret (1887) 105 N. which it was to be coupled). For other Y. 591, 12 N. E. 561 (unguarded trap cases which, as the facts stand, obvidoor in a passage); De Forest v. Jewett ously involve the same principle, even (1881) 23 Hun, 490, Affirmed in (1882) though it may not be explicitly men-88 N. Y. 264 (switchman while coupling tioned, see note to § 277, and chapter cars caught his foot in an open ditch XXI., passim. Compare also the decior trench which had remained in the sions absolving the master from liabilsame condition while he had worked for ity under the theories discussed in chap-

\* Bancroft v. Boston & M. R. Co. day); Clark v. St. Paul & S. C. R. Co. (1893) 67 N. H. 466, 30 Atl. 409 (1881) 28 Minn, 128, 9 N. W. 581 (awn- (brakeman who knew that there was no ing of elevator projected over railway gate and flagman at a certain crossing, track); Gibson v. Erie R. Co. (1815) and that the view of the crossing was 63 N. Y. 449, 20 Am. Rep. 552 (low liable to be obstructed by cars standing overhead bridge); Williams v. Dela on an adjacent siding, held unable to ware, L. & W. R. Co. (1889) 116 N. Y. recover for injuries while he was on a 628, 22 N. E. 1117 (low overhead switch engine, by a collision with a cart bridge); Arizona Lumber & Timber Co. on the crossing); Lake Shore & M. S. v. Mooney (1895; — Ariz. —) 42 Pac. R. Co. v. Fitzpatrick (1877) 31 Ohio 952 (circular saw left without a hood); St. 479 (no servant stationed at a place Balle v. Detroit Leather Co. (1889) 73 where he was required); Chicago & E. Mich. 158, 41 N. W. 216 (one who en- I. R. Co. v. Geary (1884) 110 Ill. 383 ters upon employment in a tannery, (night watchman in yard run down by where he walks backwards, dragging backing train, owing, as he alleged, to hides from vats to a wash wheel, on a the want of a man on the rear end of

The fact that the dangerous conditions arose after the plaintiff entered the employment is considered to be immaterial, where it is shown that he had continued to work after the change, with a full appreciation of the increased risk.4 Plainly, no other position is logically tenable, consistently with the retention of the theory of an implied centract in regard to every risk of which the servant obtains a knowledge before his injury is received. The doctrine thus applied is, however, felt to be a severe one, and various attempts have been made, with more or less success, to modify its operation in certain directions. In one of the earlier cases Blackburn, J., suggested that the assumption of a risk added by the master's negligence after the beginning of the service ought to be inferred only where the risk was normal in such a sense as to have become a regular incident of

been employed); Lake Shore & M. S. of the employment, and such as are in-R. Co. v. Knittal (1878) 33 Ohio St. cident to the business." It was held 468 (customary disregard of rule). For that words equivalent to, "or which exother cases of a similar type, see § 277, isted during the course of the employ-

Rogers v. Leyden (1890) 127 Ind. 50, tion which limits the risks assumed by 26 N. E. 210: Norton v. Louisville & an employee to those known to him, or N. R. Co. (1895) 16 Ky. L. Rep. 846, which were discernible by a person of 30 S. W. 599; Johnson v. Devoe Snuff his age and capacity in the exercise of Co. (1898) 62 N. J. L. 417, 41 Atl. 936; ordinary care at the time he entered on Dillenberger v. Weingartner (1900) 64 the employment, is prejudicially erro-N. J. L. 292, 45 Atl. 638; Davis v. neous, where the evidence tends to show Forbes (1898) 171 Mass. 548, 47 L. R. that he became aware of the risk dur-A. 170, 51 N. E. 20; Dynen v. Leach ing his employment. Norfolk Beet-(1857) 26 L. J. Exch. N. S. 221 (plain-fixed worked several months after a less 76 N. W. 566. safe device had been substituted for the York, L. E. & W. R. Co. (1885) 98 N. Y. 274 (handle of hand car on which plaintiff rode out of repair for three weeks before the accident); East Tennessee, V. & G. R. Co. v. Smith (1882) 9 Lea, 685 (unsound handle of hand car in use one month); Atchison, T. Kan. 315, 27 Pac. 965 (conductor inform the work with a full appreciation jured by insufficiency of crew of train, of the risk. Goldthuait v. Haverhill begins been reduced about one & G. Street R. Co. (1894) 160 Mass. force having been reduced about one & G. Street R. Co. (1894) 160 Mass. year before the accident); Mundle v. 554, 36 N. E. 486 (where the risk was Hill Mfg. Co. (1894) 86 Me. 400, 30 Atl. the obvious one that new street cars 16 (servant tripped over splinter in with projecting steps would, when pass-

supra, and chapter XXI., post.

ing been the same all the time he had except such as existed at the beginning ment, of which the employee had knowl-\*Carrigan v. Washburn & M. Mfg. edge or was bound to have knowledge," Co. (1898) 170 Mass. 79, 48 N. E. 1079; should have been added. An instruc-

Compare also the cases in which a servant in the permanent employ of a master finds himself obliged to decide whether he will undertake duties which require him to deal with particular agencies which he has never handled before, but which unquestionably belong to a category which brings their use within the scope of his contract. Here he cannot recover if he proceeds to per-form the work with a full appreciation of danger known for three months). ing round a curve, swing closer to a Other decisions taking this principle certain wall than cars without such for granted will be found in §§ 277, 278, steps, and the servant had known of the altered conditions a month before the In Sowden v. Idaho Quartz Min. Co. accident); Pingree v. Leyland (1883) (1880) 55 Cal. 443, the court at the 135 Mass. 398 (expert machinist in emrequest of the plaintiff instructed the ploy of stevedore ordered to use a dejury that "the servant assumes no risks fective winch on a particular vessel);

the employment.<sup>5</sup> But this suggestion has borne no fruit. In the following year, however, the exchequer chamber made the important concession that an agreement by the servant to take a risk of this kind would not be implied, as a matter of law, where the master had induced the servant to go on working in reliance upon the master's promise to remedy the conditions from which the risk resulted.6 See chapter xxII., post. The decision thus rendered has also been regarded as an authority for the doctrine that, independently of the element of a promise, there is no necessary implication of a contract to assume a superadded risk, where it is caused by the master's breach of a statutory duty.7 But this position is certainly not accepted in the American courts, and, as it would seem, not by all English judges. See chapter xxxv., post.

284. Length of time during which work was continued after notice of the risk was received.—It will be shown in § 302, post, that a servant does not necessarily become chargeable with contributory negligence because he does not leave the employment immediately after he ascertains the existence of a dangerous defect.

That equity and common sense point very decidedly to the propriety of admitting the operation of a similar principle where the defense of an assumption of the risk is relied upon seems to be unquestionable. Nor can it be reasonably disputed that the master himself would often be benefited rather than prejudiced by the servant's knowledge that he would not lose his right of action by continuing to work for a short period in cases where a sudden abandonment of his duties would inflict appreciable damage upon the business. A strong argument in favor of this relaxation of the general rule was made by Mr. Justice Brewer in a case which came

Carey v. Boston & M. R. Co. (1893) 158 (there the check-chains on its cars), Mass. 228, 33 N. E. 512 (projecting and the position of a servant who goes screw on handle of hand car caught on with his duties, where the premises before accident).

v. New Bedford R. Co. (1876) 119 Mass. absence of the element of a promise. 412, 20 Am. Rep. 331, the court dis- \*\*Glarke v. Holmes (1862) 7 Hurlst. & 412, 20 Am. Rep. 331, the court distinguished between the position of a N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. servant who continues to work with N. S. 992, 10 Week. Rep. 405. knowledge of a permanent imperfection

clothes of section hand, and threw him or instruments upon which or by which off, several days after the car was fur- the business is carried on are temponished in place of another one); Hale rarily defective, and remarked that, alv. Cheney (1893) 159 Mass. 268, 34 N. though the employer was never liable in E. 255 (injury caused by slippery con- the former case, he might be liable in dition of floor of room to which plain- the latter case,—especially if he had tiff had been transferred three weeks promised the servant to remedy the dangerous conditions and failed to do so. <sup>6</sup> Mellors v. Shaw (1861) 1 Best & S. But the writer is not aware of any de-437, 30 L. J. Q. B. N. S. 333, 7 Jur. cision in the state in which the principle N. S. 845, 9 Week. Rep. 748. In Ladd thus outlined has been applied in the

<sup>7</sup> See the opinion of Bowen, L. J., in in an agency of the master's business Thomas v. Quartermaine (1887) L. R. Vol. I. M. & S.—14. before him, while sitting as a circuit judge. The weight of that argument, however, is considerably impaired by the fact that, as will be shown in § 310, note 6, post, the defense of waiver was regarded by him, at the time when he rendered this decision, as being merely one form of the defense of contributory negligence. other case indicative of a disposition to break away, to some extent, from the doctrine which throws the responsibility for injury upon the servant from the time that he becomes aware of the increased danger, is one which embodies the doctrine that, where a servant is exposed to a new danger by a change in the position of some fixed appliance, he is not bound at his peril to leave the service immediately, if it is reasonable to suppose that the danger will presently be removed. He may, it was declared, remain in the employment a short time in

555, 51 J. P. 516.

18 Q. B. Div. 685, 56 L. J. Q. B. N. S. see the general way in which he conducts 340, 57 L. T. N. S. 537, 35 Week. Rep. his business; and if he finds that his employer intends to use machinery with <sup>1</sup> O'Rorkc v. Union P. R. Co. (1884) defects, or to conduct his work in a 22 Fed. 189, Section man had worked dangerous manner, finds that is to be seven or eight months without any flag his habit; finds that, after he has been to protect him from trains. The deci- notified, he still intends to conduct his sion was, as might be expected, against business in that way, and then goes on the plaintiff on the facts; but the fol- and continues in the work,—it is fair lowing remarks are rendered something to assume that he takes the risks. Of more than mere obiter dieta by the ref- course, there can be no question where erence to the case mentioned at the end it is expressly agreed upon. Suppose, of this note: "This doctrine of waiver for instance, that I own a mill; suppose has been carried by some courts to a the machinery in it is clearly defective, great extent. They have affirmed that and I say to an employee: I am runan employee, whenever he finds suitable ning a mill in which there is defective precautions have not been taken for his machinery—and I point out to him the safety, ought to stop at once, and, if he defect,—are you willing to work here continues on, he assumes all the risks. and take the risks? If he says he is, I do not think that can be held to be he cannot afterwards recover if he is . . I do not think that the injured. And so, in order that there urgency can be forced upon an employee should be an implied agreement, the so quickly as that for deciding; that facts should exist for so long a time that he cannot be called upon at the instant the employee has opportunity to see to stop work if he sees there is danger. that his employer means to let the ma-Suppose an engineer running a train be-chine remain in that condition, and tween the point of departure and the point of terminus finds that his engine is out of order, can he stop right there at work, he may be presumed to conand say he will stop until the injury is mended? It would not be safe to do this. He must carry the defective engine to its point of destination. No other rule would be safe. And so, generally, a man cannot be called upon at the moment to say, There is a defect, or there is danger, and I will stop. He moment to wait a reasonable time, has a right to wait a reasonable time, to consider the circumstances of the case, and to give notice to his employers to consider the engloyer means to have whether the employer means to have coming more and more interested in the defect remedied; time enough to their work, were prompted by feelings tween the point of departure and the carry on his business in that way as a the defect remedied; time enough to their work, were prompted by feelings

the expectation that the hazardous conditions will be remedied.<sup>2</sup> But the value of this case also is somewhat doubtful, as it emanates from a state in which the defenses of assumption of risks and contributory negligence are not always properly distinguished; and it is uncertain whether the court, when it rendered the decision, had that distinction clearly in view.

It must be admitted, however, that the rationale of the doctrine of assumption of risks militates very strongly against the correctness of the views propounded in these cases, and imperatively requires the conclusion that, as the servant is entitled to guit the employment as soon as he ascertains that the master is guilty of a breach of contract in exposing him to an abnormal danger, he must avail himself at once of this right, or suffer the consequences of an imputed acceptance of the responsibility for any injury which he may thenceforth receive, owing to the existence of that danger. And this seems to be the effect of all the authorities except those already referred to.<sup>3</sup> All that can be safely affirmed, therefore, with regard to the evidential import of a somewhat extended period of continuance in the employment is that,—if such a paradox is permissible—what was certain apart from this element is rendered still more indisputable. In the subjoined note several rulings are given to which this remark is applicable.4

of emulation to perform their share of knowledge of its position would be mait more and more expeditiously. The terial only if it had been acquired beconsequence was that less and less care fore the trip on which the accident ocwas taken in securing the rails. Finally curred. Union P. R. Co. v. Monden at about 3 o'clock in the afternoon one of them fell on the plaintiff. The contention of the defendant, that he den (1893) 50 Kan. 539, 31 Pac. 1002.

The language used in Rogers v. Leycontention of the defendant, that he den (1890) 127 Ind. 50, 26 N. E. 210, should have refused to work any longer seems to amount to an explicit recognias soon as he observed the increased tion of the principle that a servant who dangers to which the methods of work does not abandon the employment the

Ill. 236 (servant caught on revolving cepted it. shaft which projected into the room <sup>4</sup> Skinp v. Eastern Counties R. Co. where she worked; the employer, owing (1853) 9 Exch. 223, 3 C. L. Rep. 185, to a press of business, had omitted to 23 L. J. Exch. N. S. 23 (insufficiency of shorten it after it had been placed in staff known for several months); Chi-

dangers to which the methods of work does not abandon the employment the were subjecting him, was rejected. moment extraordinary risk comes to <sup>2</sup> Fairbank v. Haentzsche (1874) 73 his knowledge is presumed to have ac-

shorten it after it had been placed in position).

\*\*In The Maharajah\*\* (1891) 1 C. C. III. 25 (drawbar of locomotive known A. 181, 1 U. S. App. 20, 49 Fed. 111, for several years to be dangerous); Chithe fact that a defective winch had been used for nearly a whole day by a man familiar with such machinery was held to disable him from recovering.

In an action by a trainman to recover 276, 3 N. W. 43 (position of platform damages for an injury caused by his with relation to the track known for striking against a switch stand, it is error to instruct a jury in language Missouri P. R. Co. (1887) 36 Kan. 129, from which they might infer that his 12 Pac. 582 (switchman injured by an

285. Servant induced by master's promise to continue work.— In chapter xxii., post, it will be shown that a servant may, without being necessarily chargeable with assumption of an abnormal risk, remain at work for a period varying according to circumstances, if the master has promised to remedy the conditions from which the risk arises. The existence of this qualification of the rule is not infrequently recognized in the statements which refer to the absence of a promise as an element corroborating the inference that the risk was assumed.1

286. Fact that injury was received in obeying a special order given ad hanc vicem; significance of .- Every injury which constitutes a cause of action must, ex hypothesi, have been received in doing some-

unblocked frog after he had worked two 12 R. I. 112, 34 Am. Rep. 615 (servant and a half months in its vicinity); Weld operated machinery for several weeks v. Missouri P. R. Co. (1888) 39 Kan. after the boxing had been broken.

63, 17 Pac. 306 (held not to be prejused). See also memorando of facts appended. dicial error to exclude evidence of the unsafe condition of a bridge, the conceded facts being that the plaintiff had crossed it daily in the performance of cago & A. R. Co. v. Munroe (1877) 85 his duties for two years, and had spoken III. 25; Little Rock & Ft. S. R. Co. v. to his coemployees in terms which Duffey (1880) 35 Ark. 602; Illinois C. showed that he was well aware of its R. Co. v. Morrissey (1891) 45 III. App.

showed that he was well aware of its R. Co. v. Morrissey (1891) 45 III. App. dangerous condition); Louisville & N. 127; McQueen v. Central Branch Union R. Co. v. Bryant (1893) 15 Ky. L. Rep. P. R. Co. (1883) 30 Kan. 689, 1 Pac. 181, 22 S. W. 606 (brakeman injured 139; Money v. Lower Vein Coal Co. after one month of service by the want (1881) 55 Iowa, 671, 8 N. W. 652; of a coupling stick which should have Greenleaf v. Illinois C. R. Co. (1870) been furnished under the rules of the 29 Iowa, 14, 4 Am. Rep. 181; Sweet v. road); Chicago & N. W. R. Co. v. Dona-Ohio Coal Co. (1890) 78 Wis. 127, 9 hue (1874) 75 III. 106 (switchman had L. R. A. 861, 47 N. W. 182; Goldthwait known for five or six weeks that no v. Haverhill & G. Street R. Co. (1894) watchmen were stationed on the rear 160 Mass 554. watchmen were stationed on the rear 160 Mass. 554, 36 N. E. 486; Feely v. end of backing trains); Baltimore & O. Pearson Cordage Co. (1894) 161 Mass. R. Co. v. State (1874) 41 Md. 268 (conductor injured by a collision after ne L. R. Co. v. Watson (1887) 114 Ind. had worked eight or nine months with a knowledge of rules prescribing a cerv. v. W. C. De Pauv Co. (1894) 138 Ind. 14 Ind. tain number of train hands for each train); Huffman v. Michigan C. R. Co. Milling Co. (1895) 131 Mo. 241, 33 S. (1896) 109 Mich. 251, 67 N. W. 118 (brakeman injured in coupling cars by Houst. (Del.) 168, 14 Atl. 545; Cowles night, owing to the poor quality of the oil furnished for his lantern, he haveral months); Bancroft v. Boston & M. 357; Foley v. Jersey City Electric Light R. Co. (1893) 67 N. H. 466, 30 Atl. 409 Co. (1892) 54 N. J. L. 411, 24 Atl. 487; (risk of collision with team at crossing held to have been assumed after three passing with knowledge of conditions); Wilkinson v. H. W. Johns Mfg. 51 Neb. 527, 71 N. W. 61; Kelley v. Co. (1901) 198 Pa. 634, 48 Atl. 810 Silver Spring Bleaching & Dyeing Co. (1878) Neb. 793, 60 N. W. 1044, Spring Bleaching & Dyeing Co. (1878) Neb. 793, 60 N. W. 1044, watchmen were stationed on the rear 160 Mass. 554, 36 N. E. 486; Feely v.

thing under the authority of the master or his representative; otherwise the servant must have been a mere volunteer. See chapter XXXIII., post. As the necessary authority can be conferred only by general or special directions, it follows that such directions cannot be regarded as differentiating factors tending to negative the servant's assumption of a risk, unless so far as they may supply a ground for inferring the absence of one or more of the essential elements which must be established before that assumption can be predicated. In certain cases it is clear such an inference may be drawn with respect to the elements of voluntary action and complete appreciation of the risk. The effect of an order in both these connections will be discussed in chapter xxIII., post.

287. Assurance by master or vice principal that the conditions were safe; effect of .- If the circumstances were such that the servant was justified in relying upon the assurance of the master or his representative that the work which was being done when the injury was received involved no special risk, it is clear that the essential element of appreciation of the risk must have been lacking, and that the master cannot successfully invoke the defense of an assumption of that risk, or any other of the defenses based on the servant's knowledge. This situation is discussed in chapter xxiv., post.

288. Servant's acceptance of a known risk usually presumed to be voluntary.—(See also § 466, post.)—The rationale of the servant's assumption of a given risk being an implied agreement to include it among those which he undertakes, it is clear that, in order to entitle the master to avail himself of this defense, it must be shown that the undertaking of the servant was voluntary.1

For practical purposes, however, this requirement is of very slight utility to a servant, owing to the general adoption of the theory that, as regards the abandonment of an employment which imperils his safety, he is presumptively a free agent.2 The mere fact that the

1"An employer has no right to subject an employee to an unnecessary he cannot afterwards complain, in case of injury in consequence thereof, that the machinery was of a dangerous kind, 491, 57 Am. Rep. 479, 6 Atl. 226.

In many statements of the doctrine, the servant's assumption of a risk is expressly referred to as being conditional upon the servant's having "voluntarily" or "willingly" encountered the given risk. See, for example, the following passage: "If, however, a person specially undertake to perform a peculiarly perilous work by operating a machine obviously wanting in suitable appliances of injury in consequence thereof, that the machinery was of a dangerous kind, and that it was wanting in appliances reasonably necessary to render it safe." Rummell v. Dilworth (1885) 111 Pa. 343, 2 Atl. 355. Compare also the language used in Berns v. Gaston Gas Coal Co. (1885) 27 W. Va. 285, 55 Am. Rep. 304.

2 A servant "is not bound to risk his safety in the service of his master, and he may, if he thinks fit, decline to do that which exposes him to imminent

servant exposed himself to an abnormal risk because he feared that, if he did not do this, he would lose his position, is not considered to be evidence of legal constraint.3

111 Pa. 343, 2 Atl. 355.

ley v. Fowler (1837) 3 Mees. & W. 1, additional and more dangerous employ-Murph. & H. 305, 1 Jur. 987; Wonder ment, he accepts its incidental risks; v. Baltimore & O. R. Co. (1870) 32 Md. and, while he may require of the em-411, 3 Am. Rep. 143: Buzzell v. Laconia ployer to perform his duty, he cannot Mfg. Co. (1861) 48 Me. 113, 77 Am. Dec. recover for an injury which occurs only 212; Little Rock, M. R. & T. R. Co. v. from his own inexperience. The employ-Leverett (1886) 48 Ark. 333, 3 S. W. er is not necessarily unjust, because he 50; Indianapolis & C. R. Co. v. Love wishes in his employ a servant who can

at the matter in a legal point of view, ment, takes it or continues in it with a knowledge of its risks, he must trust Cockburn, Ch. J., in Woodley v. Metropolitan Dist. R. Co. (1877) L. R. 2 Exch. Div. 384, 389, 46 L. J. Exch. N. S. 521.

This case was approved in Leary v. 585. Boston & A. R. Co. (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115, where it was held that the plaintiff assumed the risk of acting as fireman on an en-gine, though the duty was not within his original contract. The court said: "The plaintiff did this, it is true, rather may accept or refuse it. If he has an W. 274. executory contract for the original serv-

Rummell v. Dilworth (1885) himself of his remedy on his contract. If he has no such contract, and know-Compare the language used in Priest- ingly, although unwillingly, accepts the (1858) 10 Ind. 554; Chicago & T. R. from time to time relieve a skilled work-Co. v. Simmons (1882) 11 Ill. App. 147. man, while his ordinary duties will be 3 "Morally speaking, those who employ those of a mere laborer. It must cerman on dangerous work without doing tainly be his right to engage a servant all in their power to obviate the danger who, while his ordinary duties will be are highly reprehensible. . . . The simple and expose him to no danger, is workman who depends on his employ- willing, as a part of his service, from ment for the bread of himself and his time to time to assume duties which, family is thus tempted to incur risks in order to be safely performed, require to which, as a matter of humanity, he a higher degree of skill, and which exought not to be exposed. But looking pose him to a certain degree of danger."

Where an employee complained of an if a man, for the sake of the employ- appliance as unsafe, and was told that he might either continue to use it or leave, and he continued thereafter to use the same rather than lose his place, he will be held to have assumed the risk, and cannot recover for resulting injuries. Lamson v. American Axe & Tool Co. (1900) 177 Mass. 144, 58 N. E.

So, also it has been laid down that a threat to discharge a servant if he refuses to work with appliances which are in the same condition as when he began work is not coercion. Sweeney v. Berlin & J. Envelope Co. (1886) 101 N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358; Prentice than lose the position which he had, and v. Wellsville (1893) 50 N. Y. S. R. 557, which he desired to retain; but by so 21 N. Y. Supp. 820. See also to same doing he ingrafted this duty on his oreffect Westcott v. New York & N. E. iginal contract, of which he made it a R. Co. (1891) 153 Mass. 460, 27 N. E. part. Morally, to coerce a servant to 10; Worlds v. Georgia R. Co. (1896) 99 an employment the risks of which he Ga. 283, 25 S. E. 646; Atchison, T. & does not wish to encounter, by threaten- S. F. R. Co. v. Schroeder (1891) 47 ing otherwise to deprive him of an em- Kan. 315, 27 Pac. 965; Southern Kansas ployment he can readily and safely per- R. Co. v. Moore (1892) 49 Kan. 616, form, may sometimes be harsh; but 31 Pac. 138 (servant undertook to lift when one has assumed an employment, ties which he knew were too heavy for if an additional and more dangerous him); Dougherty v. West Superior Iron duty is added to his original labor, he & Steel Co. (1894) 88 Wis. 343, 60 N.

In Shearm. & Redf. Neg. 5th ed. § ice, he may refuse the additional and 211 (a), it is stated that in the lastmore dangerous service; and if for that named decision the court relied on cases reason he is discharged he may avail since overruled. Those cited are Leary

In taking this position, as will be observed from the passages quoted, the courts have frankly conceded that it furnishes a protection to employers whose conduct may be described as immoral and inhuman. See § 64, ante, and note 3 to this section. But setting aside these expressions of opinion, which, in any event, are not strictly pertinent when the subject of voluntary action as an element of an implied contract is under discussion, it would seem that no disposition to soften the rigor of the generally received doctrine has ever been evinced by any court, speaking as a whole, except by that of Virginia; and even in that state the later decisions seem to have virtually destroyed the authority of the vigorous protest quoted below.4 See § 274, note 1, supra. Two other extracts of a similar tenor from dissenting judgments are set out in the note to § 65, ante,

v. Boston & A. R. Co. (1885) 139 Mass. Byles, J., considered that a master who 580, 53 Am. Rep. 733, 2 N. E. 115; violated his contract with his servant Bradshaw v. Louisville & N. R. Co. to provide a fence for machinery ex- (1893) 14 Ky. L. Rep. 688, 21 S. W. ercised a species of compulsion over 346; Woodley v. Metropolitan Dist. R. him; but whether he thought the essen-Co. (1877) L. R. 2 Exch. Div. 384, 46 tial element of this compulsion to be L. J. Exch. N. S. 521. The reply to this the fear of losing the employment is not assertion is simple. The Massachusetts apparent from the report. cases cited above, been twice reaffirmed. ence, if the injured employee continued The Kentucky case remains unimto work for him after he knew of the pugned, so far as we can discover, by negligent and dangerous manner in any later ruling in that state. The authority of Woodley's Case has been to be conducted. . . . It was palpadoubtless shaken to some extent by the later English dicta and decisions cited by reason, justice, nor law. The usual in the chapter which deals with the and legal duty of every employer is maxim, Volenti non fit injuria, (XX.); but on this particular point it has certainly not been overruled categorically in his employment. It is a cruel, an in any case where the defense of a continuum, doctrine that the employer, tractual assumption of risks, as distinguished from an assumption based on the maxim, has been relied on. Beand it is at least a reasonable hypothe- those employees who, serving him under sis that the court deliberately preferred such circumstances, are injured by his to follow the authorities which it cited, negligent acts and omissions, if the inrather than any others. These remarks jured parties, after themselves becoming are made, not because we disagree with cognizant of the peril occasioned by

later decision in that state, and the ant is to the effect than an employer is point that a fear of dismissal is not released from all liability for negligence, coercion has, as will be seen from the although aware of its continued existcases cited above, been twice reaffirmed. ence, if the injured employee continued the maxim, has been relied on. Be- lives and limbs of those in his employsides, these dicta and decisions are all ment puts them in constant hazard of of earlier date than the Wisconsin case, injury, is not to be held accountable to are made, not because we disagree with cognizant of the peril occasioned by the learned authors in regard to the their employer's negligent way of condoctrine that the fear of dismissal ducting his business, continue in his emshould be regarded as coercion, but because we think it important that there should be no misapprehension as to the real effect of the cases on the subject. The daily food essential to keep away In Clarke v. Holmes (1862) 7 Hurlst. starvation itself." Richmond & D. R. & N. 947, 31 L. J. Exch. N. S. 356, 8 Co. v. Norment (1887) 84 Va. 172, 4 Jur. N. S. 992, 10 Week. Rep. 405, S. E. 211. where the writer has proffered some remarks as to what he considers the absurdity of the legal theory of voluntary action.

Some of the English judges who have discussed the meaning and effect of the maxim, Volenti non fit injura, have taken a more liberal view with respect to the dilemma in which the servant is placed when he is thus forced to elect between two disagreeable alternatives. § 382, post.

289. Circumstances under which a servant is not deemed to have acted voluntarily in exposing himself to a risk .-- The servant's nonassumption of the risk on the ground that the element of voluntary action was lacking has been asserted in four different classes of cases. The decisions cited should be compared with those reviewed in the corresponding sections (302, 382) of the chapters relating to contributory negligence in undertaking or continuing an employment, and to the maxim, Volenti non fit injuria. It will be found that, where either of these defenses is put forward, the position of the servant, so far as it depends upon the existence or absence of coercion, is more favorable than it is when this factor is considered in its bearing upon the availability of the defense of a contractual assumption of a risk.

a. Minors.—There is some authority for the doctrine that, where a minor is concerned, one class of extraordinary risks—viz.. those incident to work outside the scope of the original contract (see chapter xxv., post)—is prima facie not to be regarded as being undertaken voluntarily. This conception, however, scarcely seems to have been necessary as a support for the conclusion of the court that the master is not, as matter of law, free from liability under such circumstances, and this was the only point actually involved in the case cited. There is, of course, no presumption that any extraordinary risk is assumed by the servant. See §§ 270-273, supra; § 461, post. This decision, therefore, does not seem to be of much significance in the present connection. The inference of a voluntary acceptance, which is ordinarily drawn from the bare fact that the servant went on working with a full appreciation of a given risk, may doubtless be rebutted, in the case of a minor as of an adult, by positive evidence. But, aside from this decision, there is, so far as the writer is aware, no intimation in the

In Chicago & G. E. R. Co. v. Harney "There was then no opportunity to ad-'In Chicago & G. E. R. Co. v. Harney "There was then no opportunity to ad(1867) 28 Ind. 28, 92 Am. Dec. 282, just the compensation with a view to
the court held that a demurrer to a the risk. There was no consent to percomplaint which alleged that a minor form the service on any terms. It was
was "compelled" by his superior to labor a compulsory service, and under such
at a business much more perilous, and
circumstances neither justice nor policy
was injured while so engaged, had been
properly overruled. The court said:
quitted of responsibility."

reports that, in the absence of such evidence, the action of a minor can be treated as involuntary any more than that of an adult. Such a conception, on the contrary, is impliedly negatived by the numerous cases in which minors have been denied recovery for injuries due to extraordinary risks. See subtitle D of this chapter, and chapter xxI., C, post.

b. Seamen.—There seems to be no reason why, under ordinary circumstances, seamen should not, like any other classes of employees, be deemed to have consented voluntarily to undertake any abnormal risks of which they have notice before they enter into their contract. This particular point, however, does not seem ever to have been discussed. On the other hand, it is well settled that no such voluntary quality can be ascribed to their conduct in continuing to expose themselves to abnormal risks which come to their knowledge while their contract is being carried out. The rationale of this exception to the general rule is that they are bound by their shipping articles to strict obedience, that they are subject to severe penalties if they refuse to perform their duties, and that they have not the option, which landsmen are theoretically supposed to possess, of abandoning their employment the moment they are exposed to an abnormal risk.2

<sup>2</sup> "A seaman aboard ship is bound to port, but must obey at any risk or haz-

"Obedience to officers is the necessary law of the ship; disobedience is criminal; and seamen have the correspondinal; and seamen have the correspond- able manner of accomplishing the obing right to protection against needless ject proposed, and by which he was inexposure. They are not required to vindicate their right to security by refusal reasonable way of accomplishing the to work at the risk of being put in irons same object, and then submitting to the or going to jail." The Frank & Willie order and authority of the master, and (1891) 45 Fed. 494.

ternative but to obey or suffer punish- whole duty, and thereby removed from ment. He cannot dissent from or aban- himself all of the responsibility. The

perform such services as may be reard to himself; and yet he voluntarily quired of him in the line of his employincurs no risk, but acts upon the risk quired of him in the line of his employing responsibility of those whose law-prompt obedience because he may deem ful authority demands of him implicit the appliances faulty or unsafe. Masters of ships exercise large powers, and they may legally compel obedience to orders. A seaman necessarily surrenders much of his personal liberty and freedom of action, and he is never at authority also imposes upon him the liberty, like the landsman, to quit or make much objection to the circumstances surrounding the work commanded." Lafourche Packet Co. v. Henalog incurs no risk, but acts upon the risk and responsibility of those whose law-ful authority demands of him implicit obedience to every lawful command, however unreasonable or dangerous, to which he reluctantly submits to his own upon the master this almost absolute freedom of action, and he is never at authority also imposes upon him the liberty, like the landsman, to quit or siderate, and reasonable exercise in all stances surrounding the work commanded." Lafourche Packet Co. v. Henalog incurs no risk, but acts upon the risk and responsibility of those whose law-ful authority demands of him implicit obedience to every lawful command, however unreasonable or dangerous, to which he reluctantly submits to his own upon the master this almost absolute fullest responsibility of its careful, conmand, and he is never at authority also imposes upon him the liberty, like the landsman, to quit or submits to his own upon the master this almost absolute freedom of action, and he is never at authority demands of him implicit obedience to every lawful command, however unreasonable or dangerous, to which he reluctantly submits to his own upon the master this almost absolute freedom of action, and he is never at authority demands of him implicit obedience to every lawful command, however unreasonable or dangerous, to which he reluctantly submits to his own upon the master this almost absolute freedom of action obedience to every lawful command, however unreasonable or dangerous, t derson (1899) 36 C. C. A. 519, 94 Fed. bility—or upon those he represents—for any personal damages occasioned by such default. The plaintiff, by protest-ing against the dangerous and unreasonjured, and suggesting a safer and more attempting to do the work required in "The seaman on the voyage has no al- a careful and prudent manner, did his don the service on account of the dan-master, by declining and rejecting the gers or unreasonableness of the particusafer and reasonable manner proposed lar service required, as he might do inby the plaintiff, and by gross careless-

- c. Convicts whose labor is hired by private employers.—It is manifest that convicts whose services are let out under contract to private employers, and who, while they are at work, are under the control of a guard who has the power to secure their obedience by the exercise of force, are not voluntary agents in respect to such abnormal risks as they may be required to incur.3
- d. Statutory provisions restricting servant's right to abandon the employment.—Under the provision of the Louisiana Code, which declares that laborers who hire themselves out to serve on plantations have not the right of leaving the person who has hired them, and that they cannot be sent away by the proprietor until the term of their engagement has expired, unless good and just causes can be assigned, it has been held that a man working for a monthly salary under a contract which covered a period of several months, which was required to take off the crop, did not, by remaining in the employment, undertake the risks created by a fellow servant's incompetency. The court considered that voluntary action was negatived, for the reason that, if he had left the employment, owing to his apprehension of danger, and afterwards brought suit for his wages, and been unable to establish satisfactorily the existence of a good cause for so leaving, he would not only have suffered the loss of the wages which would have accrued during the remainder of his term, but would also have rendered himself liable for the refunding of the wages already received.4

784, 3 N. W. 579.

articles, discovers that a certain appli-

ness imperatively commanding the plain- it will be observed, is extremely nartiff to perform the work in the more row, as the considerations relied upon dangerous way, assumed all of the reare applicable only in cases where the sponsibility and risk for the defendants. injury is received between the time when The plaintiff entered upon this danger- the servant obtains knowledge of the ous service under duress and submis- abnormal danger and the time when he sion to compulsion, without the liberty may, without a breach of his contract, of choice or freedom of the will, and is leave the employment without incurring therefore not responsible for his acts, the consequences of a wrongful aban-without negligence." Thompson v. Her-donment. In most industrial occupa-mann (1879) 47 Wis. 602, 32 Am. Rep. tions, the period thus limited is usually very brief, and even if a statutory A seaman who, after signing shipping provision similar to that of the Louisiana Code were generally in force, the ance which he deems unsafe is to be position of servants would not be imused, and, upon informing the chief of proved to any great extent. Nor is it ficer that he will not go if it is used, by any means certain that courts genis assured that it will not be used, does erally would be willing to concede the is assured that it will not be used, does erally would be willing to concede the not assume the risk of its use during the correctness of the inferences drawn in voyage. Keating v. Pacific Stream this decision, with regard to the effect Whaling Co. (1899) 21 Wash. 415, 58 of that provision. It does not seem to Pac. 224.

\*\*Chattahoochee Brick Co. v. Braswell the parties to a contract of service postlem v. Lemon (1891) 45 Fed. 225.

\*\*Poirier v. Carroll (1883) 35 La. Vails. Ordinarily, whenever there has Ann. 699. The scope of this decision, been incompetency of that pronounced

In one case it seems to be taken for granted that coercion which will preclude the inference of an assumption of the risk is established if it appears that the master's representative refused to permit the plaintiff to stop work immediately upon his expressing a wish to do so.<sup>5</sup> In view of the principles laid down in the cases cited in § 288, supra, this theory seems to be of disputable soundness,—at least when applied to adults of full age and ordinary intelligence.

290. Complaint, objection, or protest omitted or made.— (Compare §§ 383, 466, post.)—a. No complaint, objection, or protest established by the evidence.—The theory that the mere fact of the servant's having continued to work with knowledge of an abnormal risk charges him, as a matter of law, with an assumption of that risk, manifestly involves the corollary that, viewed as an evidential element, the servant's failure to express dissatisfaction with his environment is merely corroborative and confirmatory in its effect. Such, accordingly, is the significance of that fact in the numerous cases in which it is mentioned as indicative of the servant's intention to accept the responsibility for any future accidents which may be caused by the defective instrumentality.1

character which would lead the average ployer for the injury sustained by him. servant to throw up his position, it Jones v. Manufacturing & Invest. Co. must have been of such a pronounced na- (1899) 92 Me. 565, 43 Atl. 512. ture, and must have been manifested by mistakable, that a court would very danger, it is error to refuse an instruc-rarely feel any difficulty in adopting tion directing the jury to find for the the servant's theory that the master had employer if the servant, having such been guilty of a breach of contract in re-taining the incompetent person in his objection. Wells v. Burlington, C. R. & employment. The reports of employers' N. R. Co. (1881) 56 Iowa, 520, 9 N. W. liability cases show only too plainly 364. that the almost universal inclination of servants is rather to take the most des- this principle has been recognized might perate chances than to abandon their be much lengthened, if any useful pur-

Misc. 8, 27 N. Y. Supp. 331. There recovery was denied on the ground that those in which the words "complaint," the injury was really caused by the fact "objection," and "protest" are used, that the servant's attention was distant the servant's attention was distant though they are practically synonymous tracted by the conversation, and that, in the present connection. under such circumstances, the accident Scley (1894) 152 U. S. 145, 38 L. ed. would have happened even if the words Scley (1894) 152 U. S. 145, 38 L. ed. spoken had been expressive of consent, 391, 14 Sup. Ct. Rep. 530; The Maharand not of refusal.

1 The general principle may be laid down as follows: An employee who 9 Ben. 203, Fed. Cas. No. 1 (a case does not ask for further safeguards, or where the plaintiff was the servant of a otherwise so conducts himself as to as-

otherwise so conducts himself as to as-stevedore); Limberg v. Glenwood Lumsure the employer that he is content bcr Co. (1900) 127 Cal. 598, 49 L. R. with the machinery and appliances furnished, and will himself take the chance mington & N. R. Co. (1899) 2 Penn. of injury, cannot recover against an em- (Del.) 210, 43 Atl. 629; McCauley v.

Under this theory where there is some acts or omissions of an import so un- evidence that the servant knew of the

The subjoined list of cases in which work on slight provocation.

<sup>6</sup> Malsky v. Schumacher (1894) 7 In tabulating the cases it will be conMisc. 8, 27 N. Y. Supp. 331. There revenient to separate into different groups

b. Complaint, objection, or protest established by the evidence.— That the failure of the servant to complain, object, or protest is a circumstance purely corroborative in its nature, and not differentiating, is shown still more clearly by these cases which deal with

560; Burns v. Chicago, M. & St. P. R. Chicago & A. R. Co. v. Munroe (1877) 227, 30 N. W. 25; Lumley v. Caswell Bryant (1893) 15 Ky. L. Rep. 181, 22 (1877) 47 Iowa, 159; Cowles v. Chi-S. W. 607; Corbett v. Smith (1898) 101 cago, R. I. & P. R. Co. (1897) 102 Iowa, Tenn. 368, 47 S. W. 694; Goodridge v. 507, 71 N. W. 580; Money v. Lower Washington Mills Co. (1893) 160 Mass. Vein Coal Co. (1881) 55 Iowa, 671, 8 234, 35 N. E. 484; O'Connor v. Whittall N. W. 652; Forbes v. Boone Valley Coal (1897) 169 Mass. 563, 48 N. E. 844; & R. Co. (1901) 113 Iowa, 94, 84 N. Carrigan v. Washburn & M. Mfg. Co. W. 970; Schnibbe v. Central R. & Bkg. (1898) 170 Mass. 79, 48 N. E. 1079; Co. (1890) 85 Ga. 592, 11 S. E. 876; McDermott v. Hannibal & St. J. R. Co. Rush v. Missouri P. R. Co. (1887) 36 (1885) 87 Mo. 285; Fletcher v. Louis-Kan. 129, 12 Pac. 582; Bogenschutz v. ville & N. R. Co. (1899) 102 Tenn. 1, 49 Smith (1886) 84 Ky. 330, 1 S. W. 578; S. W. 739; Erdman v. Illinois Steel Co. Hatt v. Nay (1887) 144 Mass. 186, 10 (1897) 95 Wis. 6, 69 N. W. 993. N. E. 807; Huffman v. Michigan C. R. No protest.—Baltimore & O. R. Co. v. Co. (1896) 109 Mich. 251, 67 N. W. Baugh (1892) 149 U. S. 368, 37 L. ed. 118; American Dredging Co. v. Walls 772, 13 Sup. Ct. Rep. 914; Martin v. (1898) 28 C. C. A. 441, 55 U. S. App. Chicago, R. I. & P. R. Co. (1901; Iowa) 460, 84 Fed. 428; Kielley v. Belcher Sil-87 N. W. 654; Goldthwait v. Haverhill ver Min. Co. (1875) 3 Sawy. 500, Fed. & G. Street R. Co. (1894) 160 Mass. Cas. No. 7,761; Hattaway v. Atlanta 554, 36 N. E. 486; Feely v. Peurson Steel & Tin-Plate Co. (1900) 155 Ind. Cordage Co. (1894) 161 Mass. 426, 37 507, 58 N. E. 718; McCarthy v. Shone-N. E. 368; Wescott v. New York & N. man (1901) 198 Pa. 568, 48 Atl. 493; E. R. Co. (1891) 153 Mass. 460, 27 N. N. W. 652; Forbes v. Boone Valley Coal (1897) 169 Mass. 563, 48 N. E. 844; man (1901) 198 Pa. 568, 48 Atl. 493; E. R. Co. (1891) 153 Mass. 460, 27 N. man (1901) 193 Fa. 305, 45 Att. 435, 12. 10. 00. (1831) 165 Mass. 405, 21. 11. Philadelphia & R. R. Co. v. Hughes E. 10; Ft. Wayne, J. & S. R. Co. v. (1888) 119 Pa. 310, 13 Att. 286; Chi-Gildersleeve (1876) 33 Mich. 133; cago, B. & Q. R. Co. v. McGinnis (1896) Shackelton v. Manistee & N. E. R. Co. 49 Neb. 649, 68 N. W. 1057; Kaare v. (1895) 107 Mich. 16, 64 N. W. 728; 49 Neb. 649, 68 N. W. 1057; Kaare v. (1895) 107 Mich. 16, 64 N. W. 728; Troy Steel & I. Co. (1893) 139 N. Y. Huffman v. Michigan C. R. Co. (1896) 369, 34 N. E. 901; Brossman v. Lehigh Valley R. Co. (1886) 113 Pa. 490, 57 Am. Rep. 479, 6 Atl. 226; Green & C. Street R. Co. v. Bresmer (1881) 97 Pa. Am. Rep. 419, 6 Atl. 226; Green & C. Mich. 212, 58 N. W. 60; Mansfield Coal Street R. Co. v. Bresmer (1881) 97 Pa. & Coke Co. v. McEnery (1879) 91 Pa. 103; Rummell v. Dilworth (1885) 111 185, 36 Am. Rep. 662; Relyea v. Toma-Pa. 343, 2 Atl. 355, 363; Wilkinson v. hawk Pulp & Paper Co. (1901) 110 H. W. Johns Mfg. Co. (1901) 198 Pa. Wis. 307, 85 N. W. 960; Thompson v. 634, 48 Atl. 810; McCarthy v. Shoeman Missouri P. R. Co. (1897) 51 Neb. 527, (1901) 198 Pa. 568, 48 Atl. 493; East Tennessee, V. & G. R. Co. v. Duffield (1883) 12 Lea, 63, 47 Am. Rep. 319; words are combined,—as, where the Galveston, H. & S. A. R. Co. v. Eckols words are combined,—as, where the Galveston, H. & S. A. R. Co. v. Eckols servant was denied recovery on the (1894) 7 Tex. Civ. App. 429, 26 S. W. ground that he made no protest or com-1117; Sweet v. Ohio Coal Co. (1890) 78 Wis. 127, 9 L. R. A. 861, 47 N. W. 182; [1898] 62 N. J. L. 417, 41 Atl. 936; Poll v. Hewitt (1893) 23 Ont. Rep. 619. Warminaton v. Atchisce T. & S. E. D. Poll v. Hewitt (1893) 23 Ont. Rep. 619. No objection.—Garnett v. Phænix Bridge Co. (1899) 98 Fed. 192; Hattaway v. Atlantic Steel & Tin-Plate Co.

(1900) 155 Ind. 507, 58 N. E. 718; 58).

Swift & Co. v. Rutkowski (1897) 167 In one Virginia case it seems to be Ill. 156, 47 N. E. 362; Kroy v. Chicago, intimated that the absence of evidence R. I. & P. R. Co. (1871) 32 Iowa, 357; South Florida R. Co. v. Weese (1893)

Southern R. Co. (1897) 10 App. D. C. E. R. Co. v. Britz (1874) 72 Ill. 256; Co. (1886) 69 Iowa, 450, 58 Am. Rep. 85 Ill. 25; Louisville & N. R. Co. v.

109 Mich. 251, 67 N. W. 118; La Pierre v. Chicago & G. S. R. Co. (1894) 99 Mich. 212, 58 N. W. 60; Mansfield Coal

plaint (Johnson v. Devoe Snuff Co. [1898] 62 N. J. L. 417, 41 Atl. 936; Warmington v. Atchison, T. & S. F. R. Co. [1891] 46 Mo. App. 159); or no objection or protest (Greenleaf v. Dubuque & S. C. R. Co. [1871] 33 Iowa,

of a complaint is not conclusive against the servant. Richmond & D. R. Co. v. 32 Fla. 212, 13 So. 436; St. Louis & S. Norment (1887) 84 Va. 167, 4 S. E. 211.

the converse situation, in which the servant has expressed his dissatisfaction. It is well established that his having done this will not throw the responsibility upon the master, if he afterwards goes on working, -at all events where he has no specific grounds for supposing that a remedy is to be applied at the earliest possible moment.<sup>2</sup> See § 285, supra. In other words, complaints, protests, or objections are unavailing where the risks are understood and the servant continues to encounter them.3 Especially must be be regarded as having assumed the risk where he is told that he may either continue to use the defective appliance or leave the employment.4

The rule is perhaps different where the maxim, Volenti non fit injuria, is specifically relied upon. See § 383, b, post.

But the authority of this case seems to about the want of proper stuff. McGee be of an extremely dubious character in v.  $Eglinton\ Iron\ Co.\ (1883)\ 10\ Sc.\ Sess.$  this as in other respects. See § 285, Cas. 4th Series, 955.

note 4, supra.

A brakeman who, without protesting service rendered dangerous by defective against or reporting the infraction of a machinery, if the party making the proknown rule requiring east-bound trains test or objection is under no legal oblito enter a certain siding from the west gation to remain in the service, cannot end, alights for the purpose of opening render the services subsequently perthe eastern switch, at a distance from formed involuntary. There is a distinuch greater than that at which he parity in the relation of master and would, in the ordinary course of things servant, but not such as can make the have alighted if the train had been act of the servant in remaining in a stopped before reaching the western service which he knows to be peculiarly switch, cannot recover for injuries redangerous from defective machinery and ceived from falling into an open culinvoluntary act in legal contemplation." vert at the place where he steps off the Galveston, H. & S. A. R. Co. v. Drew car. West v. Southern P. Co. (1898) (1883) 59 Tex. 13, 46 Am. Rep. 261. 29 C. C. A. 219, 56 U. S. App. 323, 85 Cummings v. Collins (1876) 61 Mo.

sumption of the risk of doing the work with an insufficient number of hands, where he had no reason to believe or hope that the order would be modified or revoked. Atchison, T. & S. F. R. Co. These decisions indicate that the supreme court of Iowa can scarcely be v. Schroeder (1891) 47 Kan. 315, 27 right in holding that an instruction is Pac. 965. The declaration of a laborer erroneous which, in stating the rule who seeks to recover on the ground that that the servant's continuance of work his master furnished unsuitable pieces of with knowledge of a risk charges him of wood for checking cars on an incline with its assumption, omits the condihas been held to show that he cannot tional element of the absence of objectmaintain the action, where it states he tion or protest against the maintenance was well acquainted with the nature of the defective conditions. Greenleaf the timber furnished, and had on two v. Dubuque & S. C. R. Co. (1871) 33 occasions complained to his foreman sumption of the risk of doing the work action.

"Protest against, or objection to, a

<sup>2</sup> Assop v. Yates (1858) 2 Hurlst. & In one case it was observed, arguen-N. 768, 27 L. J. Exch. N. S. 156 do, that "the risk from the master's (hoarding so placed as to be likely to breach of duty never rests upon the pro-That a servant protested against an not sciens, is the test." Dempsey v. order of the master to pursue his work Sawyer (1901) 95 Me. 295, 49 Atl. with such help as he could command, on pain of being discharged, will not prevent him from being charged with an asportest indicates in itself involuntary

## D. Assumption of risks by minor servants.

291. Ordinary risks.—The principle has frequently been laid down or recognized that a minor assumes the ordinary risks of any employment which he undertakes, in so far as those risks are, or ought to have been, known to and appreciated by him, whether the source of his knowledge be his own observation and experience, or the instructions which he has received from his employer or his employer's representative.1 In other words, the fact that the servant was a minor does not enlarge his rights, where it is once established that he understood the danger.2 This principle has been applied in favor of the master in cases where the injury was caused by the negligence of a fellow servant; by permanent, visible conditions of the plant; by

<sup>1</sup>Bohn Mfg. Co. v. Erickson (1893) can arise, said: "Minors' contracts are 5 C. C. A. 341, 12 U. S. App. 260, 55 not void. They are voidable merely, Fed. 943; Cudahy Packing Co. v. Mar- and we think a plaintiff, whether the can (1901) 54 L. R. A. 258, 45 C. C. A. minor himself or another, by suing for 515, 106 Fed. 645; Dunn v. McNamee an injury caused by some specific negli-(1896) 59 N. J. L. 498, 37 Atl. 61; gence committed in the course of the Alabama Mineral R. Co. v. Marcus business, apart from the fact of employ-(1896) 115 Ala. 389, 22 So. 135; Crown ment itself, necessarily adopts, for the v. Orr (1893) 140 N. Y. 450, 35 N. E. purposes of the action, the minor's void-648, Reversing 71 Hun, 613, 24 N. Y. able contract of employment, and sub-Supp. 620; Beckham v. Hillier (1884) jects himself to the same rules which 47 N. J. L. 12; Smith v. Irwin (1889) govern in actions by or in right of adult 51 N. J. L. 507, 18 Atl. 852; Omaha Bottling Co. v. Theiler (1899) 59 Neb. 257, 80 N. W. 821; Anderson v. Morri-son (1875) 22 Minn. 274.

of the business are incident to the work. He cannot claim on account of infancy to be relieved from the consequences of such risks. He might as well claim to enforce the contract for his wages without performing any service." De Graff v. New York C. & H. R. R. Co. (1879) 76 N. Y. 125.

A parent has the right to engage his minor child in a dangerous employment. In such a case the parent impliedly assumes for himself and child the ordinary risks of the employment. Gulf, C. & S. F. R. Co. v. Jones (1890) 76 Tex. 350, 13 S. W. 374.

In Harris v. McNamara (1892) 97 ing § 357 of Beach on Contributory Negmoving machinery. E. S. Higgins Carligence, in which that author criticises pet Co. v. O'Keefe (1897) 25 C. C. A. the doctrine which charges a minor with 220, 51 U. S. App. 74, 79 Fed. 900; the assumption of ordinary risks, on the Bohn Mfg. Co. v. Erickson (1893) 5 C. ground that, minors having no power to C. A. 341, 12 U. S. App. 260, 55 Fed. make a contract, they are not bound by 943; Palmer v. Harrison (1885) 57 their express contracts with their em-Mich. 182, 23 N. W. 624; Jones v. Robployers, and that for this reason no im- erts (1894) 57 Ill. App. 56; Gilbert v. plied contract to assume ordinary risks Guild (1887) 144 Mass. 601, 12 N. E.

employees."

ottling Co. v. Theiler (1899) 59 Neb. 2 Nugent v. Kauffman Milling Co. 57, 80 N. W. 821; Anderson v. Morri- (1895) 131 Mo. 241, 33 S. W. 428; Hinckley v. Horazdowsky (1890) 133 III. 359, 8 L. R. A. 490, 24 N. E. 421; the business are incident to the work. Jones v. Roberts (1894) 57 III. App. 56.

The fact that an employee is a minor does not vary the law as to his assumption of risk, if he has sufficient intelligence to comprehend the dangers incident to his service. Goff v. Norfolk & W. R. Co. (1888) 36 Fed. 299 (in charge to jury).

The mere fact that an employee is under the age of twenty-one years does not shield him from the usual responsibility incident to an employment voluntarily assumed by himself. Houston & G. N. R. Co. v. Miller (1879) 51 Tex. 270.

See chapter XXVI., post.

As, where a minor is injured by the Ala. 181, 12 So. 103, the court, discuss- contact of some part of his person with

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the common operations incident to the performance of his duties;<sup>5</sup> by a defect in an appliance, where the existence of that defect does not imply negligence on the master's part.6

It will be observed that the rule, as thus stated, differs from the corresponding rule applicable to an adult in one important respect. In the case of an adult the servant's inability to recover for injuries resulting from ordinary risks is declared in terms which are indicative of the fact that his comprehension of those risks is presumed in the absence of evidence which justifies the opposite conclusion. In the case of a minor, on the other hand, the defense of an assumption of ordinary risks is viewed as one which is merely conditional upon the production of specific and positive evidence going to show that the risk in question was, as a matter of fact, comprehended. In short, where a minor is concerned, ordinary risks are, for evidential purposes, always treated at the outset of the inquiry as extraordinary, and the burden of establishing the servant's comprehension of the particular risk is cast upon the employer. Some courts, it is true, have laid it down that, where

Where a minor brakeman leaning out

Hun. 289.

Hun, 289.

See also Probert v. Phipps (1889) that he was wanting in capacity, and 149 Mass. 258, 21 N. E. 370 (comprehension of risk proved by testimony of fect in the appliances,—a nonsuit is minor himself); O'Connor v. Whittall properly granted. Sims v. East & W. (1897) 169 Mass. 563, 48 N. E. 844; R. Co. (1889) 84 Ga. 152, 10 S. E. 543. Pratt v. Prouty (1891) 153 Mass. 333, Former Appeal (1888) 80 Ga. 807, 6 26 N. E. 1002; De Souza v. Stafford S. E. 595.

Mills (1892) 155 Mass. 476, 30 N. E. 6 De Graff v. New York C. & H. R. R. Co. (1879) 76 N. V. 125

81.
As that of coupling cars. Viets v. As that of coupling cars. Viets v. Whether an intant is to be treated Toledo, A. A. & G. T. R. Co. (1884) 55 as having assumed the risks of personal Mich. 120, 20 N. W. 818 (evidence here injury to himself from performance of negatived culpability on the part of dangerous labor, and held to the exerthose in charge of the train); Oliver v. cise of ordinary care in order to recover Ohio River R. Co. (1896) 42 W. Va. damages from his employer for a per-703, 26 S. E. 444; Texas & P. R. Co. v. sonal injury, depends upon his capacity Carlton (1883) 60 Tex. 401; Umback v. and fitness for the particular kind of Lake Shore & M. S. R. Co. (1882) 83 labor upon which he is employed when injured. De Losier v. Kentucku Luminium De Losier v. Kentuck

368; Ogley v. Miles (1893) 139 N. Y. 1021); and to work on the construction 458, 34 N. E. 1059; Wojciechowski v. of a building (Evans v. Vogt & Bros. Spreckels' Sugar Ref. Co. (1896) 177 Mfg. Co. [1893] 5 Misc. 330, 25 N. Y. Pa. 57, 35 Atl. 596; and other cases Supp. 509; struck by object which the cited in § 399, note 1, subd. (h) et seq., servant of a third party let fall from an upper floor).

In an action against an employer for of the car was struck by a switch target injuries sustained by a minor employee, with the position of which he was fa- caused by the falling of lumber which miliar, he cannot recover. Evans v. he was piling, where there is no evidence Lake Shore & M. S. R. Co. (1877) 12 that the work was dangerous, or that he did not know how to do it properly, or

<sup>6</sup> De Graff v. New York C. & H. R. R. Co. (1879) 76 N. Y. 125.

Whether an infant is to be treated Ind. 191.

A minor of nineteen assumes the danber Co. (1892) 13 Ky. L. Rep. 818, 18 gers incident to work on a construction frain (Evansville & R. R. Co. v. Henderson [1893] 134 Ind. 636, 33 N. E. in every case involving the liability of a minor servant is of such an age that his physical and mental powers have virtually attained their full maturity, his rights and disabilities should be tested by the same standards as if he were actually over twenty-one.8 The proper logical meaning of this doctrine, however, seems to be, not that there is, as regards a minor of this age, a presumption that ordinary risks are appreciated and accepted, but rather that the age itself constitutes specific evidence which rebuts the presumption that there is no such appreciation and acceptance. The correct position undoubtedly is simply this,—that, on the one hand, a minor old enough to understand the risks of a dangerous employment must be deemed to have assumed those risks to the same extent as though he were an adult, and that, on the other hand, if a minor has

for the plaintiff unless his age, intelligence, and experience were such as to induce a man of ordinary care and prupersons against their employers, we recognize as sources of liability the inexperience of the servant, and the want of specific instruction as to the dangers of the service, and we suspend the rule that the servant assumes the risk of the service, when he has not knowledge by experience or by specific instruction." In May v. Smith (1893) 92 Ga. 95, 18 S. E. 360, it was declared that the necessity of warning an inexperienced boy of seventeen of the dangers incident to machinery at which he is set at work is not dispensed with by the fact that the machinery is in perfect order, where the danger is not open and obvious. The rule as to the assumption of risk by a servant having equal knowledge with the master of the danger incident to the the master of the danger incident to the work "presupposes that the servant has sufficient discretion to appreciate the dangers, and has no application to the case of young and inexperienced children." Fisk v. Central P. R. Co. (1887) 72 Cal. 38, 13 Pac. 144. That there is no presumption that a minor understands ordinary risks was also recognized in McIntosh v. Missouri P. R. Co. (1894) 58 Mo. App. 281: Wolski v. (1894) 58 Mo. App. 281; Wolski v. 573 (see § 249, note, ante).

Knapp-Stout & Co. Co. (1895) 90 Wis. \*Dunn v. McNamee (1897) 59 N. J.

178, 63 N. W. 87; Evansville & R. R. L. 498, 37 Atl. 61; Emma Cotton Seed

the master to a minor servant, to find N. E. 345, 34 N. E. 511. See also notes

9, 10, 11, infra.

In Hayes v. Colchester Mills (1894) 69 Vt. 1, 37 Atl. 269, it was said that Induce a man of ordinary care and pruordinary care and pruordina tions as to the danger of certain unfamiliar work which he was suddenly called upon to do.

Numerous other decisions in which this principle is taken for granted will be found cited in § 399, note 1, post.

The point thus decided is, it should be observed, quite independent of the question whether an infant shall or shall not be presumed to have a capacity for understanding the dangers of his employment, according as he is above or below a certain age. See §§ 249, ante, and 348, post.

A complaint is good against a demurrer based on the ground that the servant was sixteen years of age, and that the same presumptions, in regard to comprehension of risks, that are applicable to an adult, are also applicable to a minor over fourteen years of age. White v. San Antonio Waterworks Co. (1895) 9 Tex. Civ. App. 465, 29 S. W.

<sup>8</sup> Alabama Mineral R. Co. v. Marcus (1896) 115 Ala. 389, 22 So. 135. Vin-cennes v. Citizens' Gaslight Co. (1892) 132 Ind. 114, 16 L. R. A. 485, 31 N. E.

Co. v. Maddux (1893) 134 Ind. 571, 33 Oil Co. v. Hale (1892) 56 Ark. 237, 19

not the mental capacity and experience to appreciate the dangers of an employment, a master who employs him therein without instructing him as to those dangers is liable for an injury occasioned by his deficient intelligence.10

What is to be regarded as a sufficient age to justify a court in holding, as a matter of law, that the defense of assumption of ordinary risks is available to the master, must obviously be determined by considering the character of the risk from which the injury in suit resulted, in its relation to the actual age of the injured servant. It seems reasonable to say that, in the case of a very young child, the range of circumstances under which an appreciation of such risks is a necessary inference is so narrow that the doctrine of their assumption should be regarded as practically suspended, in so far as its application is a matter under the control of the court. 11 But it must be admitted that some courts have gone to such lengths in subjecting extremely young persons to the consequences of an imputed comprehension of the danger to which the injury was due, that it is difficult to assert that any such general principle as this has been definitely established.

Information as to ordinary as well as other risks is commonly conveyed to minors by means of instruction. See chapter xvi. If the master has adequately performed his duty in this respect, recovery by the servant becomes impossible for two reasons: First, because the master is guilty of no negligence in the premises, and the general

S. W. 600. This aspect of the principle is under the age of twenty-one years is taken for granted in most of the cases should shield him from the usual re-

To the same effect is Gulf, C. & S. ployment voluntarily assumed by him-F. R. Co. v. Jones (1890) 76 Tex. 350, self. This rule, however, should not be 13 S. W. 374. There the actual point enforced against a child of tender years, comprehend.

in a Texas case we find the followgers to exempt the master from liabiling: "We do not believe that, upon ity in case of injury." Texas & P. R. sound principles of public policy or autority, the mere fact that an employee W. 511, holding that the trial court had Vol. I. M. & S.—45.

was that the master was liable because who evidently would not have the requithe minor had been employed without site discretion and experience to be a the consent of his parent. But this element is immaterial in the present connection. The existence or absence of ler (1879) 51 Tex. 270. In another consent may affect the parent's right of case, where a youth of nineteen was inaction for a loss of services, but has no jured by stumbling over a lump of coal significance where the essence of the on a railway track, the same court said: wrong complained of is the exposure of The great weight of authority supports the minor to a risk which he did not this rule, "that, if a servant be under the age of twenty-one years, and he has <sup>10</sup> See chapter xvI., ante, and also the not been instructed by the master as to cases cited in § 399, note 1, post, where the dangers of his employment, it is a the servant was allowed to recover for question for the jury whether he has injuries resulting from various causes. principles stated in §§ 3, 60, ante, operate as a bar to the action; 12 and, secondly, because a properly instructed minor servant must be taken to have understood the risks to which that instruction related, and as the presumption of his ignorance of those risks is thus rebutted, his assumption of the risk becomes a necessary inference.<sup>13</sup>

A minor, although too young to be chargeable under the circumstances with contributory negligence, may be unable to recover for the reason that the evidence shows that he fully comprehended the risks involved in the act which caused his injury.14

From the foregoing remarks it is manifest that the inquiry whether a minor servant has assumed in a particular instance the ordinary risks of an employment always resolves itself into an examination of the weight of the evidence which tends to establish or negative the inference that he understood it. A further discussion of the subject will therefore be appropriately reserved for the chapter which deals generally with the circumstances under which a comprehension of risks is imputed to servants. See §§ 39S et seq., post.

292. Extraordinary risks.— To a minor, as to an adult, the principle is applicable that he does not assume any risks which neither he nor his father—supposing the latter to have made the contract—had reason to believe that he would be required to encounter. (As to

ant and assume the risks incident to his inexperience." Beckham v. Hillier employment." These passages seem to (1885) 47 N. J. L. 12; Carrington v. contemplate theoretical, rather than a Mueller (1900) 65 N. J. L. 244, 47 Atl. practical, suspension of the doctrine of 564. the assumption of ordinary risks in the any view of the rights of minors.

properly refused an instruction that ment, those ordinary risks of their servethe plaintiff should be regarded as sui ice which are obvious to them, or have juris because he was of sufficient age been pointed out in a manner suited to and discretion to contract with defend- the comprehension of their youth and

564.

14 On this ground the action failed instance referred to. But if this is real- where a boy under fourteen years of age ly its meaning, it is too sweeping under was injured by getting astride of movable doors closing an elevator well and 12 This seems to be a better way of raised by the elevator as it ascended, for putting the situation than that which is the purpose of seeing who was using the indicated in the statement that the elevator below and preventing his raissame rules as to liability and obligation ing it; the evidence being that he had are applicable between a minor servant been fully instructed as to the elevator, and his master as are applicable in a understood its operation, and had used case in which an adult is injured, sub- it himself many times, and had been ject only to the limitations created by told not to go upon the doors. Kaufthe requirement resting upon the mashold v. Arnold (1894) 163 Pa. 269, 29 ter more fully to advise an inexperienced minor of any danger incident to of being negligent is conclusively prethe business than he is required to do in sumed not to exist in children less than the case of an experienced person enfourteen years of age. See § 348, post. gaged in the same business. Texas & 'Union P. R. Co. v. Fort (1873) 17 P. R. Co. v. Carlton (1883) 60 Tex. Wall. 553, 21 L. ed. 739, cited to this effect in Northern Pacific Coal Co. v. 13 "Minor servants . . . are held Richmond (1893) 7 C. C. A. 485, 15 U. to assume, by their contracts of employ- S. App. 262, 58 Fed. 756. A minor dicases of this class, see, further, §§460–464, post.) On the other hand, it is equally well settled that the inference of a minor's assumption of such risks may be drawn by the court where the evidence is reasonably susceptible of no other construction than that the servant, notwithstanding his youth, had as full intelligence and information and as fully appreciated the danger to which he was exposed as a man of mature judgment under like circumstances.<sup>2</sup> In § 399, post, it will be shown under what circumstances a minor comes within the operation of this principle.

rected by his superior to perform a task Spehr (1893) 145 III. 329, 33 N. E. not within the range of his employment 944; White v. Wittemann Lithographic does not necessarily assume the in-Co. (1892) 131 N. Y. 631, 30 N. E. 236: creased risk from a defective appliance, Hickey v. Taaffe (1887) 105 N. Y. 26, although he is aware thereof, and an 12 N. E. 286; Michael v. Stanley (1892) adult with the same knowledge would 75 Md. 464, 23 Atl. 1094; Thompson v. assume such increased risk. Foley v. Johnston Bros. Co. (1893) 86 Wis. 582, California Horseshoe Co. (1896) 115 57 N. W. 298 (breach of statutory duty).

<sup>2</sup> Herdman-Harrison Milling Co. v.

## CHAPTER XVIII.

## CONTRIBUTORY NEGLIGENCE IN RESPECT TO THE ACCEPTANCE OR RETENTION OF A GIVEN EMPLOYMENT.

- 293. Introductory.
- A. Under what circumstances the servant's action is barred.
  - 294. Servant's acceptance of duties for which he is not fitted.
  - 295. Negligence not inferred from continuance of work, where servant had no knowledge of the abnormal risk which caused his injuries.
  - 296. Negligence not necessarily inferable where knowledge of defects only is shown.
  - 297. Knowledge of defects,—when sufficient to justify inference of negligence.
  - 298. Negligence inferred, as matter of law, where knowledge both of defects and consequent risks is shown.
  - 298a. Illinois doctrine.
  - 299. Rationale of the servant's inability to recover, on the ground of negligence in continuing work.
  - 300. When negligence is not imputed, as a matter of law, to a servant who knows of a risk.
  - 301. Missouri doctrine as to the effect of the servant's knowledge.
  - 302. Voluntary or involuntary quality of the servant's action in continuing work.
    - a. Will power of servant overcome.
    - b. Servant's fear that he may lose his position if he disobeys.
    - c. Voluntary action not predicable in the case of seamen.
  - 302a. Duty of the servant to quit the employment when he ascertains that he is exposed to an abnormal risk.
  - 303. Failure of servant to report a defect.
    - a. Generally.
    - b. To whom the report should be made.
    - c. Sufficiency of the notice.
  - 304. Duty of servant to remedy defects.
- B. RELATION BETWEEN THE DEFENSES OF ASSUMPTION OF RISKS AND CONTRIBUTORY NEGLIGENCE.
  - 305. Generally.
  - 306. Logical independence of the two defenses.
  - 307. Contributory negligence at the time of the injury is material only in cases where there has been no assumption of the risk.
  - 308. Cases not giving due effect to this principle.
  - 309. Defenses confused owing to inaccuracies of terminology.
  - 310. Doctrinal confusion between the defenses.
  - 311. Concluding remarks.

The defense discussed in this chapter is treated in chapters xxi. XXIV., post, with relation to the four special elements indicated by the titles.

293. Introductory.—In the preceding chapter it has been shown that the servant's assumption of a risk caused by the master's negligence is based upon the hypothesis of an implied agreement. But it is obvious that, under the general principles of the law of negligence, evidence of the servant's continued exposure of himself to a known peril also raises a question which is independent of the conventional relations of the parties, viz., whether he was acting with reasonable prudence in encountering that peril. Side by side, therefore, with the series of cases in which the defense raised is an assumption of the risk, we find another series in which the theory upon which the master seeks to escape liability is that the servant contributed to his own injury by his negligence in entering or remaining in an employment which involved abnormal dangers. The rulings upon this latter aspect of the servant's conduct are much less consistent and harmonious than those in which his knowledge of the risk is dealt with as evidence of its conventional acceptance by him, and the difficulties of formulating a body of clear and well-defined principles are greatly aggravated by the fact that the two defenses have been confounded. both verbally and doctrinally, to an extraordinary degree. See subtitle B, infra.

## A. Under what circumstances the servant's action is barred.

294. Servant's acceptance of duties for which he is not fitted .--A servant's acceptance of any given employment is deemed to be equivalent to an assertion that he is properly qualified for his duties. Spondet peritiam artis. Hence, if he suffers injury as a result of his want of skill or experience, the accident is considered to be caused by his own negligence in accepting a position for which he was unfitted. It has even been held that the master is not liable under these circumstances, although he was aware that the servant had not such experience and skill as were required for the safe performance of the

misunderstands the directions given

<sup>1</sup> Sunney v. Holt (1883) 15 Fed. 880; him, uses improper appliances, and puts Missouri, K. & T. R. Co. v. Young a heavy ladder against the stack so that (1896) 4 Kan. App. 219, 45 Pac. 963. it breaks off and he falls with it, shows This principle seems also to be dimly himself so ignorant of methods on board recognized in Morris v. Gleason (1879) of a boat that he cannot recover damages for injuries suggested by the fall. 4 Ill. App. 395. ages for injuries sustained by the fall. A deck hand on a steamboat, who, The City of St. Louis (1893) 56 Fed. when directed to paint the smokestack, 720.

duties which he undertook.<sup>2</sup> But the correctness of this doctrine seems decidedly questionable, since the situation thus supposed is, according to the authorities cited in § 237, ante, one which raises a duty to instruct the servant; and the breach of that duty should, it is submitted, be regarded as the legal cause of the servant's injuries.

A servant who voluntarily and without necessity undertakes work which is outside the scope of his proper employment and which he is not competent to perform is manifestly negligent.<sup>3</sup> Compare §§ 457, 465. post.

295. Negligence not inferred from continuance of work, where servant had no knowledge of the abnormal risk which caused his injuries .--There is no dispute with regard to the evidential significance of the servant's knowledge, when considered under its negative aspects. As, in cases where the defense raised is an assumption of the risk, it is well settled that the master cannot escape liability on the ground of the servant's contributory negligence unless the elements of danger are shown to have been known, either actually or constructively, to the servant.1

One of these elements is the existence of the abnormal conditions of which the danger is an incident.2 If the accident was due to two

elevator, who was not competent to de-termine the cause of the failure of the car to operate, or to apply the remedy, post.

was guilty of contributory negligence and the belief that such failure sustained: Gulf, C. & S. F. R. Co. v. was due to the loosening of the cable Donnelly (1888) 70 Tex. 371, 8 S. W.

<sup>2</sup> Alexander v. Louisville & N. R. Co. (1886) 83 Ky. 589 (instruction to this effect approved); McDermott v. Atchison, T. & S. F. R. Co. (1896) 56 Kan. 319, 43 Pac. 248. In the latter case, where the servant had made known his inexperience, the court said: "It certainly cannot be held that the company is guilty of greater negligence in employing an inexperienced brakeman than he is in soliciting and accepting such employment."

\*An employee engaged in running an effect, ploying an engaged in running an element of negligence, see also chapter 3An employee engaged in running an element of negligence, see also chapter x., ante.

Compare § 271, ante, and §§ 319, 320,

was due to the loosening of the cable Donnelly (1888) 70 Tex. 371, 8 S. W. and that the car was suspended by the 52 (railway track had suddenly, and safety "dogs," when in fact it was a without plaintiff's knowledge, become caught on a projecting bolt, he underworse owing to the recent passage of a took to adjust the cable, exposing himtrain; hand car derailed); St. Louis & S. self to inevitable injury if the car defective when the calling upon skilled 15 S. W. 789 (fireman was ignorant of men whom he knew were provided by defective wheel on his engine); Norman was proposed for such emergencies and v. Wahash R. Co. (1894) 10 C. C. A. the employer for such emergencies, and who would have instantly discovered the 617, 22 U. S. App. 505, 62 Fed. 727 difficulty. Nelson v. Sanford Mills (plaintiff injured through kneeling on (1896) 89 Me. 219, 36 Atl. 79. No one can be charged with negli-son v. Schwabacher (1893) 99 Cal. 419,

or more distinct conditions the defense of contributory negligence fails, unless the servant was aware of all of them.3

The other element of which it must be proved that the servant was aware, in order to lay a foundation for this defense, is the fact that the abnormal conditions were dangerous to a person performing his functions.4

The servant's knowledge, actual or constructive, of the abnormal conditions and of the dangers created by them, is a question of fact to be determined with reference to the particular circumstances presented by the evidence. See chapter xxx., post.

The significance of these elements under their positive aspect, namely, that which they present when there is evidence that the servant possessed a knowledge, actual or constructive, of one or both of them, is a less simple matter. It will be seen from the following sections that, while the authorities are in some important respects entirely harmonious as to the proper limits of the respective provinces of courts and juries in dealing with such evidence, there is a serious and irreconcilable conflict of opinion as to many vital points.

34 Pac. 104 (location of unprotected and his continuance at the work, do not machinery not known to servant).

tive tank owing to the substitution of a wooden plug for the valve stem, and fell onto the iron apron connecting engine and tender, where it froze, creating an icy covering on which plaintiff slipped, or served the escape of water, but not the icy formation on the apron, it was for the jury to say whether, on observing the defect, it was plaintiff's duty to forthwith abandon the engine. Mason & O. R. Co. v. Yockey (1900) 43 C. C. A. 228, 103 Fed. 265. Knowledge by an employee set to work by the side of a pile of ore, that the light is insufficient,

machinery not known to servant).

\*\*Waldhier v. Hannibal & St. J. R. Co. (1885) 87 Mo. 37 (switchman knew that the plate was broken, until his foot struck it); New Jersey & N. 3 Tex. Civ. App. 587, 24 S. W. 686, it Y. R. Co. v. Young (1892) 1 C. C. A. 428, 1 U. S. App. 96, 49 Fed. 723 (fireman knew that the air brake was defective, but not that the defect was so great as to render it impossible to stop the train within the distance at which a danger signal can be seen); Cleveland, C. C. & St. L. R. Co. v. Brown (1893) are defended work, do not constitute an assumption of the risk of the unsafe condition of the pile. Illinois Steel Co. v. Schymanowski (1896) that point of frog was loose, but did not the iron apron connecting engine and this continuance at the work, do not constitute an assumption of the risk of the unsafe condition of the pile. Illinois Steel Co. v. Schymanowski (1896) that point of frog was loose, but did not the unsafe condition of the pile. Illinois Steel Co. v. Schymanowski (1896) that point of feel was broken, until worth & D. C. R. Co. v. Wilson (1893) are ceased knew of the storm that washed many the defendant's track, the plain-tiff could not recover, was properly result of the valve had notice of the rain would not charge him with contributory negligence, unless he also had notice of the condition of the track which rain renewords a structure to fall).

Where water escaped from a locomotive tank owing to the substitution of a wooden plug for the valve stem, and fell onto the iron apron connecting engine of the valve stem, and fell onto the iron apron connecting engine of the condition of the track which rain renewords where it from a pron connecting engine of the substitution of a fact is recognized in the following cases:

Wuotilla v. Duluth Lumber Co. (1887) and the pile illinois fact is recognized in the following cases:

Wuotilla v. Duluth Lumber Co. (1887) and the pile illinois fact is recognized in the following cases: constitute an assumption of the risk of

296. Negligence not necessarily inferable where knowledge of defects only is shown.— (Compare § 272a, ante.)—An obvious corollary to the general rule laid down in the preceding section is that the servant is not prevented from recovering by evidence merely of his knowledge of the material conditions which caused the injury, inasmuch as such evidence still leaves the existence of the other essential element of his culpability to be established.1 It is one thing to be aware that machinery is defective, or in a particular condition, and another thing to know or appreciate the risks resulting therefrom. A man of ordinary intelligence and experience may know the actual condition of an instrument with which he is working and yet not know the nature or extent of the risks to which he is exposed.<sup>2</sup> The accepted doctrine,

which he was required to work has a betokened negligence on the master's in bracing the structure) Reversed in the conditions, shows that he, also, was (1892) 132 N. Y. 228, 30 N. E. 573, but negligent. Eddy v. Aurora Iron Min. not on this point; Walker v. Atlanta & W. P. R. Co. (1898) 103 Ga. 820, 30 S. E. 503.

exercise of due care impliedly negatives

<sup>1</sup>The mere fact that a servant has knowledge of defects in plans or methods of construction may not charge him with contributory negligence or assumption of risk. The question is, Did he know, or by the exercise of ordinary common sense and prudence could he have known, that, in addition to these defects, the risks existed? Sneda v. Libera (1896) 65 Minn. 337, 68 N. W. 36 (improper plan for construction of cistern wall). It is error to grant a nonsuit where, although it is admitted that the servant knew of the defect, he denied, and the evidence is consistent with the inference, that he had any actual knowledge that the appliance was dangerous. Pitts v. Florida C. & P. R. Co. (1896) 98 Ga. 655, 27 S. E. 189 (space allowed to exist between engine and tender, rendering apron liable to fly up—fireman injured); Colbert v. Ran-kin (1887) 72 Cal. 197, 13 Pac. 491 (plaintiff entitled to instruction that he was not guilty of contributory negliemployment involved danger).

A servant cannot be pronounced negli- J.). gent, as a matter of law, on the theory An averment that a servant knew that, if a certain method of doing work that a fellow servant was incompetent

right to show his ignorance of the ef- part, the mere fact that the servant feets arising from the manner adopted went on working, with a knowledge of negligent. Eddy v. Aurora Iron Min. Co. (1890) 81 Mich. 548, 46 N. W. 17. <sup>2</sup> Wuotilla v. Duluth Lumber Co. (1887) 37 Minn. 153, 33 N. W. 551, A finding that the servant was in the where the court, emphasizing the inequality in the positions of the master his knowledge of the danger. Chicago and servant, refused to set aside a ver-& E. I. R. Co. v. Hines (1890) 132 III. dict for the plaintiff, who, being only a 161, 23 N. E. 1021. common laborer, and not a machinist, was caught in a gearing near which, as was testified by several witnesses, it was

quite possible for anyone not acquainted

with machinery to work without anticipating any danger.

A verdict which exempts the servant from the charge of negligence is not inconsistent with the fact that he knew of the abnormally dangerous conditions which caused his injury. "Knowledge is only an ingredient in negligence. It may be that the knowledge of the servant induced him to use extraordinary care, which care was yet insufficient to preserve him from accident. Besides, a servant knowing the facts may be utterly ignorant of the risks." Clarke v. Holmes (1862) 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, per Byles, J.

A finding by a judge, sitting as a jury, that a scaffold was manifestly defective, the ledge being too narrow, and the standard not tied, does not necessarily imply that the servant who used it gence unless he knew, or might have was negligent. Stuart v. Evans (1883) known, that by reason of the defect the employment involved danger). (see especially the opinion of Williams,

therefore, is that, in order to charge a servant with contributory negligence, the dangers, and not the defects alone, must be so obvious that a reasonably prudent man would have avoided them.<sup>3</sup> That is to say, the true test for the determination of the question whether the servant was in the exercise of due care is not to inquire whether he was aware of the defect which caused his injury, but whether that defect rendered the peril of remaining in the service so imminent that he ought to have abandoned it.4 Or, as the rule has also been stated, the continuance of an employee in the employer's service after he learns of defects in the machinery used in his employment will not defeat a recovery for injuries resulting from such de-

accident. It must be such as a fairly W. Va. 273, 18 S. E. 584. prudent, cautious man ought to think likely to result in accident, and which 48 C. C. A. 497, 109 Fed. 436 (engineer he ought not to risk. Does the rule re- of passenger train injured by collision quire the employee in all cases to stop with helper engine running backwards work simply because he knows of defect- without a headlight on the tender). ive machinery or condition? In this

for a reasonable time before the injury case could the plaintiff fairly expect caused by such fellow servant's neglithat these openings would leave an ingence does not show that the former is sufficient supply of air? And did he debarred from recovery on the ground know that there was gas present, in of contributory negligence. *Hoey* v. which case the openings would be a real Dublin & B. Junction R. Co. (1870) Ir. danger, otherwise not? Was it rash, or even imprudent, to work? Was he so In Young v. Syracuse, B. & N. Y. R. in thinking he might go on safely? Un-Co. (1899) 45 App. Div. 296, 61 N. Y. der the circumstances of this case, you Supp. 202, Smith, J., in discussing cercannel say that the situation was such table access which he are distincted in the same distinction. tain cases which he was distinguishing as to impress him with a feeling of insefrom the one before him, remarked that curity. To do so you must fix the rule the court could not say, as a matter of unalterably that knowledge of any delaw, that the dangerous conditions were fect whatever, finally resulting in disso obvious as to make them an apparent aster, should have caused the employee risk, and drew the inference that the to stop, and will forbid recovery. Would cases did not come within the doctrine the interests of either employer or emof assumed risks, but presented a ques-ployee be subserved by such a rule? To tion of contributory negligence. Clear-know simply of a defect of machinery, ly the proper way of putting the matter or that the condition or surroundings of was that one of the elements of an as- a working place are not just what they sumption of the risk, viz., the servant's should be to guarantee safety, is not to knowledge of it, was not so indisputable be certainly or necessarily forewarned that the court could say that it existed. of danger. Does the employee from <sup>3</sup> Ashland Coal & I. R. Co. v. Wallace that knowledge in all instances assume (1897) 101 Ky. 626, 42 S. W. 744, Re- all risks? I think not. The question hearing Denied in (1897) 101 Ky. 644, is, Did he know, or ought he to have 43 S. W. 207 (defective roof in mine). known by the use of ordinary common In a case where the injury was caused sense and prudence, as applied in the by an explosion of gas in a mine, and it particular instance, that dangers were was proved that the plaintiff knew that before him likely to flow from the defect some of the cross-cuts were closed, but or condition? Not simply that he knew denied that he knew the dangerous ef- the defect or condition existed. He need fect this would have upon the ventila- not in all cases quit work. He may run tion, the court reasoned thus: "The dan- some risks provided they be such as a ger must be such as may reasonably be prudent, careful man would, under the expected to entail accident and injury, circumstances, run." Graham v. Newnot a remote probability or chance of burg Orrel Coal & Coke Co. (1893) 38

<sup>4</sup> Southern P. Co. v. Yeargin (1901)

fects, unless they are so dangerous as to threaten immediate injury, or the danger is such as to be reasonably apprehended by him.<sup>5</sup>

Considered with reference to the respective functions of courts and juries, the principles above laid down will usually involve the consequence that, when the specific evidence submitted only goes to the extent of establishing the servant's knowledge of the defect, the question of his contributory negligence cannot be withdrawn from the jury. Especially is the servant entitled to the benefit of this principle

(1897) 15 Utah, 534, 50 Pac. 834.

Magee v. North Pacific Coast R. Co. (1889) 78 Cal. 430, 21 Pac. 114 (brakeman allowed to recover, where he was injured owing to the fact that the cowcatcher of the engine was defective and failed to throw aside a cow which had strayed through a gap in the fence, the result being the derailment of the

<sup>6</sup> See cases already cited in this section, and also the following: Indermaur v. Dames (1866) L. R. 1 C. P. 274, 35 L. J. C. P. N. S. 184, 12 Jur. N. S. 432, 14 L. T. N. S. 484, 14 Week. Rep. 586, 1 Harr. & R. 243; Goggin v. D. M. Osborne & Co. (1896) 115 Cal. 437, 47 Pac. 248; Eureka Co. v. Bass (1885) 81 Ala. 200, 60 Am. Rep. 152, 8 So. 216; Le Clair v. First Div. of St. Paul & P. Fed. 407 (negligence is question for jury where knowledge of conditions only is indisputable—deadwoods out of repair, holes in track, or incompetency of fireman—brakeman injured while couptiff that, if the foreman did not do bet-ter, he would have to discharge him— were patent defects, held properly re-

<sup>5</sup> Mangum v. Bullion, B. & C. Min. Co. a statement amounting to a conditional promise; but the ruling does not seem "The right of a servant to recover on to turn upon this circumstance entireaccount of the master's negligence is not ly); Mehan v. Syracuse, B. & N. Y. R. affected by notice of any defects other Co. (1878) 73 N. Y. 585 (nonsuit propthan such as the servant ought, in the erly denied where engineer was injured exercise of ordinary prudence, to have by a derailment, he knowing merely foreseen might endanger his safety." that the track was somewhat out of repair); Kain v. Smith (1882) 89 N. Y. 375 (1881) 25 Hun, 146 (jigger used in loading cars seen to be defective); Schwandner v. Birge (1884) 33 Hun, 186 (plaintiff knew that the means of escape from fire prescribed by statute were not provided. Emphasis was laid here on the distinction between appliances used by the plaintiff himself and those in other parts of the establishment); Heavey v. Hudson River Water Power & Paper Co. (1890) 57 Hun, 339, 10 N. Y. Supp. 585 (lad fifteen years of age continued to use for the purpose of age continued to use, for the purpose of pushing a heavy pipe, a pole which, to his knowledge, had become spongy and soft at the end, the consequence being that it slipped, and he was precipitated into a vat of hot fluid; error to rule R. Co. (1873) 20 Minn. 9, Gil. 1; Northat plaintiff must have known pole to be folk & W. R. Co. v. Ward (1894) 90 Va. unfit for use); Fox v. Le Conte (1896) 687, 24 L. R. A. 717, 19 S. E. 849; 2 App. Div. 61, 37 N. Y. Supp. 316 (negLouisville & N. R. Co. v. Kelly (1894) ligence of plaintiff question for jury 11 C. C. A. 260, 24 U. S. App. 103, 63 where he denied that he knew that the clicking of a power press indicated danger, and this testimony was corroborated by other witnesses, who stated that they did not consider danger to be a necessary inference); Hungerford v. Chi-cago, M. & St. P. R. Co. (1890) 41 Minn. 444, 43 N. W. 324 (brakeman in-jured by the "gooseneck" of an engine, generally used for passenger trains, but in this case ordered to be coupled to a fireman—brakeman injured while coupling; Parker v. South Carolina & G. R. cago, M. & St. P. R. Co. (1890) 41
Co. (1896) 48 S. C. 364, 26 S. E. 669
(derailment caused by defective engine jured by the "gooseneck" of an engine, and track); Fordyce v. Edwards (1895)
60 Ark. 438, 30 S. W. 758 (engine derailed by collision with a horse in consequence of its pilot being too high); it would be extremely apt to cause in-Laning v. New York C. R. Co. (1872)
49 N. Y. 521, 10 Am. Rep. 417 (plaintiff the were not familiar with the applikance of incompetency of foreman. Here the master's agent had told the plaintiff that, if the foreman did not do bet-directing verdict for defendant, if there where the defective appliance had been safely used by himself or his fellow servants so frequently and so long that he might reasonably

dised where the servant saw that a Normern Pacific Uoal Uo. v. Richmond switch engine had a square tank, but (1893) 7 C. C. A. 485, 15 U. S. App. did not know the danger of its use); 262, 58 Fed. 756. It has been held that St. Louis & S. F. R. Co. v. McClain a fireman was not necessarily negligent (1891) 80 Tex. 85, 15 S. W. 789 (verdict for plaintiff will not be set aside brake of which was so defective that because the record shows that he knew the train could not be stopped within of the defective condition of the appli- the distance danger signals could be disof the defective condition of the appli-ance); Gulf, C. & S. F. R. Co. v. Shear-cerned, where it was not shown that this er (1892) 1 Tex. Civ. App. 343, 21 S. was manifest before the accident. New W. 133 (instruction that knowledge of Jersey & N. Y. R. Co. v. Young (1892) defect — unballasted track — rendered 1 C. C. A. 428, 1 U. S. App. 96, 49 Fed. servant chargeable with negligence is 723. Whether or not a freight conduct-446, 43 S. W. 808 (crack in singletree ive, with an inadequate number of of wagon); Pierson v. New York, N. H. brakemen, is for the jury, upon evidence & H. R. Co. (1900) 53 App. Div. 363, that a number of cars were added to the 65 N. Y. Supp. 1039 (air brakes did not train under the orders of the train deswork properly owing to leak in steam patcher, against the conductor's protest pipe, which reduced the pressure below that there was not a sufficient number the requisite degree); Brownfield v. of brakemen. Mew v. Charleston & S. Chicago, R. I. & P. R. Co. (1899) 107 R. Co. (1898) 55 S. C. 90, 32 S. E. 828. Iowa, 254, 77 N. W. 1038 (fireman re-A brakeman continuing work with mained on defective engine to complete knowledge of the discontinuance of run); Davidson v. Cornell (1892) 132 night inspection of defendant's track N. Y. 228, 30 N. E. 573 (servant knew does not assume the risk of an accident of master's omission to provide the caused by the burning of a bridge over usual means of rendering secure the sys- a stream, in the night. Such a change tem of operations adopted, but did not of system does not necessarily expose know the natural consequences of that him to any certain danger. Maydole v. omission); Foley v. California Horse- Denver & R. G. R. Co. (1900) 15 Colo. shoe Co. (1896) 115 Cal. 184, 47 Pac. 42 App. 449, 62 Pac. 964. (minor of fourteen had his sleeve caught moving cars).

The mere fact that a miner knew that (1896) 14 Utah, 383, 46 Pac. 374. one of two ore cars which he had to operate was higher than the others in that an employee who was injured by use does not show conclusively that he the insufficiency of the supports used to knew it to be dangerously high with relation to the roof of an entry at a certain point. It is for the jury to say ty of negligence in continuing the work whether he was negligent in continuing was that he had a right to rely on the to perform duties which required him to ride in that car through the entry. Tennessee Coal, Iron & R. Co. v. Currier (1901) 47 C. C. A. 161, 108 Fed. 19. (1901) 47 C. C. A. 161, 108 Fed. 19. if there was any probability of a cave Where a boy of fourteen stumbled over in. Kearney Electric Co. v. Laughlin a lump of coal near a railway track in (1895) 45 Neb. 390, 63 N. W. 941. a mine, it was held to be for the jury to In Gallagher v. Piper (1864) 16 C. say whether he appreciated the risk, alb. N. S. 669, 33 L. J. C. P. N. S. 329, though he knew the obstacle was there. Willes, J., approved of the finding of

fused where the servant saw that a Northern Pacific Coal Co. v. Richmond properly refused); Bowman v. Texas or was negligent in running a train Brewing Co. (1897) 17 Tex. Civ. App. over a road known to him to be defect-

A switchman's knowledge that a in a cogwheel, while he was screwing on switch engine is operated without a firea misplaced nut); Powers v. Standard man does not of itself, as matter of law, Oil Co. (1898) 53 S. C. 358, 31 S. E. preclude recovery for injuries resulting 276 (rotten plankway); Burns v. Merfrom the failure of the engineer to see chants' & Planters' Oil Co. (1901; Tex. signals, because his attention was di-Civ. App.) 63 S. W. 1061 (no watch-verted by the performance of a duty man stationed to guard servant from which ordinarily would be performed by a fireman. Wright v. Southern P. Co.

> A special reason assigned for holding sustain the sides and roof of a tunnel which he was excavating was not guilvigilance, knowledge, and judgment of the superintendent, and to act on the presumption that he would have spoken,

suppose that its use could be continued without danger.7 It is only in a very clear case that the question whether the servant appreciated the danger as well as the defect can be withdrawn from the jury.\*

In instructing the jury it is proper to draw their attention to the rule that a servant is not necessarily chargeable with contributory negligence because of his knowledge of the conditions which gave rise to the danger, if he did not, in fact, know of the danger.9 On the other hand, an instruction ignoring or disregarding the element of danger, as distinguished from the knowledge of the defect, is erroneous.<sup>10</sup> See, however, the following section, where cases which apply a less stringent doctrine are mentioned.

297. Knowledge of defects,-when sufficient to justify inference of negligence.— The doctrine laid down in the preceding section has manifestly arisen out of the necessity of providing a rule adapted for use in courts in which the practice of trial by jury prevails. Essentially it amounts to nothing more than this,—that when that part of the evidence, the significance of which is unquestionable, merely goes to the extent of showing that the abnormal conditions which caused the injury were known to the servant, and it is an open question whether he understood the risk created by those conditions, it is for

unteer."

"It seems to be the true doctrine that perhaps there may be instances in which the knowledge of the defects, possessed by the injured party, is so defi-nite that he must be deemed, as a matter of law, to have taken the risk on himself of injury arising therefrom, but himself of injury arising therefrom, but that, as a general rule, such knowledge is only a circumstance to be submitted to the jury from which they may infer negligence." McMahon v. Port Henry Iron Ore Co. (1881) 24 Hun, 48 (nonsuit held erroneous, where plaintiff knew that a blast had been negligently prepared).

See also cases cited in § 298a, note 4, (1893) 136 Mass. 1; Lasure v. Granite-ville Mfg. Co. (1882) 18 S. C. 275; Galveston, H. & S. A. R. Co. v. Parrish (1897; Tex. Civ. App.) 40 S. W. 191; Bussey v. Charleston & W. C. R. Co. (1898) 52 S. C. 438, 30 S. E. 477; Southern P. Co. v. Yeargin (1901) 48

and § 301, infra.

XXI., post, with regard to the effect of South Carolina & G. R. Co. (1897) 48 the servant's inexperience or minority S. C. 364, 26 S. E. 669. are also pertinent in this connection.

<sup>7</sup>Lyttle v. Chicago & W. M. R. Co. note 2, infra. (1890) 84 Mich. 289, 47 N. W. 571

the jury that a laborer was not negli- (footboard, known to be defective, had gent in continuing to work after com- been used by a switchman one hundred plaining to his foreman that the mate-times a day for a week, without in-rials furnished for a scaffold which he jury); Hawley v. Northern C. R. Co. was erecting were deficient in quantity, (1880) 82 N. Y. 370 (engine run with saying that "a man can hardly, under cars attached over a defective road was such circumstances, be considered a vol- overturned-other engine had frequently been run over the road in safety, in the same way that plaintiff was running his).

<sup>8</sup> Louisville & N. R. Co. v. Kelly (1894) 11 C. C. A. 260, 24 U. S. App. 103, 63 Fed. 407; Kain v. Smith (1882)

89 N. Y. 375 (1881) 25 Hun, 146.

\*\*Knoxville Iron Co. v. Pace (1898) 101 Tenn. 476, 48 S. W. 232. See also

nd § 301, infra.

Southern P. Co. v. Yeargin (1901) 48
Many of the cases cited in chapter C. C. A. 497, 109 Fed. 436; Parker v.

See also note 6, supra, and § 298a,

the jury to determine whether he was negligent in continuing in the employment. On general principles, it is plain that, where there can be no reasonable doubt that a person in the servant's position, who knew of the defect in question, must also have understood the resulting risk, it may be ruled, as a matter of law, that, for the purpose of the defense, his information was complete.<sup>1</sup> This is the rationale of those decisions in which a knowledge of the defect alone has been held sufficient to prevent recovery.2 In determining whether the case is one in which the verdict of a jury on this point may be directed or overridden, the material question is, whether knowledge of the defects necessarily, and in legal contemplation, carries with it knowledge of the risk or danger, or whether knowledge of the defects can possibly warrant any other conclusion than that the risk was understood.3 If the conditions are such as to require an affirmative answer to that question, we arrive at the same point in the deductive process as that which is contemplated by the rule explained in the next section. Whether or not notice of danger in the continued use of a defective appliance can be imputed to the servant will depend upon the character of that appliance, and upon whether it was in so obviously a dangerous condition as to convey notice to a person of his intelligence of the danger which might result to him in consequence of his continuing to use it.4 As a matter of ultimate analysis, therefore, the decisions exemplifying that rule and those in which actions have been held not maintainable on the ground

A. 170, 51 N. E. 20.

That the rule by which the continuance of work with knowledge of defects ed the happening of the accident, he is

That an appliance may be so grossly the court stated the effect of the or clearly defective that the servant previous decisions in Maryland as must have known of the risk to which it follows: "If the machinery or apexposed him was laid down in \*Sims\* v. pliances which the master has fur-Lindsay (1898) 122 N. C. 678, 30 S. E. nished contains obvious defects, of 19. This is in accordance with the general principle laid down by Knowlton, sonably prudent man, he might have J., in a dissenting opinion: "The danknown; or if he continues in the service growth and so obvious that ger may be so great and so obvious that, after he has discovered, or by the exer-in any possible view of the evidence, the cise of reasonable care might have disgeneral judgment of common men would covered, the existence of such defects,at once condemn his conduct in continu- he cannot recover against the master for ing to work, as careless." Davis v. injuries resulting from such defective Forbes (1898)\_171 Mass. 548, 47 L. R. machinery. In other words, if the servant has been wanting in such reasonable care and caution as would have preventance of work with knowledge of defects ed the happening of the accident, he is implies negligence is founded on the presumption that a servant understands the dangers arising from these defects was expressly noted in *Galveston, H. &* was occasioned by the defect of the mass. A. R. Co. v. Parrish (1897; Tex. Civ. App.) 40 S. W. 191.

\*\*Michael v. Stanley (1892) 75 Md.

\*\*Michael v. Stanley (1892) 75 Md.

\*\*Pitts v. Florida C. & P. R. Co. (1896) 98 Ga. 655, 27 S. E. 189.

of the servant's knowledge of the defect merely are illustrations of the same theory. Knowledge of the danger is not denied to be a necessary element of the defense. It is merely taken for granted that knowledge of the defect must have carried with it a knowledge of the concomitant danger. Viewed from this standpoint, the supposed conflict between the authorities, which has troubled some judges, entirely vanishes so far as it is a matter of theory; for no court, not even those of Missouri and of the states which have followed the Missouri decisions (see § 301, infra), has gone to the length of declaring that it is for the jury, under every conceivable state of the evidence, to say whether a knowledge of the danger shall be inferred. But it must be confessed that, on the facts, it is sometimes extremely difficult, if not impossible, to reconcile the cases cited below, in which the servant's action failed on the ground of contributory negligence, with those cited under § 296, supra. In many instances the circumstances are, for practical purposes, identical, and in at least one, viz., where the defect under review was the unfitness of a fellow servant, absolutely identical.5

<sup>5</sup> Griffiths v. Gidlow (1858) 3 Hurlst. R. Co. v. Worley (1893) 92 Ga. 84, 18 & N. 648, 27 L. J. Exch. N. S. 404 (defective hook caused the fall of a tub unfitness appeared from plaintiff's own used for hoisting water from a pit); testimony); Nelson v. Central R. & Hough v. Texas & P. R. Co. (1879) 100 Bkg. Co. (1891) 88 Ga. 225, 14 S. E. U. S. 224, 25 L. ed. 617 (defective cowatcher); Reese v. Clark (1892) 146 self testified that a brake rod was brok-Pa. 465, 23 Atl. 246 (heavy iron plates en); McGhee v. Bell (1897) 19 Ky. L. which had been laid against a wall fell Rep. 267, 39 S. W. 823, Reversing on on plaintiff); Marean v. New York S. rehearing (1897) 38 S. W. 702 (lever & W. R. Co. (1895) 167 Pa. 220, 31 of hand car was worm-eaten); Lawrence Atl. 562 (want of signal flag known to v. Hagemeyer & Co. (1892) 93 Ky. 591, plaintiff, a car inspector); Marsh v. 20 S. W. 704 (defective saw); Michael Chickering (1886) 101 N. Y. 396, 5 N. v. Stanley (1892) 75 Md. 464, 23 Atl. E. 56 (defective ladder); Smith v. Memphis & L. R. Co. (1883) 18 Fed. 304 (in by circular saw in which two teeth were charge to jury); Dillon v. Union P. R. wanting); Erdman v. Illinois Steel Co.

phis & L. R. Co. (1883) 18 Fed. 304 (in by circular saw in which two teeth were charge to jury); Dillon v. Union P. R. wanting); Erdman v. Illinois Steel Co. Co. (1874) 3 Dill. 319, Fed. Cas. No. (1897) 95 Wis. 6, 69 N. W. 993 (cracked 3,916 (engineer injured owing to want of signal bell in cab of engine); Atlanta (1882) 68 Ga. 699 (cleaver used for & C. Air Line R. Co. v. Ray (1883) 70 cutting iron bars threw off a sliver Ga. 674 (employee who had to light stove knew that it was defective); Porton Land (1882) 68 Ga. 699 (cleaver used for when struck by a hammer); Western & Land (1887) 97 N. C. 66, 2 S. E. 581 (plain-tiff held not to be entitled to recover lift held not to be e

There is good authority for the position that it is not a misdirection to give a charge to the effect that, if the injured servant had continued work with a knowledge of the defective conditions, he was guilty of contributory negligence. But there is manifestly some danger that

waukee, L. S. & W. R. Co. (1890) 76 App. Div. 271, 42 N. Y. Supp. 116. The Wis. 136, 44 N. W. 752 (iron hook plainly showed a flaw on the outside. Special finding that the defect could have been observed by the owner of the hook or parties that used it if they were exercising ordinary care in using or taking the fall of the roof. Pittsburgh & W. care of it, held conclusively to negative Coal Co. v. Estievenard (1895) 53 Ohio the right to recover); Anderson v. C. N. St. 43, 40 N. E. 725; Victor Coal Co. v. Nelson Lumber Co. (1896) 67 Minn. 79, Muir (1894) 20 Colo. 320, 26 L. R. A. 69 N. W. 630 (uncovered machinery); 435, 38 Pac. 378; Oleson v. Maple Grove King v. Ford River Lumber Co. (1892) Coal & Min. Co. (1901) 115 Iowa, 74, 93 Mich. 172, 53 N. W. 10 (same facts); 87 N. W. 736.

Schroeder v. Michigan Car Co. (1885) Schroeder v. Michigan Car Co. (1885) McKelvey v. Chesapeake & O. R. Co. 56 Mich. 132, 22 N. W. 220 (same (1891) 35 W. Va. 500, 14 S. E. 261, facts); Peterson v. Sherry Lumber Co. was construed in Woodell v. West Vir. (1895) 90 Wis. 83, 93, 62 N. W. 948 ginia Improv. Co. (1893) 38 W. Va. 23, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 1893, 18 Week. Rep. 261 (habitual violation of damag rule on which servant's safety depended); Alabama G. S. R. Co. v. Davis (1875) 55 Ga. 133 (words of headnote (1898) 119 Ala. 572, 24 So. 862 (devirten by the court).

An allegation that the delinquent comatching with the main track); Limberg v. Glenwood Lumber Co. (1900) chines after they were stopped," and 127 Cal. 598, 49 L. R. A. 33, 60 Pac. that "this was known to the officers of 176 (no seat on a wagon).

A brakeman who is notified by a rule of the company that he will sometimes have to couple cars which have lumber, etc., projecting over their ends, and is required to observe the manner in which such cars are loaded, cannot, even if such method of loading is negligent, recover for injuries received in coupling a car so loaded, for he is negligent in voluntarily engaging in the service with knowledge of the company's nonperformance of its duty. Brennan v. Michigan C. R. Co. (1892) 93 Mich. 157, 53 N. W. 358. An employee working in the C. R. Co. (1892) 93 Mich. 157, 53 N. signal to stop, where the engine was in W. 358. An employee working in the good condition when it was taken out by vicinity of a clay bank assumes the risk the crew, but became defective while from the caving-in of the bank where they were using it, and they continued he knows that a large mass has already its use without objection. Hunt v. fallen and that a slide is imminent, but Kone (1900) 40 C. C. A. 372, 100 Fed. believes that he can finish the work at 256. In Ford v. Fitchburg R. Co.(1872) which he is engaged before the cavingin occurs. Baker v. Sutton (1896) 11 court sustained the refusal of the trial

(same point); Nadau v. White River 17 S. E. 386, as a ruling that an engi-Lumber Co. (1890) 76 Wis. 120, 43 N. neer's knowledge that some stay bolts W. 1135 (same facts); Houston & T. C. in a locomotive boiler were broken ren-R. Co. v. Myers (1881) 55 Tex. 111 dered him chargeable with negligence in (arguendo); Texas & P. R. Co. v. Bradging on working. But the actual deford (1886) 66 Tex. 732, 59 Am. Rep. cision was that his negligence was for 739, 2 S. W. 595 (no proper appliances the jury, as a promise to repair had been

> Where a servant "knowingly" used defective machinery, he cannot recover damages for injuries resulting therefrom. Johnson v. Western & A. R. Co. (1875) 55 Ga. 133 (words of headnote

> the defendant corporation, and they retained him in its employ," will not authorize a recovery, where the plaintiff also alleges that he had a knowledge of this propensity. Smith v. Sibley Mfg. Co. (1890) 85 Ga. 333, 11 S. E. 616.
>
> See also § 298a, note 5, infra.
>
> It has been held proper to instruct

> a jury that a railroad company cannot be held liable for an injury to a switchman caused by the fact that the engine used by the crew leaked steam so that it prevented the engineer from seeing a

such an instruction may mislead the jury to the prejudice of the servant, and the better practice is, therefore, that which is indicated by the cases cited at the end of the last section.

The phrase "knowledge of the risk," which is customarily employed in statements of the principle applied in the cases cited under this section, is somewhat ambiguous in meaning. By one court it is interpreted as implying that the action is not barred by the servant's knowledge of a defect, unless the circumstances were such as "necessarily and inevitably to expose him to danger." But it is manifest that many of the decisions collected in note 4, supra, cannot be brought within the purview of any such stringent principle. They rather proceed upon the theory suggested in other cases, that negligence is properly inferred wherever injury may "reasonably be apprehended."8 The probability or improbability of

judge to charge the jury to the effect machine, the risks incident to the busithat the plaintiff could not recover if ness done with the defective implement he knew, or had reasonable cause to believe, that the engine which exploded opinion to indicate that the engineer was defective, and approved the followmust have had knowledge of the danger good working order, knowing it to be or notice, by the defect itself, that such such; and the particulars in which it an event might occur. Texas & P. R. was not in good working order were Co. v. Bradford (1886) 66 Tex. 732, 735, signs of a defective condition in the 59 Am. Rep. 739, 2 S. W. 595. boiler, causing an explosion by which the plaintiff was injured; and a competent engineer ought to have known that tiff's foot caught in a hole in a plank of which the plaintiff was injured of which the control of the ment of the defendants as an engineer, defect was not such as to render the —he cannot recover." If we compare place of work "necessarily dangerous." the language of the instructions thus rejected and adopted, it will be apparent 200, 60 Am. Rep. 152, 8 So. 216. "Wheth-

ing instruction, as given: "If the plain of an explosion otherwise than as he tiff ran the engine when it was not in may have been affected with knowledge good working order, knowing it to be or notice, by the defect itself, that such

such particulars were signs of such decrossing). Compare Waldhier v. Hanfective condition; and the plaintiff held nibal & St. J. R. Co. (1885) 87 Mo. 37, himself out as such a competent engi- where the servant was allowed to mainneer when he entered into the employ- tain his action on the ground that the

that this Massachusetts case is not an er continuing in the service after disauthority for the unqualified proposi- covering the defect constitutes contribuadthority for the unqualified proposition in support of which it is sometimes tory negligence depends in a great meascited, viz., that to defeat the action of ure upon its nature and extent. Unthe servant it must be proved, not only questionably, when the danger is so apthat he knew of the defects from which parent that injury appears to be inevithe injury resulted, but that he must table, the employee is not justified in
also have known of the danger. Comcontinuing in the service. No man is menting upon the case, the supreme bound to subject himself to certain and court of Texas has made the following inevitable injury, endangering life in remarks: This opinion we understand rendering service to another. Continuonly to declare that knowledge of a deance in service under such circumstances feet which in the ordinary course of would be reckless, and, if death ensued, events, under the operation of well-suicidal. But that the injury should known laws governing matter, may reappear to be unavoidable is not requisult in injury, will cast upon the persite. When injury is imminent, when son who, with knowledge of such, conthe appearance of injury is of a degree tinues to use the defective implement or greater than that which produces the

encountering the particular risk of which the servant had knowledge at the time when the injury was received may also, as it would seem, be taken into account.9 In other words, whenever the servant sees, or ought to see, that the probable consequence of his remaining in an environment which the master's breach of duty has made more than usually dangerous will be some personal injury, the possibility of disaster is sufficiently serious to require him, as a prudent man, to discontinue work.

It should be observed that, under the evidence as sometimes presented, the failure of the servant to obtain the knowledge which, according to the decisions thus far cited, is sufficient to charge him with negligence in continuing to work, may be treated as in itself a culpable omission, operating as an efficient cause of the injury,—as, where he failed to make an examination of the defective appliance; 10 or did not notice a defect which was obvious. 11 See, generally, chapter xxi., post.

298. Negligence inferred, as matter of law, where knowledge both of defects and consequent risks is shown .- The ultimate proposition which, as already stated, is implied in the decisions mentioned under the preceding section is that, in the absence of some special element which suggests a sufficient excuse for his conduct, a servant is chargeable, as a matter of law, with contributory negligence if he goes on working after he has ascertained that an extraordinary risk, creating

nent that it necessarily informed the when he was proceeding on the journey servant of the risk which he encounduring which the injury was inflicted, tered, his contributory negligence was he was to encounter that particular inheld to be for the jury, where a pole becompetent engineer. longing to his employer, a telephone longing to the pole had been condemned and warned to examine the rope of a hoist-marked for removal, there was nothing ing cage before descending into a mine, to show that it would not support his weight. Southern Bell Teleph. & Teleg.

"Bemisch v. Roberts (1891) 143 Pa.

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impression that injury may result, Justice Lawson, in denying the sound-when it leaves no room for reasonable ness of the doctrine which would make when it leaves no room for reasonable ness of the doctrine which would make doubt—continuing in the service after continuance in employment with knowl-knowledge of the defect causing the inedge of the incompetency of a fellow jury, and its nature and extent, must servant contributory negligence, laid be regarded as contributory negligence." stress upon the fact that although a Highland Ave. & B. R. Co. v. Walters (1890) 91 Ala. 442, 8 So. 357.

On the ground that the danger in petent engineer in the service of the computation was not so obvious and imminatory that there was one incomponent with the danger in proposed in the doctrine which would make doubt make doubt—continuing in the service after continuance in employment with knowl-hamped and the incompetency of a fellow jury, and its nature and extent, must servant contributory negligence, laid be regarded as contributory negligence."

Highland Ave. & B. R. Co. v. Walters in petent engineer (the plaintiff) might know that there was one incompetency of the incompetency of a fellow jury, and its nature and extent, must servant contributory negligence, laid be regarded as contributory negligence."

Highland Ave. & B. R. Co. v. Walters in petent engineer (the plaintiff) might know that there was one incompetency of the contributory negligence. question was not so obvious and immi- mon employer, he could not know that,

to it, the evidence being that, although intestate and his colaborers had been

weight. Southern Bell Teleph. & Teleg.

Co. v. Clements (1900) 98 Va. 1, 34 S.

1, 21 Atl. 998 (holes in which were the pins which confined the load on a bugges, so worn that the pins would not R. Co. (1870) Ir. Rep. 5 C. L. 206, where stay in, and the load fell off).

an ever present possibility of injury, has been superadded to the incidents of his employment.1

The knowledge which this doctrine contemplates is the complete appreciation which, as is shown elsewhere (§ 271, ante), must also be established before the master can protect himself by the defense that the risk was assumed. The servant's continuance of work with a mere

gence does not wholly deprive the servtouched upon by the majority of the court of appeals, but made the foundation of a dissent by Goff, J.); Barkdoll v. Pennsylvania R. Co. (1888) 21 W. N. C. 281, 13 Atl. 82 (brakeman killed in coupling broken ear); Tenanty v. Boston Mfg. Co. (1898) 170 Mass. 323, 49 N. E. 654 (defective saw); Mehan v. Syracuse, B. & N. Y. R. Co. (1878) 73 N. Y. 585 (defective track; conceded that engineer could not recover if he knew that it was so badly out of repair knew that it was so badly out of repair 226; \*\*Bemisch v. \*\*Roberts\* (1891) 143 Fa. that it was dangerous to run over it); 1, 21 Atl. 998; \*\*Hough v. \*\*Texas & P. R. Jones v. \*\*Roach\* (1876) 9 Jones & S. Co. (1879) 100 U. S. 213, 25 L. ed. 612 248; \*\*Crutchfield v. \*\*Richmond & D. R. (defective cow-eatcher).

\*\*Co. (1878) 78 N. C. 300 (held error to refuse to charge the jury that "if they believed that plaintiff [a brakeman] knew, or had reasonable grounds for believing, that the engine used by defendant prior to the time of the injury complained of was not controllable by the dangers and risks to the plaintiff, by provincer and that the roadhed was in a reason of the uncovered condition of the

The following cases apply or recognize this principle: Stuart v. Evans to trust one's weight, at a height of 70 (1883) 49 L. T. N. S. 138, 31 Week. feet above the ground, supported by Rep. 706, per Cave, J.; The Setapis guys extending under the trusses of a (1892) 2 C. C. A. 102, 8 U. S. App. 49, building in process of demolition, such (1892) 2 C. C. A. 102, 8 U. S. App. 49, building in process of demolition, such 51 Fed. 91 (stevedore used an unsafe trusses being known to be in such a steam winch, with knowledge of the condition that they were liable to fall danger and risk), Reversing (1891) 49 at any moment); Eureka Co. v. Bass Fed. 393. The Max Morris (1890) 137 (1886) 81 Ala. 200, 60 Am. Rep. 152, 8 U. S. 1, sub nom. The Max Morris v. So. 216 (defective fuse, known to be Caurent 34 L. ad. 586 11 Sup. C. Para department of the condition o Curry, 34 L. ed. 586, 11 Sup. Ct. Rep. dangerous); Pleasants v. Raleigh & A. 29 (holding that contributory negli- Air-Line R. Co. (1886) 95 N. C. 195 (section master used dump car which ant of his right to damages, a point not he knew to be out of order and in a dangerous condition); Reese v. Wheeling & E. G. R. Co. (1896) 42 W. Va. 333, 26 S. E. 204 (laborer, in spite of the repeated warnings of his foreman, traveled on a truck in a construction train pushed ahead of the engine, and was injured by a derailment); Ballou v. Chicago, M. & St. P. R. Co. (1882) 54 Wis. 280, 41 Am. Rep. 31, 11 N. W. 559; Brossman v. Lehigh Valley R. Co. (1886) 113 Pa. 490, 57 Am. Rep. 479, 6 Atl. 226; Bemisch v. Roberts (1891) 143 Pa.

engineer, and that the roadbed was in a reason of the uncovered condition of the was injured thereby, then the plaintiff saw, such as would be apparent to a was injured thereby, then the plaintiff person using ordinary care and obserwas guilty of contributory neglivation, and having the knowledge and gence"); Nelling v. Industrial Mfg. Co. experience in sawmills which the plain-(1886) 78 Ga. 260 (court refused to set till then had?" Iney also found that aside a verdict for the defendant, being there was no want of ordinary care on of the opinion that the jury were not the part of the plaintiff which contribmisled by an instruction which an uted to cause the injury sustained by nounced in substance that if the serv- him. As the only ground on which conant is aware of the dangerous charactributory negligence was imputed to the ter of a particular tool or instrument, plaintiff was that he remained in the or may, by the exercise of ordinary service with knowledge of the risk, the care, be apprised of it, and continues second finding was held to be equivalent nevertheless to use it, he cannot have to an affirmation that he did not so reredress for any damage he sustains by main with that knowledge, and to be its use); Pollich v. Sellers (1890) 42 therefore inconsistent with the first one.

apprehension of possible danger is not such negligence as will bar his action.2

The effect of this doctrine in relation to practical litigation is, it will be observed, practically to make it a matter of indifference, so far as the servant's rights are concerned, whether the master relies on the defense of assumption of risks or contributory negligence. In either case the functions of the jury cease when it is determined that both the defects and the resulting risks were known to the servant.<sup>3</sup>

298a. Illinois doctrine.— The general principle which is declared to be firmly established in Illinois is that, "if a person, knowing the hazards of his employment as the business is conducted, voluntarily continues therein, without any promise of the master to do any act to render the same less hazardous, the master will not be liable for any injury he may sustain therein, unless, indeed, it may be caused by the wilful act of the master." Owing to the perplexing manner in which the defenses of assumption of risks and contributory negligence have been confounded (see § 309, infra,), it is impossible to say precisely how far the true doctrine of assumption of risks, as a defense based on an implied contract, is really accepted by the courts of this state. But if the explicit language used in the section just mentioned<sup>2</sup> is to be taken as an indication of the doctrinal position actually adopted, the latter defense is the one which may normally be supposed to be raised in any case which turns upon the evidential significance of the servant's acceptance or continuation of work after he had ascertained that the employment involved an extraordinary risk. It has been deemed permissible, therefore, in spite of the ambiguity of the language used in some of the decisions cited below, to collect them under the present chapter, as being, properly speaking, illustrations of the same doctrine as that applied in the last section.<sup>3</sup>

<sup>&</sup>lt;sup>2</sup> Dumas v. Stone (1893) 65 Vt. 442, in continuing to use it. Unless the evidence of wire rope some of the strands of which had become rusty, and had been repaired after breakage); Chicago, W. & V. Coal Co. v. Peterson (1890) 39 III. in venturing to run his engine over the App. 114 (request of minor for more props showed apprehension of danger); (1890) 49 La. Ann. 86, 21 So. 153 (brakeman killed by guy wire of streetcar company; presumption of servant's fault ought not to rest on vague surmises of the possibility of danger). (1896) 49 La. Ann. 86, 21 So. 153 (brakeman killed by guy wire of streetcar company; presumption of servant's fault ought not to rest on vague surmises of the possibility of danger). (1885) 114 III. 244, 2 N. E. 185. Co. (1885) 114 III. 244, 2 N. E. 185 (fellow servant known to be incompetent); so far out of repair that he incurs some danger in running his engine over it is not conclusive proof that he is negligent of a platform which he was using to

As in other states, it is recognized that the servant's action is not barred unless he not only knows of the defective conditions, but also understands the danger created by them. 4 But, as in other states, this limitation is of no practical importance in cases where servants cannot reasonably be supposed to possess the former kind of knowledge without possessing the latter also.5

299. Rationale of the servant's inability to recover, on the ground of negligence in continuing work .- In one case the servant's inability to recover where he continues work with knowledge of a defect is put

v. Wilder (1886) 116 111. 100, 5 N. E. R. Co. v. Kinnare (1898) 76 111. App. 292 (fellow servant known to be incompetent, so that plaintiff's position was extra hazardous); Illinois Steel Co. v. being the danger of the service); Coal in the danger, as well as the defect); Chicago & A. R. Co. v. Merriman (1899) N. E. 876 (speaks of defects augmenting the danger of the service); Coal in Show Case Co. v. Blindauer (1898) Run Coal Co. v. Jones (1889) 127 III. 175 III. 325, 51 N. E. 709, Affirming 379, 8 N. E. 865, 20 N. E. 89 (gas in mine exploded—known to have been accumulating in dangerous quantities); to be maintainable if the servant knew of the defect); Batchelor v. Union Stock S. E. R. Co. v. Munroe (1877) St. Louis thimble in a bumper to keep the coupling link from running back); St. Louis thimble in a bumper to keep the coupcago, R. I. & P. R. Co. (1893) 41 III. App. 395; Chicago, R. I. & P. R. Co. (1893) 41 III. App. 395; Chicago, R. I. & P. R. Co. (1893) 41 III. App. 147, App. 87 (plaintiff injured by slipping Affirmed in (1884) 110 III. App. 147, App. 87 (plaintiff injured by slipping Affirmed in (1884) 110 III. App. 147, App. 823 (finding that servant knew of held to be obvious); Illinois C. R. III. App. 623 (finding that servant knew of defective coupling); Wabash, St. L. & Co. v. Jones (1882) 11 III. App. 324 of unsafety held inconsistent with general verdict for plaintiff); Fraser v. P. R. Co. v. Thompson (1884) 15 III. Schroeder (1896) 163 III. 459, 45 N. E. App. 117 (tumbing rod of pumping approved with the carge with held in constitution approved which stated the action not comminded the plant of proving a knowledge of the denger, as well as the defect); Chicago & A. R. Co. v. Blindauer (1899)

1894 (instruction approved which stated the necessity of proving a knowledge of the danger, as well as the defect); Chicago & A. R. Co. v. Blindauer (1899)

1895 (similar ruling).

1906 (1898) 75 III. App. 166 III. App. 167 III. App. 167

transfer freight from one car to anoth-er); United States Rolling Stock Co. fell without warning); Chicago & G. T. v. Wilder (1886) 116 Ill. 100, 5 N. E. R. Co. v. Kinnare (1898) 76 Ill. App. 92 (fellow servant known to be incom-394 (instruction approved which stated

eral verdict for plaintiff); Fraser v. P. R. Co. v. Thompson (1884) 15 Ill. Schroeder (1896) 163 Ill. 459, 45 N. E. App. 117 (tumbling rod of pumping apparatus sets. Louis Packing & Provision paratus not boxed); Chicago, B. & Q. R. Co. v. McElroy (1888) 29 Ill. App. 504. Co. v. Montgomery (1884) 15 Ill. App. It is error to charge that a servant, 205 (peculiarly hazardous form of coupalthough he has full knowledge of a dan-ling; Evans v. Chessmond (1890) 38 gerous defect, may recover if he uses or- Ill. App. 615 (rock in the roof of a drift dinary care to avoid injury from such of a mine in such a condition as to be liadefect; at all events where he has not ble to fall at any moment); Peoria, D.& reported the defect, or objected to the E. R. Co. v. Puckett (1893) 52 Ill. App. maintenance of the dangerous condition, 223 (brakeman injured by a hole in the maintenance of the dangerous condition, 223 (brakeman injured by a hole in the or received a promise that it will be track); Illinois C. R. Co. v. Swisher remedied. Chicago, R. I. & P. R. Co. (1893) 53 Ill. App. 411 (fireman inv. Clark (1882) 11 Ill. App. 104.

Swift & Co. v. O'Neill (1900) 187 a lamp on a rotary switch); Legnard Ill. 337, 58 N. E. 416, Affirming (1900) v. Lage (1894) 57 Ill. App. 223 (plain-88 Ill. App. 162 (insufficient light in a tiff injured by the fall of a bank of place where heavy trucks were being earth, the condition of which was visipushed to and fro); Howe v. Medaris ble): Webster Mfg. Co. v. Schmidt (1898) 82 Ill. App. 515 (lever which (1897) 77 Ill. App. 49 (incompetent controlled power by which paper cutter coservant), upon the ground that his doing so is a fact which, of itself, shows that there was no negligence on the master's part. The consequences of this doctrine are, it will be noticed, similar to those which are entailed by the one already developed in an earlier part of this treatise (chapter vii., post), with reference more especially to the doctrine of an assumption of risks. But the more common theory is that, whatever may be the period of service to which the servant's contract binds him, the master's failure to perform his obligations entitles the servant to abandon his employment if he see fit; and that, inasmuch as he has this right, his conduct in remaining at work after he acquires knowledge of an abnormal hazard must amount, in the absence of some special countervailing circumstance, to that species of negligence which consists in the deliberate exposure of oneself to unnecessary perils.<sup>2</sup> The servant's freedom of action is, of course, an especially decisive consideration, where his employment is for no definite period of time.3 The situation which thus supervenes upon the servant's failing to exercise his option to leave the employment is that the master, in permitting his machinery to be more than ordinarily dangerous, is guilty of negligence, while the servant, by remaining with

field when, in their treatise on Negli-

1"If the servant, acting as a prudent gence (ed. 1888) § 215, they undertook man would ordinarily act, would underto sustain the doctrine discussed in take to do the work with knowledge of § 298a, supra, by vouching in aid a supthe defect, this very test relieves the posed general principle that "a party master from liability, for the obligations and duties of master and servant obligations is allowed to perform fully are correlative; each is held to that de- his part, notwithstanding the failure of gree of care in reference to all matters the other party to fulfil a condition affecting the safety of the servant while precedent, without necessarily waiving in the master's employment which men his right to insist upon performance of of ordinary prudence would or ought such condition at a later period." (This to exercise under the same circumstan- passage was cited with approval in ces. If the servant, with a knowledge *Thorpe* v. *Missouri P. R. Co.* (1886) 89 of the defect, as a prudent man may Mo. 650, 58 Am. Rep. 120, 2 S. W. 3, undertake the work, can it be said that but has been excised in the last edition the master has not exercised that degree of care required of him?" Texas happens, is precisely the reverse of that & P. R. Co. v. Bradford (1886) 66 Tex. here stated (see Bishop, Contracts, 732, 59 Am. Rep. 739, 2 S. W. 595.

2 See the language used in Laning v. here stated (see Bishop, Contracts, 839, and a note by the present writer in Davis v. Bronson (N. D.) 33 Am. New York C. R. Co. (1872) 49 N. Y. St. Rep. pp. 791 et seq.). But in any 521, 10 Am. Rep. 417; Leary v. Boston event, the negligence of the servant & A. R. Co. (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115; Wheeler v. of any injury which he receives after Borry (1893) 95 Mich. 250, 54 N. W. the master's breach of the contract gives 876; Reese v. Clark (1892) 146 Pa. him the right to consult his personal 465, 23 Atl. 246; Marean v. New York, S. & W. R. Co. (1895) 167 Pa. 220, 31 Atl. 562; Crutchfield v. Richmond & D.

R. Co. (1877) 76 N. C. 320.

This consideration seems to have been ployed by the trip). Compare \$\frac{3}{2}\$ 288, forgotten by Messrs. Shearman and Redfield when, in their treatise on Ncglithe master has not exercised that de- of the treatise.) The true rule, as it

full knowledge of the resulting risks, contributes to his own injury.4 The causal connection between the employer's negligence and the injury is said to be broken at the time the danger becomes so plain that a person of ordinary care would not incur the risk of continuing to work at the place of danger.<sup>5</sup> Under such circumstances, if the

<sup>4</sup> Swoboda v. Ward (1879) 40 Mich. danger. Western & A. R. Co. v. Bishop 20, quoting Cooley, Torts, pp. 551, 552. (1873) 50 Ga. 465. 420, quoting Cooley, Torts, pp. 551, 552.

"While there is an implied contract between employer and employee that or might be known by the exercise of the former shall procure and keep suitable tools, implements, means, etc., with recovery where it is immediate and of which to perform the labors required of such a character as to impose upon one If he has full knowledge of all the perils of a particular service, he may decline to engage in it, or require that it shall first be made safe; but if he does

Mfg. Co. (1885) 140 Mass. 150, 3 N. 40 N. E. 725. E. 21. Is a man without fault who uses he still chooses to expose himself to the cases the continuance on the part of the

the latter, and also that the latter shall who undertakes to pass the danger a be advised by the former of all the dan-hazard that a prudent man would not gers incident to the service, of which incur. A man has no right to cast himthe latter is not cognizant, yet the fail- self upon a known danger where the act ure of the employer in this regard fur-subjects him to great peril. If there nishes no excuse for the conduct of an is a risk, apparent or known, that will employee who voluntarily incurs a probably result in injury, he must not known danger. He must himself use encounter it." Lake Shore & M. S. R. due care and caution to avoid injury. Co. v. Pinchin (1887) 112 Ind. 592, 13 N. E. 677 (an action by a stranger).

<sup>5</sup> Pollich v. Sellers (1890) 42 La. Ann.

623, 7 So. 786.

"As to whether the employee was negthus enter it, he assumes the risk, and ligent, his actions should be judged by must bear the consequences." Pennsyl- the facts as they existed, within his vania Co. v. Lynch (1878) 90 Ill. 333. knowledge, or within what he ought to (Note the confusion here between the have known, at the time he acted or conceptions of an assumption of risks failed to act; and the previous negliand a want of due care; see § 309, gence of the employer, which was known to the employee, or ought to have been "It is for the plaintiff to show, not known by him, will not excuse him. In merely that the place was unsafe, and the case at bar the failure to furnish that he was injured thereby, but that he props at the working place of the plainhimself was in the exercise of due care. tiff below was negligence on the part of His evidence fails to show this, if it apthe defendant below; but if plaintiff pears that, knowing and appreciating knew of this negligence, or ought to the danger arising therefrom, he voluntarily exposes himself thereto. Business is sometimes carried on in build-gerous, his injury was directly caused ings or places obviously unsafe, and if, by his own negligence in remaining in a with a knowledge that a business is thus room known to be dangerous, and not by conducted, the workman engages in it, defendant's negligence in failing to furhe takes the risks which he must know nish props." Pittsburgh & W. Coal Co. are incident thereto." Taylor v. Carew v. Estievenard (1895) 53 Ohio St. 43,

"When the danger is not obvious or a dangerous and insufficient tool know- imminent, and both the employer and ing it to be so? Can a man claim that the employee, with full knowledge of he has been damaged by the fault of the same, enter into the contract of emother employees who have furnished an ployment, or continue the same, neither insufficient tool, when he has for months party is guilty of culpable negligence as used that tool and knows that it is un-toward the other; while if the danger safe. and still runs the risk? An em- is obvious and imminent, and it is ensafe, and still runs the risk: An emission is a contributer to his own hurt.—if, ties are equally guilty of culpable negling that negligence, seeing the danger, pable contributory negligence. In all

servant were allowed to recover after voluntarily encountering the hazard, he would receive compensation for his own negligence.6

300. When negligence is not imputed, as a matter of law, to a servant who knows of a risk.—The doctrine stated in §§ 297, 298, supra, is applied in its unqualified form only in cases where the evidence does not present any of those special elements which are treated in chapters xxII.-xxv., post. It is also possible that, in all the courts whose decisions have thus far been cited, a servant who offered testimony going to show that he had reasonable grounds for supposing that the defective conditions of which he had obtained knowledge would have been remedied in the ordinary course of the master's business before the time when the injury was received would be allowed to go to the jury, even though he might not have received an explicit promise that the conditions would be remedied, or an explicit assurance that they had been remedied. In this point of view, the continuance of work may be regarded as peculiarly justifiable, where the abnormal conditions were the result of a breach of a duty imposed upon the master by statute. It has been explicitly held that, under such circumstances, the servant is entitled to presume that the master will proceed to perform his duty without any unnecessary delay.2 Compare chapter xxx.

can it be negligence on the part of the Co. v. Arrington (1898; Tex. Civ. App.) master. What the servant may lawful-45 S. W. 59 (recovery allowed where ly do witnout negligence, the master servant knew that a fellow servant had may lawfully hire him to do without undertaken to remedy the defective connegligence. The master cannot be bound ditions). to take greater care of the servant than would also show that there could not be any culpable negligence or any breach of duty on the part of another person for hiring him to assume it. There cannot be negligence on the part of the one, and not on the part of the other, where both are capable of understanding the danger, and both are fully informed as to all the facts." Rush v. Missouri P. R. Co. (1887) 36 Kan. 129, 12 Pac. 582.

\*\*Illinois River Paper Co. v. Albert (1893) 49 Ill. App. 363.

\*\*This seems to be the effect of the one not necessarily debarred from recovery, though he does not think it sufficiently propped. M'Monagle v. Baird (1881) 9 co. Sess. Cas. 4th series, 364.

\*\*Quackenbush v. Wisconsin & M. R. Co. (1885) 62 Wis. 411, 22 N. W. 519. Of a railway company which is derelict as regards its duty to build a fence to remedy defective conditions. See chapter XXII., post.

servant in the master's employment, following cases: Galveston, H. & H. with full knowledge of the danger, is R. Co. v. Bohan (1898; Tex. Civ. App.) either negligence or it is not negligence. 47 S. W. 1050, Denying Rehearing in If it is negligence, and injury results. 47 S. W. 1052 (yard master not necesthen no recovery can be had, because of sarily negligent in continuing to ride the culpable contributory negligence of upon the footboards of switching engine the servant; but if it is not negligence because he knows that rocks frequently on the nort of the servant, then neither fall upon the tracks). Terrall Convences on the part of the servant, then neither fall upon the tracks); Terrell Compress

Where a miner has complained to his the servant is of himself. If the danger superior about the unsafe condition of is such that an ordinarily prudent man the roof of a tunnel, and, after it has could assume it without being guirty of been partially secured, goes on working negligence, then the same facts and the with the expectation that it will be more same reasoning which would show this effectually secured in due time, he is would also show that there could not be not necessarily debarred from recovery,

subd. b, post. But in any event it seems clear that the element of expectation will carry a differentiating significance for a certain limited period only. Compare § 302, note 6, infra. There is also a considerable body of authority for the view that even where none of these distinctly differentiating factors are introduced, a court is not necessarily warranted in inferring negligence, as a matter of law, from the mere fact that the servant remained in the employment with an appreciation of a risk resulting from the master's breach of duty.3

knew the work was manifestly danger- not mean to do so. To me it seems an ous of itself does not constitute contrib- unnatural doctrine that merely telling utory negligence." Weblin v. Ballard the servant of the defect should absolve (1886) L. R. 17 Q. B. Div. 122, 55 L. J. the master from liability, and unless Q. B. N. S. 395, 54 L. T. N. S. 532, 34 there is some authority that binds me Week. Rep. 455, 50 J. P. 597, per Smith, to accept it, I cannot do so. Is it true J. See also Sledge v. Gayoso Hotel Co. to say that the mere knowledge of the knowledge of danger, not demurrable); take care that there is no defect or dan-Chicago G. W. R. Co. v. Price (1899) ger makes the continuance of the serv-38 C. C. A. 239, 97 Fed. 423 (servant ant at the work evidence of negligence held entitled to recover unless the dan- on his part? Are there not innumeragers were so obvious and threatening ble instances which negative this,—as, that a prudent man would have avoided for instance, if the servant, in spite of

whether the plaintiff was guilty of omisk nowledge of the plaintiff of the want of sions which prevented his recovery, care of the defendant is not conclusive where he had seen the captain drunk on against the former, though it is a mathree occasions during his employment terial fact for the consideration of the

or more, until he was injured, the question of whether he was guilty of con-

<sup>8</sup> "The mere fact that the servant defect or to tell the servant that he does (1890) 43 Fed. 463 (complaint showing servant that the master is not going to the danger, does any act tending to save In an action by an employee on a scow life or to the protection of his master's to recover damages because of an injury property? I protest against its being due to the negligent act of the drunken said that a jury are bound to find that captain, it is a question for the jury there is negligence in such case on the under the circumstances of the case part of the man who runs a risk. The of eight days, and neither made complaint nor left the employment. Tonnether the circumstances the plaintiff was guilsen v. Ross (1890) 58 Hun, 415, 12 N. ty of contributory negligence. The case Y. Supp. 150; Thompson v. Ross (1890) of Clarke v. Holmes (1862) 7 Hurlst. 35 N. Y. S. R. 273, 12 N. Y. Supp. 151 & N. 937, 31 L. J. Exch. N. S. 356, 8 (same facts). Where plaintiff went to work upon a been often observed upon, but it has defective street car, not knowing at the never been overruled, and it seems to time that it was defective, but soon aft- me to be this case. It is binding on us, er discovered the defect, and that its use and, moreover, it is, in my opinion, was surrounded by some danger, and rightly decided, and in each of the judg-thereupon continued work for an hour ments I find it laid down, that knowledge is only a fact in the case, to be the same was for the jury. Murdock v. stances in determining the question Oakland, S. L. & H. Electric R. Co. (1900) 128 Cal. 22, 60 Pac. 469.

In a leading English case Lead T. taken into consideration by the jury (1900) 128 Cal. 22, 60 Pac. 469.

In a leading English case Lord Esher of which he seeks to charge the defendused the following language: "I can ant." Thomas v. Quartermaine (1887) not see, therefore, that the knowledge of L. R. 18 Q. B. Div. 685, 689, 56 L. J. the plaintiff absolves the defendant from Q. B. N. S. 340, 57 L. T. N. S. 537, 35 any duty. It is put in argument that Week. Rep. 555, 51 J. P. 516. Language the duty of the master is either to take of the same purport is also found in reasonable care that there shall be no the opinions of Bowen and Fry, L. JJ.

This doctrine embodies the conception that, as it is expressed in some cases, the fact that an injured servant voluntarily took some risk is held not to be conclusive evidence, under all circumstances, that he was not using due care.4 The result of this theory obviously is that, whenever the danger is not of an obviously imminent and glaring character, the question whether the servant is debarred from recovering on the ground of contributory negligence depends on the use which he made of his knowledge of the danger.<sup>5</sup> The implication manifestly is that, if the danger is one of the character thus indicated, the court may declare the action to be, as a matter of law, not maintainable.

In the opinion of the present writer this theory of the respective provinces of the court and the jury is not only fairer and more equitable, but also more correct in a purely juristic sense, than the alternative one which has been explained in the preceding sections. The hypothesis which underlies the latter theory,—viz., that it must necessarily be imprudent to incur a danger the existence of which implies a dereliction of duty on the master's part,— appears to be quite arbitrary, as well as inconsistent with the fundamental conception upon which the defense of contributory negligence ultimately rests. The character and magnitude of a danger being the essential point to

In Northern P. R. Co. v. Mares (1887) tiff's own testimony shows that the ac-123 U. S. 710, 31 L. ed. 296, 8 Sup. Ct. tion cannot be maintained. It is into refuse to work, in view of that pra.

knowledge on his part, might be negligence,—that it was for the jury to say (1900) 94 Me. 17, 46 Atl. 804. Comfrom all the attending circumstances pare also § 322, post.

tiff's evidence is always for the jury, be dangerous, without regard to the detiff's evidence is always for the jury, be dangerous, without regard to the dethat the question of his contributory gree of danger and risk involved: nor negligence cannot be considered on a unless it be of a degree which would ormotion for a nonsuit. Bolden v. Southdinarily deter one of ordinary prudence ern R. Co. (1898) 123 N. C. 614, 31 S. from the undertaking. Southern R. Co. E. 851. But it is not apparent why the v. Guyton (1898) 122 Ala. 231, 25 So. trial should proceed in this instance 34.

See also next section.

Rep. 321, the court approved the refusal conceivable that the court can intend to of an instruction to the effect that the stand sponsor for the doctrine that the duty of the plaintiff is not to be deternegligence of the plaintiff is a question mined by the single fact of his knowlupon which the verdict of a jury is aledge of the danger he incurred by con-tinuing to serve with a coemployee ing logically requires an acceptance of known by him to be an unfit and incom-petent person, and said that it was consistent with the case of Crutchfield enough for the court to say, as it did, v. Richmond & D. R. Co. (1878) 78 N. that a failure on the part of the servant C. 300, referred to in § 298, note 1, su-

whether his failure to do so was in fact contributory negligence.

See also the Missouri cases cited in & B. R. Co. v. Holborn (1888) 84 Ala. § 301.

133, 4 So. 146. A servant is not guilty
In North Carolina it has been held, of contributory negligence in working,
on the ground that the weight of plain-merely because he knows the work to

be considered in determining whether it was negligent to encounterit, it is manifestly illogical to adopt a doctrine which involves taking the position that, whatever the danger may have been, whether serious or trifling, imminent or remotely possible, the mere fact that it was traceable to the master's negligence carries the case into a category in which the controlling factor is a presumption juris et de jure that the servant was culpable in remaining in the employment. Such a criterion has never been applied in actions brought by strangers,6 and no valid reason has ever been suggested why it should be applied in actions brought by servants.

301. Missouri doctrine as to the effect of the servant's knowledge.-The Missouri decisions upon the disabling effects of the servant's continuance of work with knowledge of abnormal conditions produced by the master's breach of duty are so extraordinarily conflicting that it will be convenient to review them separately. In a later section, the confusion, both of doctrine and terminology, which these cases exhibit, will be noted. At present we are concerned merely with the effect of the actual rules administered.

In the earlier cases the supreme court dealt with the defenses of contributory negligence and assumption of risks on precisely the same footing as the courts of other states; that is to say, the servant's knowledge of the risk was treated as an element which enabled the master to rely upon either one or other of the defenses at his option. cases where the defense put forward was contributory negligence the theory adopted was apparently the same as that explained in the preceding section, the quality of the servant's conduct in continuing in the employment being treated sometimes as a question for the jury, and sometimes as an inference of law.2 But in 1885,—the very year,

¹ Decisions recognizing the defense of assumption of risks are cited in § 274, note 1, ante.
² In Stoddard v. St. Louis, K. C. & N.
² In Stoddard v. St. Louis, K. C. & N.
that morning; and that the plaintiff R. Co. (1877) 65 Mo. 514, where a brakeman's foot was caught in a frog, while he was uncoupling cars, it was held to be for the jury to say whether, under the circumstances, he was justified in supposing that, by the use of great caution and skill, he could per-

\*See, for example, Dewire v. Bailey form his duties safely,—the evidence (1881) 131 Mass. 169, 41 Am. Rep. being that four persons were necessary 219; Anderson v. Scholey (1888) 114 for switching the cars and making up Ind. 553, 17 N. E. 125; Martin v. North the train; that the plaintiff and another Star Iron Works (1884) 31 Minn. 407, man undertook this in the absence of 18 N. W. 109; Clayards v. Dethick the yard master, who had been notified (1848) 12 Q. B. 439; Shearm. & Redf. of the sickness of one of the hands, but Neg. § 92, note 8. eg. § 92, note 8.

failed to provide a substitute; that the Decisions recognizing the defense of officers of the company knew that the

it should be observed, in which the second of the cases just referred to was decided,—a novel doctrine was propounded, viz., that, in cases in which a servant goes on working with knowledge of abnormal conditions, the only defense, if any, open to the employer is that plaintiff was negligent, under the circumstances, in continuing to perform his duties.3 Since that time the doctrine has been repeatedly applied in

out reporting it, is McDermott v. Han- v. Missouri P. R. Co. (1886) 89 Mo. nibal & St. J. R. Co. (1885) 87 Mo. 285, 650, 58 Am. Rep. 120, 2 S. W. 3; Hughes where it was held that the action was v. Fagin (1891) 46 Mo. App. 43. barred because the plaintiff knew of the prudent man.

and servants."

tion, is properly a question of contribu- gence of the plaintiff is for the jury, tory negligence, as the authorities be-fore cited well show, and is to be deter-mined by rules applicable in such cases." in McMahon v. Port Henry Iron Ore Co. The position of the court, as he pointed (1881) 24 Hun, 48, which is given a out, was that the doctrine by which a prominent place among their citations, servant, who continues in the employ we find language to this effect, but it ment after knowledge of a defect in the would be putting a strained constructionappliance, thereby waives all objections tion on the words of the court to supto such defective instrumentality and pose that they imply that the defense takes upon himself all the risks, makes of assumption of risks is excluded altoit the duty of the servant to abandon gether where the risks are caused by his contract of employment, because of the master's breach of duty. Even if

See also, as to the reasons of abstract would now be of no authority whatever justice which underlie the rule, Thorpe in view of later decisions of the New

incompetency of the vice principal whose approval of Messrs. Shearman and Redact caused the injury. Two judges disfield in the fourth edition of their well-sented, but the division of opinion seems known treatise on Negligence. See §§ to have been merely on the special 211, 212, ante. Most of this passage ground that the delinquent servant was has been altered as respects the lana vice principal, the contention on be-guage, or altogether excised, in the last half of the plaintiff being that this cir-edition of this treatise. But the aucumstance took the case out of the op-thors evidently remain of the same opin-eration of the rule which would otherion, as they lay it down that the true wise have been applied, the effect of rule is that a servant can recover for which, as a whole, was to deprive the an injury suffered from defects due to master of the benefit of the latter dethe master's fault of which he had nofense, in cases where the risk was due tice, if, under all the circumstances, a to his breach of duty, and to make the servant of ordinary prudence, acting servant's right to recover turn solely with such prudence, would, under simupon the question whether, in remaining ilar conditions, have continued the work in the employment, he had acted as a under the same risk, and not otherwise. If the "true rule" is the one sustained <sup>3</sup> Devlin v. Wabash, St. L. & P. R. Co. by the great weight of authority the (1885) 87 Mo. 545. In this case it was present writer takes leave to demur very remarked by Black, J., that the qualistication of the principles previously administered was "in accord with common dence that, outside of jurisdictions in fairness and the daily conduct of master which the theory of the learned authors themselves has been deliberately adopt-In Hamilton v. Rich Hill Coal Min. ed, no decision has ever been rendered Co. (1891) 108 Mo. 364, 18 S. W. 977, which supports their view that contribthe same judge, referring to earlier deutory negligence is the only defense cisions, said: "The question, whether available to the master under the circontinuing in the service after knowl- cumstances supposed, though it may be edge of danger arising from a defective conceded that more authority may be appliance will defeat the servant's ac- found for the doctrine that the neglia breach of duty on the part of the mas-ter, and is unjust and unreasonable. the correct one, the rule thus arrived at

this state. In working it out the courts necessarily follow lines which, up to a certain point, are very similar to those which are traceable to the decisions in jurisdictions in which contributory negligence is treated as being a concurrent and alternative defense, and not an exclusive one. Thus, mere knowledge of a defect is held not to be enough, as a matter of law, to bar the servant's action. Under this

be conceded to be anything but a wholly unwarrantable attempt to qualify that and incongruous element. Even in Missouri itself the doctrine of the learned authors has been so severely shaken by the latest decisions that it may fairly be doubted whether the earlier ones in which it was embodied are any longer to be regarded as good law. See following notes.

the publication of the passage we have the publication of the passage we have servant may, without necessarily losing been reviewing, its statement of prinhis right to an indemnity, go on workciples was expressly approved: Ham-ing in the face of all but the more seriliton v. Rich Hill Coal Min. Co. (1891) ous kinds of peril. To justify the court 108 Mo. 364, 18 S. W. 977, per Black, in determining that he was, as a matter J.; Thorpe v. Missouri P. R. Co. (1886) of law, guilty of negligence, the instruse Mahaney v. St. Louis & H. R. Co. have been so "glaringly defective" (1891) 108 Mo. 191, 18 S. W. 895 (de- (Huln v. Missouri P. R. Co. [1887] 92 fective track): Sullivan v. Hannibal & Mo. 440. 4 S. W. 937: O'Mellia v. Kanfective track); Sullivan v. Hannibal & Mo. 440, 4 S. W. 937; O'Mellia v. Kanst. J. R. Co. (1891) 107 Mo. 66, 17 S. sas City, St. J. & C. B. R. Co. [1893] W. 748 (servant knew staging to be de- 115 Mo. 205, 21 S. W. 503) or so obvi-

York court of appeals. See, especially, 977 (unblocked rail); Donahoe v. Kan-Knisley v. Pratt (1896) 148 N. Y. 372, sas City (1897) 136 Mo. 657, 38 S. W. 32 L. R. A. 367, 42 N. E. 986, a strong 571 (insufficient bracing of trench); case, as the duty violated was statutory, Warner v. Chicago, R. I. & P. R. Co. and the plaintiff was a minor, and yet (1895) 62 Mo. App. 184 (plaintiff's rether risk was held to have been assumed. Moreover, it is only necessary to examine the recent cases to see that the doctrine of the assumption of known risks is applied as regularly and consistently R. Co. (1877) 65 Mo. 520 (holding that, as it ever was in the great majority of the states, and that judges have, with that plaintiff had knowledge of a spring the few exceptions adverted to, declined to countenance the logical and juridical paradox that the question whether a of four were undertaking to make up the train, the question whether the action of the plaintiff in making up the upon whether a prudent person would tion of the plaintiff in making up the have bound himself by it. It is subtrain while having this knowledge was mitted, therefore, that the statement of such a reckless character as to make criticised is not the "true rule," either it contributory negligence on his part on principle or authority. For similar was for the jury); Hughes v. Fagin reasons, the clause which has been in(1891) 46 Mo. App. 44 (incompetent serted in § 209 of the same treatise, fellow servant); Irmer v. St. Louis limiting the cases in which a risk is Brewing Co. (1896) 69 Mo. App. 17 assumed by the servant to those in (here the servant had only partial which "ordinary prudence would require knowledge of the conditions); Loc v. him to refuse to encounter it," cannot Chicago, R. I. & P. R. Co. (1894) 57 be consided to be anything but a whell. Mo. App. 350 (same facts); Thorpe v. Missouri P. R. Co. (1886) 89 Mo. 650, doctrine by the addition of an irrelevant 58 Am. Rep. 120, 2 S. W. 3 (inadequate switching crew).

See also the case cited in note 6, in-

But the language used to describe the circumstances under which the negligence of the servant still remains a question for the jury indicates that not only is his knowledge of the danger not In two Missouri cases, decided after enough to bar the action, but that the servant may, without necessarily losing fective); Hamilton v. Rich Hill Coal ously and immediately dangerous that Min. Co. (1891) 108 Mo. 364, 18 S. W. a man of common prudence would refuse doctrine, therefore, if the defects or insufficiency in the appliances which term embraces the men employed to do the work, as well as other instrumentalities employed—is so great that, obviously, even with the use of great caution, the danger is imminent, then, as a matter of law, the servant who incurs the risk is guilty of contributory negligence, and cannot recover. But if, upon this question, there is substantial doubt, the question is one of fact for the jury, and a nonsuit or demurrer to the evidence is not permissible.<sup>5</sup> The doctrine is

and obvious" defect, as to operate as App. 177 (roof of entry in mine fell). conclusive evidence that the place of "Thorpe v. Missouri P. R. Co. (1886) work was necessarily dangerous). Or 89 Mo. 650, 58 Am. Rep. 120, 2 S. W. "so far out of repair that it would be 3. In the following cases, also, in which necessarily dangerous to the mind of a the culpability of the plaintiff was held prudent person" to use it. Devlin v. to be a question for the jury, this as-Wabash, St. L. & P. R. Co. (1885) 87 pect of the situation was emphasized: Mo. 545 (defective track injured engineer). Or one of which the danger (1890) 100 Mo. 673, 13 S. W. 714 was "apparent and threatening." Mu-sick v. Jacob Dold Packing Co. (1894) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1894) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1894) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1894) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1894) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1894) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1894) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1894) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1894) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1894) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1894) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1894) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1894) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1894) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1894) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1895) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1896) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1896) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1896) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1896) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1896) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1896) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1896) (brakeman knew that track was rensick v. Jacob Dold Packing Co. (1896) taken the chances.' Harriman v. Kan60 Mo. App. 231 (inadequate number of sas City Star Co. (1899) 81 Mo. App. servants); Hamman v. Central Coal & 124. Or one which it was not reasonable to suppose might be "safely used 1091 (miner continued to work in an

danger" must have been so "imminent and threatening as to require him to abandon the service." Reichla v. Grucontinuing to excavate an embankment ensfelder (1892) 52 Mo. App. 43. Or at its base after seeing the bulged consoglaring and obvious that there could be no fair debate about the question whether a prudent man would assume the risk under the circumstances." the risk under the circumstances." where the bank had been in such conditions v. St. Louis, N. & P. Packet Co. (1890) 43 Mo. App. 398. Or that the defect must have been one which "threatened immediate injury." Stephens v. required. Bradley v. Chicago, M. & St.

to use it. Settle v. St. Louis & S. F. R. Hannibal & St. J. R. Co. (1888) 96 Co. (1895) 127 Mo. 336, 30 S. W. 125 Mo. 207, 9 S. W. 589; Swadley v. Mis-(brakeman allowed to recover for insouri P. R. Co. (1893) 118 Mo. 268, 24 juries received through a defective hand-S. W. 140; Huhn v. Missouri P. R. Co. hold on a car); Waldhier v. Hannibal (1887) 92 Mo. 440, 4 S. W. 937 (want necessarily dangerous to the mind of a the culpability of the plaintiff was held able to suppose might be "safely used by the exercise of care and caution." entry after the owner of the mine had Benham v. Taylor (1896) 66 Mo. App. failed to comply with his request for 308; Warner v. Chicago, R. I. & P. R. props); Adams v. Kansas & T. Coal Co. (1895) 62 Mo. App. 192; Bullmas-Co. (1900) 85 Mo. App. 486 (similar ter v. St. Joseph (1897) 70 Mo. App. facts); Booth v. Kansas City & I. Air 60; Hurst v. Kansas City, P. & G. R. Line (1898) 76 Mo. App. 516 (section-Co. (1901) 163 Mo. 309, 63 S. W. 695; Mai's eye put out by a sliver of iron Smith v. Little Pittsburg Coal Co. (1898) 75 Mo. App. 177.

It has also been laid down that to (1900) 86 Mo. App. 429 (improper arbar the servants' action, the "increased danger" must have been so "imminent and threatening as to require him to law, guilty of contributory negligence in law and threatening as to require him to law, guilty of contributory negligence in law and the law and th

applied without regard to the question whether the servant had or had not received a promise that the defective conditions would be remedied.6 See chapter xxII., post.

The theory that the master is thus confined to the defense of contributory negligence has not obtained much foothold outside of Missouri.7 In some states it has been explicitly rejected.8 It is, of course, inconsistent with all those very numerous decisions (see chapter xxi., ante) which apply the doctrine that a servant's assumption of an extraordinary risk may be inferred, as a matter of law, if the evidence shows that the risk was, or ought to have been, known to him.9

P. R. Co. (1897) 138 Mo. 293, 39 S. W. risks. See § 274, note 1, ante. 763. The fact that the plaintiff safely Nor have they gone to the same extent performed the work in which he was as the Missouri courts in upholding the engaged when injured, for several days right of the servant to go on working after the force of servants had been re- without being chargeable, as a matter

establishment).

\*Redfield's treatise which was referred to in note 2, supra, has been cited with approval in Martin v. California C. R. Co. (1892) 94 Cal. 326, 29 Pac. 645, and Colorado C. R. Co. v. Ogden (1877) 3 Colo. 499. But in California, at least, this destrine is replaced as expected. this doctrine is no longer accepted, even in cases where the defense of contributory negligence is raised. See Limberg v. Glenwood Lumber Co. (1900) 127 Cal. 598, 49 L. R. A. 33, 60 Pac. 176. And in both these states that defense is, at most, an alternative to assumption of risks. See § 274, note 1,

The Missouri decisions are followed in The Missouri decisions are followed in fication of the general rule was difficult Dwyer v. St. Louis & S. F. R. Co. to maintain on principle, as it virtually (1892) 52 Fed. 87; Sioux City & P. R. changed the rule as to the free agency Co. v. Finlayson (1884) 16 Neb. 578, of the servant, and required that the 49 Am. Rep. 724, 20 N. W. 860; Lee v. master should be more careful of the Smart (1895) 45 Neb. 318, 63 N. W. servant than the servant is of himself. 940; The Serapis (1891) 49 Fed. 393.

duced, is one of the circumstances which of law, with a want of care. In Kane may be considered as bearing on the v. Northern C. R. Co. (1888) 128 U. S. question of the plaintiff's contributory 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16, negligence. Thorpe v. Missouri P. R. it was remarked that negligence was Co. (1886) 89 Mo. 650, 58 Am. Rep. predicable of the exposure of oneself to 120, 2 S. W. 3.

\*\*Rep. 1816 \*\*The Proceed Rep. 1816 \*\*T Pauck v. St. Louis Dressed Beef & a prudent man would have avoided Provision Co. (1901) 159 Mo. 467, 61 them." But these words can hardly be S. W. 806 (defective switch in packing intended to carry that restrictive sigtablishment). nificance which they bear in the Mis-The passage from Messrs. Shearman souri cases, as they should be construed Redfield's treatise which was referred with special reference to the facts,—the point being (see § 302, note 9, infra) whether the plaintiff was bound to abandon his duties immediately upon the discovery of the defect. The doctrine of the Supreme Court of the United States is, as is shown by the decision in Hough v. Texas & P. R. Co. (1879) 100 U. S. 224, 25 L. ed. 617, that, under ordinary circumstances, the action is barred by knowledge of any dangerous defect. See also cases cited in § 297, note 4, and § 298, note 1, every 298, note 1, supra.

8 In East Tennessee, V. & G. R. Co. v.

Duffield (1883) 12 Lea, 68, 47 Am. Rep. 319, the court remarked that this modification of the general rule was difficult

9 It should be remarked that the deci-The last-mentioned decision was resions in other states, which the courts versed in (1892) 2 C. C. A. 102, of Missouri have cited in support of this S U. S. App. 49, 51 Fed. 91. doctrine,—for example, Perigo v. Chi-The Federal courts certainly recog-cago, R. I. & P. R. Co. (1880) 55 lowa, nize the defense of assumption of 326, 7 N. W. 627; Hawley v. Northern

Even in Missouri itself the ordinary doctrine of assumption of risks has never been entirely discarded for any great length of time, and within recent years the courts have shown some tendency to fall into line with those of other jurisdictions.<sup>10</sup>

302. Voluntary or involuntary quality of the servant's action in continuing work.— (Compare §§ 288, 289, supra, and §§ 381-384, 440, subd. e, 466, post.)

Housatonic R. Co. (1864) 8 Allen, 441, Steinhauser v. Spraul (1895) 127 Mo. 85 Am. Dec. 720,—are not fairly avail- 541, 27 L. R. A. 441, 28 S. W. 620, 30 able as precedents at least to the extent S. W. 102. It is, perhaps, open to disasserted. The mere fact that they ema- cussion whether the risk in the case thus nate from jurisdictions in which the de- referred to was not held to be assumed fenses both of assumption of risks and of on the ground that it was an ordinary contributory negligence are recognized one. But in Nugent v. Kauffman Mill as being appropriate to cases where the Co. (1895) 131 Mo. 241, 33 S. W. 428, effect of the servant's continuance of we find a categorical enunciation of the work with knowledge of an unusual risk doctrine of assumption of extraordinary is in controversy, proves that they are risks, in the court's discussion of one not authorities for the principle that evi- of the theories of the evidence upon dence of such knowledge raises a ques- which the plaintiff relied, though the tion of contributory negligence exclu- case really turned on the view that the

appearance, we find an explicit recognirisks, in Alcorn v. Chicago & A. R. Co. Reichla v. Gruensfelder (1892) 52 Mo. unless the danger is apparent and man v. Central Coal & Coke Co. (1900) threatening, is misleading. Fugler v. 156 Mo. 232, 56 S. W. 1091.

Bothe (1890) 43 Mo. App. 44, per Rom- In two late cases the decision in (1893) 117 Mo. 487, 22 S. W. 1113. of appeals: Benham v. Taylor (1896) Coontz v. Missouri P. R. Co. (1893) 115 66 Mo. App. 308 (structure close to Mo. 669, 22 S. W. 572 (defective car track in mine); Wray v. Southwestern wheel), also seems to be argued on the Electric Light & Water Power Co. assumption that, if the servant's knowlesses (1897) 68 Mo. App. 380 (switch in edge should have been found by the jury, headboard in electric-light establishment. edge should have been found by the jury, headboard in electric-light establishment the servant's action would not have been was out of repair). But, singularly maintainable. Fugler v. Bothe, 117 Mo. 487, 22 S. W. 1113, was thought by the Co. (1897) 69 Mo. App. 17, decided in St. Louis court of appeals to have the same year, the court cited, in sounded the knell of the "immediate and threatening danger" doctrine. Moore v. 8t. Louis Wire Mill Co. (1893) 55 Mo. which, as already mentioned, was reversed by the supreme court.

It was remarked in Marshall v. Kan-

C. R. Co. (1880) 82 N. Y. 370; Pat- sas City Hay Press Co. (1897) 69 Mo. terson v. Pittsburg & C. R. Co. (1874) App. 256, that the doctrine of Fugler 76 Pa. 389, 18 Am. Rep. 412; Snow v. v. Bothe was "restored and vitalized" in danger was one incident to the work for <sup>10</sup> Passing over, as immaterial in the which the servant was hired. The curipresent discussion, the decisions of a ous conflict which is disclosed by comdate earlier than that at which the paring these decisions with those col-"glaring danger" doctrine first made its lected in notes 2 to 7, supra, is rendered still more perplexing by some of very tion of the doctrine of assumption of recent date which show that, in spite of what was said in the Fugler and Nugent (1891) 108 Mo. 81, 18 S. W. 188. Cases, supra, the "glaring danger" doc-Reichla v. Gruensfelder (1892) 52 Mo. trine is still applied by the supreme App. 43, seems to be another affirmation court. Settle v. St. Louis & S. F. R. of the same principle. In the following Co. (1895) 127 Mo. 336, 30 S. W. 125; year it was held that an instruction Hurst v. Kansas City, P. & G. R. Co. that the plaintiff's action is not barred, (1901) 163 Mo. 309, 63 S. W. 695; Ham-

In two late cases the decision in bauer, P. J., in a dissenting opinion Fugler v. Bothe (1893) 117 Mo. 487, which was adopted by the supreme court 22 S. W. 1113, was followed by the court

a. Will power of servant overcome.—See § 440, subd. e, post.

b. Scrvant's fear that he may lose his position if he disobeys.— In some cases it is laid down that the servant's fear that he may lose his situation is a material factor, where the question is whether he was guilty of negligence in undertaking to do a piece of work in response to a direct order. But on general principles it is clear that the doctrine must necessarily be subject to the qualification recognized in one case, viz., that the servant cannot recover if the danger to be encountered was so serious that a prudent man would not have risked it for the sake of a short job.2

On the other hand, according to the stricter view, which is a logical corollary of the theory that a servant is free to remain or to leave his employment, the fact that he undertook an abnormally dangerous piece of work because he feared that he would be discharged if he declined to undertake it is a wholly immaterial element. The sole point to be considered is whether the danger was or was not so great

\*Fogus v. Chicago & A. R. Co. (1892) than run the risk of defying his au50 Mo. App. 250; Chicago, R. I. & P. R. thority. The fact that the conductor
Co. v. McCarty (1896) 49 Neb. 475, 68 has the power to employ and discharge
N. W. 633; Brennan v. Front Street brakemen on his train is but evidence
Cable R. Co. (1894) 8 Wash. 363, 36 to show that the brakemen fear to disPac. 272. In Harrison v. Denver & R. obey his commands. The existence of
G. W. R. Co. (1891) 7 Utah, 523, 27 such authority, in the very nature of
Pac. 728, the court, in upholding the
correctness of a charge to the effect that
a servant is not bound to set up his
own judgment against that of his maswith a higher official than the conductor. injured in obeying an order of his conger when another safe mode of discharg-ductor which violated a rule of the defined and the fendant: "The question involved in all chambers v. Western North Carolina R. such cases is whether the subordinate Co. (1884) 91 N. C. 475."

Feels constrained to obey the orders of his superior, though apparently obedines will be attended with peril rather 319 ence will be attended with peril, rather 319,

own judgment against that of his mas-with a higher official than the conductor, ter as to the safety of the work, under peril of dismissal, where the work or-dered to be done is not obviously dan-as a superior, as it is a matter of unidered to be done is not obviously dangerous, or of such a nature that he can see that it cannot be performed with facts on all railroads, is it not reasonsafety, or where there may be a difference of opinion about it in the minds conductor has power to waive the reof reasonable and prudent persons, said:

"An employee is not usually in a condition to abandon his employment for cars in accordance with his direction, slight reason; for out of employment mand thereby delays the departure of a means often out of bread and meat for train, he may at least be reported for his family, and he will take unusual and no employer ought to put him to the choice of peril, or loss of employment."

In Mason v. Richmond & D. R. Co. be met, and he should be declared free In Mason v. Richmond & D. R. Co. be met, and he should be declared free (1892) 111 N. C. 482, 18 L. R. A. 845, from culpability, unless the plaintiff 16 S. E. 698, the court said, in reviewrick exposed himself to manifest ing a case where a brakeman had been peril, or chose to subject himself to danger the court said.

that a prudent man would not have faced it.3 His position is apparently not improved by entering a protest against being obliged to go on with the work,—at all events where that protest merely takes the form of a declaration that he will not take the responsibility.4

Under either theory, of course, where it is proved that the servant was ordered to do a certain act on pain of being discharged if he refused, the action is clearly not barred if it is shown that he did not fully appreciate the risk to which obedience would expose him.<sup>5</sup>

c. Voluntary action not predicable in the case of seamen.— Thus it is held that negligence cannot be predicated of the act of a sailor in obeying, without remonstrance, the order of his superior to operate a dangerous uncovered winch, where disobedience of the orders would, under the ship's rules, subject him to punishment, and would also, under the law of the forum, subject him to imprisonment and forfeiture of wages. Eldridge v. Atlas S. S. Co. (1892) 134 N. Y. 187, 32 N. E. 66. In the opinion of the majority it was said: "The defendant insists that the command to operate this dangerous winch was not lawful, and therefore plaintiff might rightfully have refused obedience. If it be conceded that the command was unlawful, it does not necessarily follow that plaintiff's obedience was negligence. For, whether the command was lawful or unlawful, the evidence is to the effect that his disobedience would have resulted in his punishment. The boatswain, under whose orders plaintiff was operating the winch, testified that the plaintiff 'was bound to obey the order that I gave him; if he did not obey the order he would have been put in irons and fined.' Grant that the plaintiff had been so learned in the law as to know that the courts would ultimately decide the command was unlawful, and disobedience to it lawful, he could know no way of escape from the ship's punishment of his disobedience, for there was none. The jury found in effect that he was coerced, through fear of punishment, into obedience. If the command was unlawful, the defendant's case is not improved by the fact that the punishment it would visit upon disobedience was also unlawful. In any event the plaintiff was in a dilemma. He had to choose between present punishment with a possible hope of remote justification, and customary obedience to orders with the hope that by care he would escape injury. Grant that he

<sup>7</sup> N. E. 877; Linch v. Sagamore Mfg. mand of his superior officer, when he Co. (1887) 143 Mass. 206, 9 N. E. 128. knew that the other train had the right "Wescott v. New York & N. E. R. of way, and that such officer had no speco. (1891) 153 Mass. 460, 27 N. E. 10, cial information regarding it. not recover for injuries caused by a collision which resulted from starting Vol. I. M. & S.—47

<sup>\*</sup> Haley v. Case (1886) 142 Mass. 316, his train in violation of rules, by com-

made a mistake in judgment under these difficult conditions, the law does not adjudge it to be negligence, and the jury, upon consideration, have refused to do so. We cannot hold that their refusal was error." The dissent was on the ground that it was not necessary to consider whether the servant was or was not negligent in obeying the specific order which led to his being injured, as an assumption of the risks incident to the use of his master's appliances in the condition in which they were might be implied from his acceptance of the service.<sup>6</sup> For reasons similar to those which prevent the defense of assumption of risks from being a bar to an action by a seaman (see § 289, subd. b, ante), it is held that negligence cannot be imputed to such an employee merely for the reason that he does not refuse to perform a duty which will expose him to an abnormal risk. But it would seem that, if he is doubtful whether a particular appliance is safe, he is at least bound to make some objection, or ask that another one shall be furnished.8

That the contributory negligence of a seaman in respect to the manner in which he conducted himself in performing his duties is a ground for mitigation of damages, see § 315, post.

302a. Duty of the servant to quit the employment when he ascertains that he is exposed to an abnormal risk,—The doctrine that it is, as a matter of law, contributory negligence to continue working after the existence of an abnormal risk is ascertained, obviously involves the corollary that there is a positive duty on the servant's part to withdraw from the dangerous environment altogether, within a reasonable time after he has, or ought to have, discovered its unsafety, or

\*\*Eldridge v. Atlas S. S. Co. (1890) take that course, he would, in the first 55 Hun, 309, 8 N. Y. Supp. 433; same case, after retrial (1890) 58 Hun, 96, 11 N. Y. Supp. 468.

\*\*Rothwell v. Hutchinson (1886) 13

Sc. Sess. Cas. 4th series, 463. There the court said: "Where a workman, 13 App. Div. 218, 43 N. Y. Supp. 213, seeing a danger before him, knowingly rushes into it, he has himself to blame if the sustains injury from it, the alternative order to go below and close the ports. gearing of the vessel, or with some of encountered is known). the appliances, he is therefore to strike \*The Julia Fowler work. The discipline of the ship is quite 277 (rope supporting triangle gave inconsistent with such a position, and way).

I should suppose that, if any man in the condition of a seaman on board a any defect . . . from which injury

rushes into it, he has himself to blame if 425 (not negligence per se to obey an he sustains injury from it, the alternative being that he must decline to go without taking a light,—servant fell on with his work." The case of a seadown partly opened hatch while returnman is very different from that of the ing to the deck); Keating v. Pacific ordinary workman on land. It is quite Stream Whaling Co. (1899) 21 Wash. Impossible to suggest that, because a 415, 58 Pac. 224 (not negligence to obey an example of effects the part of the seaman sees something wrong with the orders of officers, though danger to be

<sup>8</sup> The Julia Fowler (1892) 49 Fed.

ship of the mercantile marine were to may be reasonably apprehended, he

discontinue the use of the dangerous instrumentality,2 especially where he has it within his power to remedy the defect.<sup>3</sup> If the peril is created by the unfitness of one of his coservants, his proper course is to refuse to work any longer in a position where that unfitness will be a possible source of danger.4

It is manifest, on the other hand, that the consequence of adopting the doctrine that it is not culpable, as a matter of law, to continue working with a knowledge of an abnormal risk, is that an election between these alternative courses cannot be treated as being absolutely obligatory.5

Rep. 152, 8 So. 216. In *Davis* v. *Balti*tised for several years, and with which more & O. R. Co. (1893) 152 Pa. 314, the employee was familiar." The fol-25 Atl. 498, it was remarked that the lowing remarks made by him in reply plaintiff knew that box cars were in were approved, as a whole, by the sucommon use on the rear of freight preme court: "In some particulars, it trains, and, if he did not think them reasons others it is incorrect. In my judgment,

11 Ill. App. 324; Missouri Furnace Co. like that way he must leave it." v. Abend (1883) 107 Ill. 44, 47 Am. Rep. <sup>2</sup> Helbig v. Slaughter (1901) 425; Swift & Co. v. Rutkowski (1897) 167 Ill. 156, 47 N. E. 362; Smith v. Drake (1889) 125 Pa. 501, 17 Atl. 449; Philadelphia & R. R. Co. v. Huber (1889) 128 Pa. 63, 5 L. R. A. 439, 18 Atl. 334; Lineoski v. Susquehanna Coal Co. (1893) 157 Pa. 153, 27 Atl. 577; Hawk v. Pennsylvania R. Co. (1887; Pa.) 9 Cent. Rep. 786, 11 Atl. 459; every reasonable precaution on Jackson v. Kansas City, L. & S. K. R. to insure safety, is observed. Co. (1884) 31 Kan. 761, 3 Pac. 501; Pittsburgh & W. Coal Co. v. Estievenard (1895) 53 Ohio St. 43, 40 N. E. 725; upon mere imaginary danger, of which Coal & Min. Co. v. Clay (1894) 51 Ohio he may be conscious, assert his right to St. 542, sub nom. Consolidated Coal & Min. Co. v. Floyd, 25 L. R. A. 848, 38 ly looks to his employer for the observ-

should, generally speaking, quit the serv- for injuries received by reason of the ice for his own protection." Eureka kind of machinery, or mode of doing Co. v. Bass (1886) 81 Ala. 200, 60 Am. business which has been used and pracable care, it was his own folly to ride if the employee thinks that his employer one. is conducting his business in an unsafe See also United States Rolling Stock way, then it is his duty to quit it; he Co. v. Wilder (1886) 116 III. 100, 5 N. cannot, in other words, dictate to his E. 92; Baltimore & O. R. Co. v. Baugh employer how to conduct the business; (1892) 149 U. S. 405, 37 L. ed. 787, 13 but it is the duty of the employer to fur-Sup. Ct. Rep. 914; Bjorman v. Fort nish proper machinery to conduct it. In Bragg Redwood Co. (1894) 104 Cal. other words, I make a distinction bev. Ballou (1874) 71 Ill. 417; Chicago and furnishing appliances with which & A. R. Co. v. Munroe (1877) 85 Ill. to conduct it. He can conduct it as he 25; Illinois C. R. Co. v. Jones (1882) thinks proper, and if the employee don't

<sup>2</sup> Helbig v. Slaughter (1901) 95 Ill. App. 623.

Bemisch v. Roberts (1891) 143 Pa. 1, 21 Atl. 998.

<sup>4</sup> Frazier v. Pennsylvania R. Co. (1860) 38 Pa. 104, 80 Am. Dec. 467.

5 "It is undoubtedly the duty of a master, where his servant is engaged in hazardous employments, to see that every reasonable precaution on his part, mary duty of the servant is obedience, and it is not to be expected that he will, relinquish his employment. He natural-Min. Co. v. Floyd, 25 L. K. A. 848, 38 ly looks to his employer for the observ-N. E. 610. In Bannon v. Lutz (1893) ance of all reasonable and proper pre-158 Pa. 166, 27 Atl. 890, the trial judge cautions, and his continuance in the was asked by defendant to give the following instruction: "If the employee been observed is rather to be attributed thinks that his employer is conducting to confidence reposed in those to whose his business in an unsafe way, it is his superior judgment he yields." Keegan duty to leave it, and he cannot recover v. Kavanaugh (1876) 62 Mo. 232. See

Under the more rigorous, as well as the more lenient, doctrine, a servant is not bound to abandon his work the moment he has discovered the abnormal danger. The rule is that, after reporting the danger to his superior officer, he may, if it is not imminent and obvious, continue to encounter it for what is described as a "short" or "reasonable" time, with the expectation that the master will perform his duty by removing it.6 In other words, if he has justifiable grounds for believing that the master will remove the source of danger, whether his impression is the result of an explicit promise or not, he may continue working without culpability as long as the jury may consider it to be reasonable to retain that belief. As a matter of fact it will be found that, in the majority of cases, the time which had elapsed between the discovery of the abnormal conditions and the accident was at least sufficiently long to give the servant an ample opportunity for considering whether it would be advisable for him to continue to incur the risk. In no case, probably, would a court allow recovery where the defect which caused the injury had come to the servant's knowledge several months before the accident.8

The case of a railway servant stands upon a special footing, as he is deemed to owe a duty to the public as well as to his employers, and the effect of the decision, as a whole, is that he is justified in taking much greater risks than employees in other occupations, without necessarily forfeiting his right of action. Under ordinary circumstances, such a servant seems to be, at all events, entitled to remain at work until he obtains an opportunity of notifying the proper agent of the master as to the existence of the danger.9 It is only in very ex-

will be remedied. See § 429, post.

\*\*See, for example, Limberg v. Glen36 Kan. 129, 12 Pac. 582; Chicago, W. wood Lumber Co. (1899) 127 Cal. 598,
& V. Coal Co. v. Peterson (1890) 39 49 L. R. A. 33, 60 Pac. 176 (teamster Ill. App. 114 (miner apprehended that the roof of a drift was dangerous, but fore the accident, that the lines were had demanded that the owner should, as too short); Western & A. R. Co. v. he was bound to do by statute, supply Bishop (1873) 50 Ga. 465 (unsafe coupmaterial for propping it); Ross v. Chicago, M. & St. P. R. Co. (1881) 2 McCrary, 235, 8 Fed. 544 (jury charges that two or three weeks was not an unreasonable time to remain at work with

that two or three weeks was not an unreasonable time to remain at work with an incompetent coservant whose unfittion master owing partly to the condition of a platform, and partly to the mess the plaintiff had reported).

\*\*Hoffman v. Dickinson (1888) 31 W.

Va. 142, 6 S. E. 53. See also § 300, notes 1, 2, supra. Compare the language used in describing the length of the period during which a servant is justified in remaining in an employment after quest for an instruction to the effect receiving an explicit promise from the

also cases cited under chapter XXIII., master that the dangerous conditions post.

will be remedied. See § 429, post.

treme circumstances that he will not be warranted in remaining on a train until it reaches the net station.<sup>10</sup> But the exigencies of rail-

woods of the cars he was attempting to had refused to work. But the actual couple were out of repair, that there point of the decision is different. were holes and pitfalls in the roadbed, § 296, note 6, supra. and that the fireman in charge of the Usually an engineer may continue to engine was incompetent, and remained operate the engine until he reaches a cumstances, he ought to have attempted Fed. 191.

A brakeman is not chargeable with to make the coupling, and in so doing A brakeman is not chargeable with was himself negligent, or to be consid-negligence in attempting to use the risk of his act. framed as to leave it to the jury."

ject him to the charge of recklessness Sup. Ct. Rep. 264 (defective bridge). in having remained at his post, where if, upon examining his manifests, he the defendant, that if the plaintiff knew, Sup. Ct. Rep. 16. So, it has been said, man to run the engine, it was the plainarguendo, that an engineer is not neces- tiff's duty absolutely to refuse to work sarily negligent because he does not with him any longer. The Supreme abandon his engine between two stations, Court said: "The duty of the plaintiff, when he first discovers it to be defec- under such circumstances, is not to be tive. Irvine v. Flint & P. M. R. Co. determined by the single fact of his (1891) 89 Mich. 416, 50 N. W. 1008. knowledge of the danger he incurred by This principle is impliedly recognized continuing to serve with a coemployee in *Pierson* v. *New York*, N. H. & H. R. known by him to be an unfit and incom-Co. (1900) 53 App. Div. 363, 65 N. Y. petent person. It was enough for the Supp. 1039, where an engineer was held court to say, as it did, that a failure not to be negligent in taking his engine on the part of the plaintiff to refuse to or to a station a considerable distance work, in view of that knowledge on his beyond the place where the air brakes part, might be negligence on his part.

in the service of the company without station where the defect can be cured or making objection, and without receiving a new engine obtained, if the defect is any promise that the causes of danger such that he might reasonably believe mentioned should be removed, he was that it could be safely operated by great not entitled to relief. "If the defend-care, and if the risk is not greater than ant in error," said the court of appersons of ordinary prudence would peals, "knew that the deadwoods were take. Fordyce v. Edwards (1895) 60 out of repair, he must, in all probabil- Ark. 438, 30 S. W. 758. Where an enity, have acquired the knowledge on the gineer for a special trip was assigned spot; and, consistently with the terms an engine which, on examination seemed of the instruction, his supposed knowl- efficient, but the airbrake proved worthedge of the condition of the track, and less, and repairs could not be made until of the incompetency of the fireman as his return to the starting point, he did an engineer, may have come to him so not, by continuing at his post on the rerecently as to have afforded him no opturn trip, take all the risk of accident, portunity to make objection or comflynn v. Kansas City, St. J. & C. B. R. plaint. Besides, even if he had the sup- Co. (1887; Mo.) 10 West. Rep. 418. posed knowledge, it was a question for See also the remarks of Brewer, J., in the jury whether or not, under the cir- O'Rourke v. Union P. R. Co. (1884) 22

ered as having voluntarily assumed the brakes on cars so loaded as to make The question was es- their use unsafe, when he first discovers sentially one of contributory negligence, the fact at a time when the cars are in and the instruction should have been so rapid motion toward a standing car upon which others are at work and in 10 The danger arising from the want of imminent danger. Irvine v. Flint & P. a step on one of the cars in a freight M. R. Co. (1891) 89 Mich. 416, 50 N. W. train over which a brakeman may have 1008. To the same effect, see Groff v. to pass is not so imminent as to sub- Cincinnati & I. R. Co. (1871) 1 Cin.

Where the unfitness of a servant was he is assured by the conductor that the ascertained for the first time on the trip, car will be removed from the train when it was held correct to refuse to give the it reaches a station a few miles distant, peremptory instructions asked for by finds that it does not contain perishable or even had the opportunity of knowing, freight. Kane v. Northern C. R. Co. before his fall from the car in question, (1888) 128 U. S. 91, 32 L. ed. 339, 9 that the engineer was an unfit or unsafe way traffic will not excuse the servant for running the risk of almost certain injury.11

303. Failure of servant to report a defect.—(Compare § 282, ante.)

a. Generally.—From the language used in some of the cases it would seem that the failure to report the existence of a defect was regarded merely as a supplementary and cumulative ground for barring

the latter course might even increase the danger to the plaintiff himself, and incompetence of engineer).

who remained, without protest, on a deaware, the engineer had no right to take general interest to be worth quoting: the case before us."
"His information as to what was known, An engineer is go

The qualification was correct, that it an abandonment of the locomotive. It was for the jury to say, from all the was under the direction of the engineer, attending circumstances, whether his not of the fireman, and he may have failure to do so was in fact contributory felt confident that it could be run on a negligence. A suitable judgment on that side track if necessary to avoid any posquestion can only be reached by care-sible collision with a train coming in fully weighing the probable consequences the opposite direction, as was sometimes of both courses of conduct, and it might done. It would be a dangerous notion well happen that even at the risk of to put into the heads of firemen and injury to himself, occasioned by the un- other employees of a railroad company skilfulness of his coemployee, the plain- that if they had reason to believe, withtiff might still reasonably be regarded out positive information on the subject, as under a duty not suddenly and in-that dangers attended the course purstantly to refuse to continue in the consued by the movements of the train unduct of the business of his principal. der the direction of its conductor they Many cases might be conceived in which would be deemed to assume the risk of such movements if they did not expostulate with him, and, if he did not heed the danger to the plaintiff himself, and late with him, and, if he did not heed entail great injury and loss to others." the expostulation, leave the train, even Northern P. R. Co. v. Mares (1887) 123 after it had commenced one of its reg-U. S. 710, 31 L. ed. 296, 8 Sup. Ct. Rep. ular trips. A strange set of legal ques-321. To the same effect, see Francis tions would arise, more embarrassing to v. Kansas City, St. J. & C. B. R. Co. the courts than the fellow-servant ques-(1895) 127 Mo. 658, 28 S. W. 842, Aftion, if such action should be deemed esfirmed in (1895) 127 Mo. 676, 30 S. W. sential to the retention by the employee 129 (switchman not bound to abandon of the right to claim indemnity for inverse immediately upon his asceptaining juries, which might follow from the work immediately upon his ascertaining juries which might follow from the course pursued. If the employees could <sup>11</sup> No recovery can be had by a fireman abandon a train after it had commenced one of its regular trips when they had tached engine when he knew that it was reason to believe, without absolute in-about to be run without orders over a formation, that danger might attend section of the road on which, as he was their continuance on it, new strikes of employees would spring up to embarrass it without orders. Baltimore & O. R. the commerce of the country and annoy Co. v. Baugh (1893) 149 U. S. 368, 37 the community, founded upon such al-L. ed. 772, 13 Sup. Ct. Rep. 914, Field, leged apprehensions. The circumstances J., dissenting, but only on the ground attending the cases in which an emof the fireman's knowledge of the conployee has been held to have voluntarily The following remarks of the assumed the risks of an irregular, imlearned judge, made after the review of proper, or ill-advised movement of a the evidence which led him to his con-train, under directions of its conductor, clusion as to the facts, are of sufficient are essentially different from those of

An engineer is guilty of contributory and consequently directed or omitted, by negligence, where, of his own volition the engineer on that subject, was too im- and without orders, he attempts to take perfect for him to act upon it. His con- his train across a bridge which he has tinuance as fireman on the locomotive reason, from his personal examination, after its movement to return to Bellaire to believe to have become unsafe through was not with sufficient knowledge of any a flood, the waters of which are still failure of the engineer to give the proper rising. Columbus & W. R. Co. v. orders as to a scheduled train to justify Bridges (1888) 86 Ala. 448, 5 So. 864.

the servant's action, rather than as an indispensable ingredient of the It has also been specifically laid down that the servant's continuance of work with knowledge of the risk is contributory negligence, as matter of law, only where the servant has failed to object or protest.<sup>2</sup> But the simplest and most rational view would seem to be that the duty to report is really a distinct and specific obligation, the breach of which renders a servant chargeable with contributory negligence, though, in the nature of the case, the effect of that breach can seldom, if ever, become a practical question in any instance on which the legal significance of the servant's conduct in continuing to work does not also present itself for consideration. And such seems to be virtually the view of the courts which have adverted to the failure to perform the duty as one of the distinct factors bearing upon the right of recovery.3 The servant's inability to recover is, of course, espe-

<sup>1</sup> See Baltimore & O. R. Co. v. Baugh lanta & C. Air Line R. Co. v. Ray (1893) 149 U. S. 368, 37 L. ed. 772, 13 (1883) 70 Ga. 674; M'Charles v. Horn Sup. Ct. Rep. 914; McQueen v. Central Silver Min. & Smelting Co. (1894) 10 Branch Union P. R. Co. (1883) 30 Kan. Utah, 470, 37 Pac. 733; Coal & Min. Co. Branch Umon P. R. Co. (1883) 30 Kan. Utah, 470, 37 Pac. 733; Coal & Min. Co. 691, 1 Pac. 139; Laurence v. Hagemeyer v. Clay (1894) 51 Ohio St. 542, sub & Co. (1892) 93 Ky. 591, 20 S. W. 704; nom. Consolidated Coal & Min. Co. v. Jones v. Roach (1876) 9 Jones & S. Floyd, 25 L. R. A. 848, 38 N. E. 610; 248; Pollich v. Sellers (1890) 42 La. Frazier v. Pennsylvania R. Co. (1860) Ann. 623, 7 So. 786; Silvia v. Wampa-noag Mills (1900) 177 Mass. 194, 58 N. v. Roberts (1891) 143 Pa. 1, 21 Atl. E. 590; Atlanta & C. Air Line R. Co. v. 998; Lineoski v. Susquehanna Coal Co. 1883 70 Co. 674

the efficient cause of the death.

(1871) 33 Iowa, 52. Under the char-Packing Co. v. Egan (1877) 86 Ill. 253; acteristic Missouri doctrine reviewed in Stafford v. Chicago, B. & Q. R. Co. \$301, supra, neither the failure to com- (1885) 114 Ill. 244, 2 N. E. 185; Chi-

E. 590; Atlanta & C. Air Line R. Co. V.

Ray (1883) 70 Ga. 674.

"If the engineer," said the court in son v. Pittsburgh & C. R. Co. (1874)

Hough v. Texas & P. R. Co. (1879) 100 76 Pa. 389, 394, 18 Am. Rep. 412;

U. S. 213, 224, 25 L. ed. 612, 617, "after Baker v. Allegheny Valley R. Co. discovering or recognizing the defective (1880) 95 Pa. 211, 40 Am. Rep. 634 condition of the cowcatcher or pilot, had (arguendo); Philadelphia & R. R. Co. (1893) 157 Pa. 153, 27 Atl. 577; Pattercondition of the cowcatcher or pilot, had (arguenau); Philadelphia & R. R. Co. continued to use the engine without givv. Huber (1889) 128 Pa. 63, 5 L. R. A. ing notice thereof to the proper officers 439, 18 Atl. 334; Crutchfield v. Richof the company, he would undoubtedly mond & D. R. Co. (1878) 78 N. C. 300; have been guilty of such contributory Columbus & W. R. Co. v. Bradford negligence as to bar a recovery, so far (1888) 86 Ala. 574, 6 So. 90; Le Clair as such defect was found to have been v. First Div. of St. Paul & P. R. Co. the efficient cause of the death. He (1873) 20 Minn. 9, Gil. 1; New Orleans, would be held, in that case, to have him- J. & G. N. R. Co. v. Hughes (1873) 49 self risked the dangers which might re- Miss. 258: Lyttle v. Chicago & W. M. sult from the use of the engine in such defective condition."

\*\*R. Co. (1890) 84 Mich. 289, 47 N. W. 571; Illinois C. R. Co. v. Jewell (1867)

\*\*Greenleaf v. Dubuque & S. C. R. Co. 46 III. 99, 92 Am. Dec. 240; Allerton (1871) 22 Index the character of the condition of the character of the char plain, nor the making of a complaint, is cago & A. R. Co. v. Cullen (1900) 187 decisive. Thorpe v. Missouri P. R. Co. III. 523. 58 N. E. 455. Affirming (1900) (1886) 89 Mo. 652, 58 Am. Rep. 120, 87 III. App. 374; Chicago & A. R. Co. v. Brayonier (1886) 119 III. 51 7 N. P. (1880) 89 MO. 052, 58 AM. Rep. 120, 57 111. App. 374; Chicago & A. R. Co. 2 S. W. 3.

\*\*Cunningham v. Merrimac Paper Co. 688; Camp Point Mfg. Co. v. Ballou (1895) 163 Mass. 89, 39 N. E. 774; (1874) 71 III. 417; Toledo, W. & W. R. Degnan v. Jordan (1895) 164 Mass. 84. Co. v. Eddy (1874) 72 III. 138; St. 41 N. E. 117; McDermott v. Hannibal Louis & S. E. R. Co. v. Britz (1874) 72 & St. J. R. Co. (1885) 87 Mo. 285; At- III. 256; Pennsylvania Co. v. Lynch cially clear where he has failed to fulfil a duty in this regard which has been imposed upon him by the express orders of his employer.4

That the servant cannot be debarred from maintaining an action on the ground that he did not report a defect, except where he was also chargeable with a knowledge of that defect, follows immediately from the general principle explained in § 295, supra, and it has been so held in the cases cited below.<sup>5</sup> Nor can any duty to report be predicated with regard to conditions which are, or which may be presumed to be, known to the employer.6

b. To whom the report should be made.—As a general rule the servant's duty to report a defect is not considered to have been properly performed unless he notifies some employee whose official rank or functions are such that his knowledge, as thus acquired, will be imputed to the master, and cast upon the latter an immediate duty to remedy the dangerous conditions. Commonly, if not ordinarily, any employee to whom this description is applicable will be also the agent

(1878) 90 Ill. 333; Missouri Furnace the court to refuse an instruction to the Co. v. Abend (1883) 107 Ill. 44, 47 Am. effect that a convict in a coal mine, who Co. v. Abend (1883) 107 III. 44, 47 Am. effect that a convict in a coal mine, who Rep. 425; United States Rolling Stock failed to report that a roof was danger-Co. v. Wilder (1886) 116 III. 100, 5 N. ous, as was required by an order pro-E. 92; Wabash, St. L. & P. R. Co. v. mulgated by the penitentiary lessees, Thompson (1884) 15 III. App. 117; could not recover).

Evans v. Chessmond (1890) 38 III. App. 117; could not recover).

Evans v. Chessmond (1890) 38 III. App. 610; could not recover).

Evans v. Chessmond (1890) 38 III. App. 610; could not recover).

Evans v. Chessmond (1890) 57 III. App. 640; Peoria, (1876) 63 Mo. 459; Perry v. Ricketts (1876) 55 III. 234.

D. & E. R. Co. v. Puckett (1893) 52

III. App. 223; Illinois Steel Co. v. (1880) 95 Pa. 211, 40 Am. Rep. 634; Paschke (1893) 51 III. App. 456; Howe Seley v. Southern P. Co. (1890) 6 Utah, v. Medaris (1899) 183 III. 288, 55 N. E. 319, 23 Pac. 751 (danger of unblocked 724, Reversing (1899) 82 III. App. 515; frogs); Fairbank v. Haentzsche (1874) 724, Reversing (1899) 82 Ill. App. 515;

"Owing the master a duty in protecting his property, and being charged with the safety of fellow servants, of travelers, and of the property of shippers, the railway operative, knowing of defects in machinery, or want of skill in fellow servants, is derelict in not advising his master, that investigation and repairs of machinery, or the discharge of the unfaithful may follow, for the safety of all concerned." Evansville & T. H. R. Co. v. Duel (1893) 134 Ind. 156, 33 N. E. 355.

86 Tenn. 45, 5 S. W. 438 (held error for §§ 148-150, ante.

(1870) 55 III. 234.

Baker v. Allegheny Valley R. Co. (1880) 95 Pa. 211, 40 Am. Rep. 634; Seley v. Southern P. Co. (1890) 6 Utah, 319, 23 Pac. 751 (danger of unblocked frogs); Fairbank v. Haentzsche (1874) 73 III. 236 (shaft removed by master himself and temporarily placed so as to project several feet into the room where the servant was at work). This 124, Reversing (1899) 82 III. App. 515; frogs); Fairbank v. Haentzsche (1874) Chicago & A. R. Co. v. Merriman 73 III. 236 (shaft removed by master (1899) 86 III. App. 454; Helbig v. himself and temporarily placed so as Slaughter (1901) 95 III. App. 623; Ross to project several feet into the room v. Chicago, M. & St. P. R. Co. (1881) where the servant was at work). This 2 McCrary, 235, 8 Fed. 544; McFarlan principle has been embodied in the Eng-Carriage Co. v. Potter (1899) 153 Ind. 107, 53 N. E. 465. eled upon it. See chapter xxxvII., post.

<sup>7</sup> Richardson v. Cooper (1878) 88 Ill. 273. Notice of a defect in machinery to a fellow servant is not sufficient to charge the master. Chicago & A. R. Co. v. Merriman (1901) 95 Ill. App. 628; Galveston, H. & S. A. R. Co. v. Eckols (1894) 7 Tex. Civ. App. 429, 26 S. W. 1117 (switchman directing the work of other switchmen, but himself under orders of yard master, who was the only person having the right to discharge the subordinates, held not a proper person \*Knoxville Iron Co. v. Smith (1887) to whom to make complaint). Compare

who is invested with the authority to apply the remedy.8 concurrence of functions is not invariable.9

If the employee to whom the report is made fails to repair the defects, the servant is bound to notify the owner; and if he does not do this, he continues to work at his own risk.10

- c. Sufficiency of the notice.—Whether a servant gave to the employer due notice as to the dangerous conditions is primarily a question for the jury.11
- 304. Duty of servant to remedy defects. —(See also cases cited in § 432, note 11, post.)—The obligations of a subordinate servant in respect to the condition of the instrumentalities which he uses are generally limited to reporting to a superior any defects which come to his But it is quite clear, both on principle and authority, that, if he is directed and empowered to remedy the defects, he is bound to undertake this function, if its execution is reasonably within his capacity. The cases illustrating this situation may be referred to the same general category as those discussed in § 343, post.

## B. Relation between the defenses of assumption of risks and CONTRIBUTORY NEGLIGENCE.

305. Generally.—Since the conception underlying the servant's assumption of a known risk is essentially that of an implied agreement to accept the responsibility for any bodily hurt which may result from

8 Notice of the incompetency of a serv-fective engine. Pieart v. Chicago, R. I. to hire and discharge men, without any accountability to a superior, is notice <sup>10</sup> Lineoski v. Susquehanna Co to the employer. Wust v. Erie City (1893) 157 Pa. 153, 27 Atl. 577. Tron Works (1892) 149 Pa. 263, 24 Atl.

11 Ross v. Chicago, M. & St. P. R. Co.
291; Ross v. Chicago, M. & St. (1881) 2 McCrary, 235, 8 Fed. 544. It

P. R. Co. (1881) 2 McCrary, 235, is not enough to notify the employer or

8 Fed. 544 (master mechanic of rail- his representative that an appliance, way held to be a proper person to whom like a hand car, consisting of numerous to report incompetency of fellow serv-parts, is "in bad shape." It must be ant). See Weber Wagon Co. v. Kehl shown that knowledge of the particular (1891) 40 Ill. App. 585 (complaint to defect was brought home to the emthe foreman under whom a servant player. Burlington & C. R. Co. v. Liehe works, of a dangerous appliance, is (1892) 17 Colo. 280, 29 Pac. 175. proper). Parody v. Chicago, M. & St.

1 Recovery has been denied, where P. R. Co. (1882) 5 McCrary, 38, 15 Fed. plaintiff, a railway fireman, had his at-

report defective engines to the train was loose, and each time he refixed it master, although having no personal au- without reporting it to the foreman, and

ant, if given to a foreman having power & P. R. Co. (1891) 82 Iowa, 148, 47 N.

W. 1017.

10 Lineoski v. Susquehanna Coal Co.

205 (yard master a proper person to tention called to the loose condition of whom to report defect in drawbar). a step on the engine, and noticed sev-A yard master whose duty it is to eral different times thereafter that it thority to direct repairs to be made or was told by the engineer to remove the to remedy such defects, is the proper step, but failed to do so, and on the person to whom a switchman employed same day, in attempting to use the step, in the yard should complain of a de- was injured. Kerrigan v. Chicago, M.

his exposure to that risk,1 and the theory upon which contributory negligence is held to preclude him from recovery is that he was guilty of imprudence in the premises, and that this imprudence was partially or entirely the cause of his injury,2 the differentiation of the two defenses in practice would seem to present no great difficulties. But, as a matter of fact, the obvious distinction between them, and the logical results of that distinction, have, in a singularly large number of cases, been lost sight of, or treated as immaterial, or even denied to exist.3

Co. (1895) 89 Hun, 340, 35 N. Y. Supp. Am. Rep. 684, § 307, note 3, infra; and 395 (driver of street car did not make see Assop v. Yates (1858) 2 Hurlst. & any attempt to remedy brake); Butte v. N. 768, 27 L. J. Exch. N. S. 156 (re-Pleasant Valley Coal Co. (1896) 14 covery denied simply on the ground of Utah, 282, 47 Pac. 77 (miner did not the servant's voluntary continuance at

<sup>3</sup> This remark is not intended to apply to cases in which the inability of the ligence is one impliedly meant in many servant to recover for an injury caused of the cases in which language of this general terms, without any specific men- from expressions found in the other tion of either of these defenses. Such parts of the opinion, or from the cusare the following: When an employee, tomary practice of the court to test the after having the opportunity of becomight of recovery, with reference to that ing acquainted with the risks of his sit-defense. But if the court is one which plain if he is subsequently injured by sometimes as being indicative of a want such exposure. St. Louis & S. E. R. Co. of care and sometimes as showing that v. Britz (1874) 72 Ill. 257. If the serv- he assumed the given risk, it is a matter ant, after having knowledge of the de- merely of surmise which defense was infective machinery, apparatus, or matended to take effect. This uncertainty, terial, remains in the service, and athowever, is probably never of any practempts to use the same, and is thereby tical importance, since in all the juris-injured, he cannot recover of the com-dictions where this ambiguous language pany for such injury. Houston & T. C. has been employed the servant's knowl-R. Co. v. Myers (1881) 55 Tex. 111, edge of the risk prevents his maintain-quoting Pierce, Railroads, p. 379, note 4. ing the action, as a matter of law, If a servant wilfully encounters dan-whether the one defense or the other is gers which are known to him, or are relied on. Sometimes each of the two notorious, the master is not responsible defenses seems to have been present to for an injury occasioned thereby. Berns the mind of the judge at different stages v. Gaston Gas Coal Co. (1885) 27 W. in the progress of the case. Thus, in Va. 285, 55 Am. Rep. 304; Massie v. one of the earlier English cases turning Peel Splint Coal Co. (1896) 41 W. Va. on the effect of the servant's knowledge,

& St. P. R. Co. (1899) 104 Wis. 166, 80 620, 24 S. E. 644. Compare also the N. W. 586. passage quoted from Pittsburgh & C. R. See also Kenney v. Second Ave. R. Co. v. Sentmeyer (1879) 92 Pa. 276, 37 repair defective track in room where he was working); Truman v. Rudolph his assumption of the risk, or contribu- (1895) 22 Ont. App. Rep. 250 (orders tory negligence); M'Charles v. Horn of employee to apply remedy were not Silver Min. & Smelting Co. (1894) 10 carried out); Conway v. Chicago G. W. Utah, 470, 37 Pac. 733 (holding that a R. Co. (1897) 103 Iowa, 373, 72 N. W. table to condition).

\*\*See § 276, ante.

\*\*Wharton, Neg. § 300; Shearm. & Redf. Neg. 5th ed. § 63; Beven, Neg. pp. 168 et seq.; Pollock, Torts. p. 374.

\*\*This remark is not intended to apply to cases in which the inability of the ligence is one impliedly meant in many repair defective track in room where he work, without any specific allusion to

by a known risk is affirmed in perfectly tenor is used may sometimes be inferred uation, accepts them, he cannot com- treats the servant's continuance of work.

It is most desirable, therefore, to obtain an adequate idea of the true relation between these defenses. Few lawyers, we imagine, realize the extent to which this department of the law has been unnecessarily obscured and complicated through the downright intellectual obliquity or the slovenliness of language by which the boundary line between them has been blurred or obliterated.

306. Logical independence of the two defenses. — The logical situation resulting from a distinction, of which the existence of two separate lines of decisions, in which the servant's voluntary exposure of himself to a known risk is considered from the standpoint of an assumption of the risk and of contributory negligence in incurring that risk, constitutes a practical recognition, has frequently been explained by the courts.1

atter the master himself had observed eatse of action, though, in the discharge a defect and expressed his opinion about of the work undertaken, the workman it, while, in the judgment of the court, may have been guilty of no negligence. delivered by Watson, B., the servant's The other is the negligence of the plainright to recover was denied on the tiff, which may have placed him in cirground that he knew that the defective cumstances of difficulty or danger, or ground that he knew that the defective appliance was used, and, being "conwhich, when he is placed in such circumtributory of the injury," came under stances, may have contributed to the inthe principle stated by Lord Cranworth jury. Here there may have been no willing Paterson v. Wallace (1854) 1 Macq. ligence when in it. In both these questhat a plaintiff must, as a condition precedent to recovery, establish that the injury arose from no "rashness of his own." Griffiths v. Gidlow (1858) 3 "Assuming the risks of an employ-Hurlst. & N. 648, 27 L. J. Exch. ment is one thing and quite an essen-N. S. 404. Similarly in Dynen v. tially different thing from incurring an Leach (1857) 26 L. J. Exch. N. S. 221, injury through contributory negligence." while the other judges rested their Mundle v. Hill Mfg. Co. (1894) 86 Me. while the other judges rested their Mundle v. Hill Mfg. Co. (1894) 86 Me. decision on the plaintiff's assumption of 400, 30 Atl. 16.

decision on the plaintiff's assumption of the risks, Channell, B., took the ground that, by continuing in the defendant's employ, he directly contributed to the accident.

"Carelessness is not the same thing as intelligent choice." Bowen, L. J., in Thomas v. Quartermatne (1887) L. R. R. Co. (1898) 58 Ohio St. 167, 169, 50 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516. (The remainder of the passage of which this remark forms a part is quoted in chapter xx., post.)

In the same case Fry, L. J., said: v. Chicago & A. R. Co. (1891) 108 Mo. There are two matters which often arise for discussion in these cases of negligence, which are, I think, liable to arise for discussion in these cases of "The doctrine of assumption of risk by negligence, which are, I think, liable to the employee is distinct from the docnegligence, which are, I think, hable to the employee is distinct from the doc-be confused, and yet are inseparable in trine of contributory negligence, al-reason. The one is the willingness of though there may arise a certain condi-the plaintiff to assume the danger; and tion of facts capable of supporting ei-this willingness, if assumed with full ther inference. This has given rise to a

Chief Baron Pollock remarked during knowledge, may lessen or remove any the argument of counsel that a servant duty of the employer to the employed, "took the risk" if he went on working and may thus prevent the arising of any after the master himself had observed cause of action, though, in the discharge

The two defenses being distinct, it follows that evidence of the servant's having begun or continued work with a knowledge of the danger

when dealing with these defenses. 'As- unwilling or protesting he may be. Assumption of risk' rests in the law of sumption of risk is not a duty, but is contract, and involves an implied agreement by the employee to assume the servant. The risk from the master's risks ordinarily incident to his employment, or a waiver, after full knowledge testing or unwilling servant. Volens, of an extraordinary risk, of his right to not sciens, is the test." Dempscy v. hold the employer for a breach of duty Sawyer (1901) 95 Me. 295, 49 Atl. 1035. in this regard. Hooper v. Columbia & G. R. Co. (1884) 21 S. C. 547, 53 Am. gence' and of 'assumed risk' are sepa-Rep. 694. The law as to waiver applies rate and distinct. The doctrines are apbecause the relation between the employer and employee is contractual, and 'Contributory negligence,' in a case of waiver is the voluntary relinquishment this kind, implies the existence of negliof a known right. By the contract the gence on the part of an injured servant, employer and employee each assume cer- co-operating with that of a master, and tain risks, but, as in all contracts, either thus aiding in producing the injury." party may waive his right to insist upTexas & P. R. Co. v. Bryant (1894) 8 on strict performance of the other's conTex. Civ. App. 134, 27 S. W. 825. "The tractual duty. When, therefore, a case doctrine of 'assumed risk' obtains witharises in which it is shown (upon prop- out necessary reference to the existence arises in which it is shown (upon proportion out necessary reference to the existence or pleading) that the employee has assoft negligence. If the servant, with sumed the risk from which the injury knowledge of a defect in the master's arose, or, what is the same thing in efpremises, and of the danger and risk infect, has waived his right to hold the cident thereto, continues in the service employer responsible for the risk, the of the master without proper notice to employee's action is defeated because of the latter, he assumes the risk incident his agreement, and not because of neglitons of the darket without the properties. gence. 'Contributory negligence,' on istence of the defect, and this without the other hand, rests in the law of torts, regard to the degree of care which he as applied to negligence, and when such may exercise in the performance of his defense is established the plaintiff's aclabors." Texas & N. O. R. Co. v. Contion is defeated, not because of any roy (1892) 83 Tex. 214, 18 S. W. 609. agreement, express or implied, but because his own misconduct was a proximate cause of the injury." Bodie v. troit, G. H. & M. R. Co. (1887) 122 U. Charleston & W. C. R. Co. (1900) 61 S. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. C. 468, 39 S. E. 715. "This distinction, 1166; Southern P. Co. v. Seley (1894) while not emphasized in the charge, was 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. plainly manifest therein, for the jury Rep. 530; Sneda v. Libera (1896) 65 were instructed as to both defenses in Minn. 337, 68 N. W. 36; Anderson v. language from which the distinction C. N. Nelson Lumber Co. (1896) 67 was inferable." (That this court has Minn. 79, 69 N. W. 630; Wuotilla v. not always borne in mind the distinction Duluth Lumber Co. (1887) 37 Minn. tion recognized in this passage will be 153, 33 N. W. 551; St. Louis, Ft. S. & apparent from the case cited in § 309, W. R. Co. v. Irwin (1887) 37 Kan. 701, note 3, infra.)

tween the defense of contributory negli- 44 N. E. 377; and cases cited in the next gence and the defense of assumption of section. risk,—a difference often obscured, but which should be kept clear in the mind of contributory negligence being distora a correct understanding of the relative rights and duties of master and charge. It is error to give an instruction of defective machinery or applitant that there was danger, however careful ances. Contributory negligence is a the parties might be, and that such dangers are the parties might be, and that such dangers are the parties might be, and that such dangers are the parties might be, and that such dangers are the parties might be, and that such dangers are the parties might be, and that such dangers are the parties might be, and that such dangers are the parties might be, and that such dangers are the parties might be, and that such dangers are the parties might be and that such dangers are the parties might be and that such dangers are the parties might be and that such dangers are the parties might be and that such dangers are the parties might be and that the parties might be and that such dangers are the parties might be a parties might be and that the parties might be a parties might be and that the parties might be a parties might be a partie of the parties might be a parties might be a parties might be an are the parties might be a partie

great deal of confusion of statement posed by law upon the servant, however purely voluntary upon the part of the breach of duty never rests upon the pro-

"The defenses of 'contributory negliplicable under different conditions.

See also Probert v. Phipps (1889) 149 tte 3, infra.)

16 Pac. 146; Pennsylvania Co. v. Witte
"There is an essential difference be(1896) 15 Ind. App. 583, 43 N. E. 320,

The defense of assumed risks and that breach of the legal duty of due care im- ger was known to the plaintiff, then he

arising from the master's breach of duty raises both the questions whether he assumed that danger, and whether he was negligent.<sup>2</sup>

If for any reason it appears that the master is precluded from availing himself of one of these defenses, the servant's action may still be resisted on the ground that the other is applicable.3

assumed the risks ordinarily incident to what was going on there, so far as he the employment. Mayton v. Sonnefield knew of it, he could not recover; and (1898; Tex. Civ. App.) 48 S. W. 608. that if he did not know of it, and would On the ground that the instruction not have known of it in the exercise of asked for confused two distinct propoproper care, the jury must inquire sitions, that relating to the risks as- whether the injury was due solely to sumed by an employee, and that relating some neglect of duty by defendant,—is to the amount of vigilance that should appropriate to the defense of contribube exercised, it has been held not to be tory negligence also, and is therefore error to refuse to charge a jury that the not prejudicial to plaintiff, even if the servant assumed a certain risk as one matter should be referred to the head of ordinarily incident to his employment, contributory negligence. and was bound to be vigilant in avoiding Lawrence Mfg. Co. (1900) 176 Mass. it. Union P. R. Co. v. O'Brien (1896) 203, 57 N. E. 366. 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. (2) That which controls the control of the Iowa, 751, 28 N. W. 56.

kinds of negligence:

tinuance of work. See De Lisle v. Ward Elev. R. Co. (1897) 17 App. Div. 588, (1897) 168 Mass. 579, 47 N. E. 436; 45 N. Y. Supp. 474; Craver v. Christian McQueen v. Central Branch Union P. R. (1887) 36 Minn. 413, 31 N. W. 457; Co. (1883) 30 Kan. 691, 1 Pac. 139; McDonald v. Chicago, St. P. M. & O. R. Cook v. St. Paul, M. & M. R. Co. (1885) Co. (1889) 41 Minn. 439, 43 N. W. 380; 34 Minn. 45, 24 N. W. 311; Smith v. E. Smith v. E. W. Backus Lumber Co. W. Backus Lumber Co. (1896) 64 Minn. (1896) 64 Minn. 447, 67 N. W. 358; 447, 67 N. W. 358.

"If, with knowledge, or with means Or. 52. of knowledge, equal to his employer's of defects in the machinery, the servant, are alternative and concurrent, a statewithout remonstrance, voluntarily con- ment like the following is too broad: tinues in the service, a waiver of his The law does not impute negligence to a claim for damages is said to have taken servant for using the machinery of mis place, or his conduct is regarded as neg-master which he knows to be defective. ligence contributory to the resulting in- He merely assumes the risk incident to

159, 11 Pac. 50.

fect in appliances for work occurred S. W. 220. It is clear that negligence after plaintiff had commenced work, an may be imputed if the master chooses to instruction, given under the head of as-rely on that defense. See *Missouri P.* sumption of risk, that if plaintiff knew *R. Co. v. Somers* (1890) 78 Tex. 439, 14 of the existence of the hole he fell into, S. W. 779.

or would have known of it in the exercise of proper care with reference to in many circumstances a servant may.

Barker v.

(2) That which consists in the failure Rep. 618. An instruction to the effect to use proper care in regard to the act that continuance of work with actual or which was the immediate cause of the constructive knowledge of a defect in- injury. See Gibson v. Erie R. Co. creasing the dangers of one's employ- (1875) 63 N. Y. 449, 20 Am. Rep. 552 ment tends to show contributory negli- (brakeman climbing the side ladder of gence has been considered to confound a car, when his duties did not require waiver with contributory negligence. it, was struck by a projecting roof the Crabell v. Wapello Coal Co. (1886) 68 position of which he knew). Southern P. Co. v. Seley (1894) 152 U. S. 145, 38 The twofold conclusion to which the L. ed. 391, 14 Sup. Ct. Rep. 530; Ballou servant's knowledge may conceivably v. Chicago, M. & St. P. R. Co. (1882) lead is recognized in relation to two 54 Wis. 257, 41 Am. Rep. 31, 11 N. W. 559; Bemisch v. Roberts (1891) 143 Pa. (1) That which is predicated of a con- 1, 21 Atl. 998; Hanrahan v. Brooklyn Stone v. Oregon City Mfg. Co. (1870) 4

In view of the fact that the defenses jury." Wells v. Coe (1886) 9 Colo. such defect, and cannot recover damages for any injury which results from it. Where the evidence showed that a de- Green v. Cross (1890) 79 Tex. 130, 15

307. Contributory negligence at the time of the injury is material only in cases where there has been no assumption of the risk.— It would seem that, in view of the contractual relations of the parties, the first question which, in a natural, logical sequence, first demands settlement, is whether the risk which caused the injury was one of those accepted under an implied agreement, and that the question whether the servant's conduct was imprudent only becomes material after the conventional assumption of the risk has been negatived. <sup>1</sup> In a good many cases we find the essentially secondary and ulterior character of the second question fully recognized. Thus, courts have refused to consider the defense of contributory negligence where the evidence showed that the risk was assumed either as being ordinary,2 or for the reason that, although it was extraordinary, the servant went on working with a full comprehension of its nature and extent.<sup>3</sup>

by giving notice of defects in machinery assumes, the rule relates more particularly to the employer's negligence, and App. 56. that the question of contributory negli-

taining the defense of contributory neg-

For the reason that, in order to authorize recovery, the absence of contributory negligence must be established, it breach of duty." Pittsburgh & C. R.
has been held error to instruct a jury Co. v. Sentmeyer (1879) 92 Pa. 276, 37
that, if the servant did not understand Am. Rep. 684. The assumption of the the dangers incident to his duties, he risk will exonerate the master from liadid not assume the risks, and defend- bility, though the servant was himself

is implied in the remark of the supreme tering of risk on the ground that he excourt of Massachusetts that, if the serv- ercised prudence in the undertaking to ant has not exercised such care as ordi- which the risk attaches, and from which nary persons are accustomed to exercise the injury results. Texas & P. R. Co. under like circumstances, he cannot rev. Bryant (1894) 8 Tex. Civ. App. 134,

<sup>2</sup> Northern C. R. Co. v. Husson (1882) or in the course of business, relieve him- 101 Pa. 1, 47 Am. Rep. 690; McIntosh v. self from the risks which he ordinarily Missouri P. R. Co. (1894) 58 Mo. App. 281; Jones v. Roberts (1894) 57 III.

<sup>3</sup>In Carbine v. Bennington & R. R. gence in the servant always remains to Co. (1889) 61 Vt. 348, 17 Atl. 491, the some extent, and he is always bound to court said, the employee having assumed use reasonable care under all the cir- the perils of his employment in respect use reasonable care under all the circumstances known to him. McPeck v. Central Vt. R. Co. (1897) 25 C. C. A. tion of contributory negligence was not 110, 50 U. S. App. 27, 79 Fed. 590.

In Cleveland, C. C. & St. L. R. Co. v. Baker (1899) 33 C. C. A. 468, 63 U. S. App. 553, 91 Fed. 224, it was held that a statute which expressly excluded the principle of contributory negligence. a statute which expressly excluded the defense of assumption of risk in cases where a servant was injured by a breach of its provisions did not prevent the employer from successfully maintaining the defense of contributory negrous dangers which in good faith he ought to provide against; but he is not responsi-

dangers which in good faith he ought to provide against; but he is not responsi-ble for those dangers to which the servant voluntarily subjects himself, though ant was liable for injuries resulting free from negligence. Louisville & N. therefrom. Stover Mfg. Co. v. Millane R. Co. v. Orr (1882) 84 Ind. 50 An (1900) 89 Ill. App. 532. employee may not shield himself from That this is the true logical sequence the consequences of a conscious encouncover, even if he did not assume the risk 27 S. W. 825; Missouri, K. & T. R. Co. voluntarily. Mahoney v. Dore (1892) v. Wood (1896; Tex. Civ. App.) 35 S. 155 Mass. 520, 30 N. E. 366. W. 879. It matters not what care and

Whenever the evidence suggests that the servant knew of the extraordinary risk which caused the accident the jury should be instructed

of his duties; if his injuries are received risks incident to using that class of inon account of the hazards he has as-strumentality, as well as any other risk sumed,—those that he was acquainted incident to the business, and, if the maswith,—he cannot recover. Chicago, R. ter uses proper care in providing the I. & P. R. Co. v. Clark (1882) 11 Ill. kind contemplated, the employee cannot

App. 104.

In Saxton v. Hawksworth (1872) 26 L. T. N. S. 851, Mellor, J., corrected contract hushes his complaint, recounsel, who was proceeding to argue less of the employer's negligence." that there was no contributory negligence, by the remark: "You mean no acquiescence in the insufficient supply of fendant, in furnishing defective or improperly constructed machinery and implements, is waived by remaining in the placed, or the rapidity and promptness defendant has been guilty of negligence, that degree of care required of him?"

caution a servant uses in the discharge he contracts that he will assume the complain, although some other kind would have been less dangerous; his contract hushes his complaint, regard-

In Texas & P. R. Co. v. Bradford (1886) 66 Tex. 732, 59 Am. Rep. 739, 2 S. W. 595, the court remarked: "It has hands." In Perigo v. Chicago, R. I. & sometimes been held that, although the P. R. Co. (1879) 52 Iowa, 276, 3 N. W. servant may have been aware of the de-43, the court, after referring to decisions feet, yet if a man of ordinary prudence relating to the doctrine of assumption on this account would not have refused of risks, said: "The doctrine of these to do the work, but would have contincases is that the negligence of the deued in the service and have attempted to perform it, that then he may recover for an injury resulting from such defect. It seems to us that such a rule is unemployment without protest or promise sound; for if the servant, acting as a of amendment. The waiver of the neg-prudent man would ordinarily act, ligence of the defendant places the case would undertake to do the work with in the same position as though the de-knowledge of the defect, this very test fendant had not been negligent, and relieves the master from liability, for without the negligence of the defendant the obligations and duties of master and there can be no recovery. This waiver servant are correlative; each is held to cannot be affected by the particular sit- that degree of care, in reference to all uation in which the employee may be matters affecting the safety of the servant while in the master's employment, with which he may be required to act at which men of ordinary prudence would the time of the accident. These ques- or ought to exercise under the same cirtions may, very properly, bear upon the cunistances. If the servant, with a question of the contributory negligence knowledge of the defect, as a prudent of the employee, but they can have no man, may undertake the work, can it be bearing upon the question whether the said that the master has not exercised

about which the employee has a legal right to complain."

In St. Louis, I. M. & S. R. Co. v. Davis (1891) 54 Ark. 389, 15 S. W. 895, a case of an unblocked frog, the court said: "We think confusion has somequoting: "In the prevailing opinion it is case of the employee has a legal that the serve of care required of minimal transfer of the requirement of the employee has a legal that the serve of the requirement of the employee of the requirement of the employee of the employee of the requirement of the employee of the requirement of the employee of the requirement of the requirement of the employee of the requirement of the employee of the requirement of the requirement of the employee of the requirement of the employee of the requirement of the times crept into cases like this, from the is said that the servant is not bound, at effort to determine them by the rules of all times and under all circumstances, contributory negligence. We do not to be mindful of the dangers that surthink they necessarily furnish the cor- round him while engaged in the perrect criterion for determination, but formance of his duty, even though he that the contract of employment is a may be well aware of their existence. necessary element of consideration. It If the doctrine of the assumption of obis an elemental principle that an em- vious risks has any vital force, how can ployee, when he enters into service, it matter whether or not the servant has agrees to assume all risks ordinarily in- in mind the danger? This fact clearly cident to his employment, and if he is of has significance if the question be one mature years, experienced in the busi- of contributory negligence. If it be one ness undertaken, and knows what in- of the assumption of obvious risks, it is strumentalities are to be used by him, clearly immaterial. Under that docregarding the legal consequences of such knowledge, as justifying the inference both of an assumption of the risk and of contributory negligence.4 It is erroneous, under such circumstances, to refuse in-

trine the master is absolutely relieved use ordinary diligence to protect himfrom liability resulting from that risk. self from danger, and that he is charge-There is no question of the care or the able with notice of such defects as he negligence of the employee. It is a conmight discover by the exercise of such tract exemption absolute." (Per Smith, diligence, is a different proposition from

517; Ames v. Lake Shore & M. S. R. Co. jury, since both issues arose upon the (1893) 135 Ind. 363, 35 N. E. 117; evidence and under the pleadings." Louisville & N. R. Co. v. Kemper In Texas & N. O. R. Co. v. Conroy (1897) 147 Ind. 561, 47 N. E. 214; (1892) 83 Tex. 216, 18 S. W. 609, the Louisville, N. A. & C. R. Co. v. Sand-following charge was held incorrect: ford (1889) 117 Ind. 269, 19 N. E. 770; "If the gooseneck coupling apparatus Wilson v. Winona & St. P. R. Cc. was not more dangerous than an ordical (1887) 37 Minn. 327, 33 N. W. 908; nary coupler, and if plaintiff knew of Gulf, C. & S. F. R. Co. v. Schwabbe its being there, and did not use ordinary (1892) 1 Tex Civ. Ann. 573, 21 S. W. care as a man of ordinary core and (1892) 1 Tex. Civ. App. 573, 21 S. W. care as a man of ordinary care and 706.

pleading, an allegation that plaintiff making of such a coupling, then the verwas free from fault does not supply the dict should be for the defendant;" also: lack of averments negativing the volun"The existence of either one of the facts tary assumption of the risk. Louisreferred to in the charge, connected by ville, N. A. & C. R. Co. v. Corps (1890) 'and,' would be sufficient to exempt de124 Ind. 429, 8 L. R. A. 636, 24 N. E. fendant of liability, and each of them

The Illinois doctrine of comparative fenses." negligence has no application where an unwise or injudicious rule of the master, tion which leaves to the jury only the well known and understood by the serv-ant, produces a hazard which he is pre-sumed to incur voluntarily as an inci-that it would not be permissible to draw

ment was held not to have been satisfied The following passage, though not reby the following instruction: "If it lating to an accident to a servant, may should appear that plaintiff knew that be usefully quoted in the present con-in performing said duty in the manner nection: "Ordinarily, in actions to rethat he undertook to do so, or by the ex- cover damages for injuries to person or that he diddentook to do so, or by the ex-cover damages for infinites to person or cover the damages for infinites to person of contribution as to the effect known, that it was dangerous, and he of contributory negligence on the part still continued performing said work, of the plaintiff will cover all that need then plaintiff cannot recover. It was be said to the jury upon this branch of the duty of the plaintiff, for his own the case. But the principle that one safety, to exercise that degree of care may be debarred from a recovery when that a reasonably prudent person would he voluntarily assumes the risk is not have exercised under the same circumidentical with the principle on which stances; and if his injury resulted to the doctrine of contributory negligence him from a failure on his part to use rests, and in proper cases this ought to such care, then you will find for the ae- be explained to the jury. One may, fendant, and that without regard to with his eyes open, undertake to do a whether Collins had or had not failed to thing which he knows is attended with perform the duty required of him." The more or less peril, and he may, both in court said: "That the servant must entering upon the undertaking and in

that embraced in the charge asked and See also Feely v. Pearson Cordage Co. refused. While the charge given is cor-(1894) 161 Mass. 426, 37 N. E. 368; rect, yet the appellant was entitled to Morris v. Gleason (1877) 1 Ill. App. have both propositions submitted to the

skill should have used, considering the Under the strict rules of common-law circumstances and danger attending the should have been given as separate de-

Error is not predicable of an instrucdent of his employment. Illinois C. R. the inference that the servant was aware of the risk before the accident.

\*Texas & P. R. Co. v. French (1893)

6 Tex. 99, 23 S. W. 642. This require—
Tex. Civ. App.) 63 S. W. 927.

structions explaining the doctrine of assumption of risks,<sup>5</sup> especially if it is also laid down explicitly that the servant's knowledge merely casts upon him the duty of using greater care in the use of, and in avoiding danger from, such appliance.6

thereby assumes the risk may depend which give the jury to understand that, on other circumstances. One may, although the servant possessed that without fault of his own, be in a situ-knowledge, he is entitled to recover proation where he must choose a perilous vided he was in the exercise of due care, alternative. The degree of danger, the see Chicago, R. I. & P. R. Co. v. Clark stress of circumstances, the expectation (1882) 11 Ill. App. 104; Wink v. Weilor hope that others will fully perform er (1891) 41 III. App. 342 (instead of the duties resting on them may all have instruction that, if the plaintiff used to be considered." *Miner* v. *Connecticut* the defective appliance knowing it to be *River R. Co.* (1891) 153 Mass. 398, 26 defective, then the jury should consider N. E. 994.

employment, such care as a man of ordi-nary prudence would exercise, under N. E. 244; Terre Haute & I. R. Co. v. like circumstances. In entering the Pruitt (1900) 25 Ind. App. 227, 57 N. service of a railway company he as-E. 949. sumes all the ordinary risks incident to

Peirce v. Clavin (1897) 27 C. C. A. In Foley v. Jersey City Electric Light Vol. I. M. & S.—48.

carrying it out, use all the care he is 227, 53 U. S. App. 492, 82 Fed. 550. capable of. But whether or not he That any instructions are erroneous such fact in determining whether the Woodell v. West Virginia Improv. plaintiff exercised due care); Mexican Co. (1893) 38 W. Va. 23, 17 S. E. 386. C. R. Co. v. Shean (1891; Tex.) 18 S. In Texas & P. R. Co. v. Bryant (1894) W. 151; Mundle v. Hill Mfg. Co. (1894) 8 Tex. Civ. App. 134, 27 S. W. 825, 86 Me. 400, 30 Atl. 16 (held error to where the servant was injured by a hole give an instruction permitting the jury in a railway platform, the court refused to find for the plaintiff if she was not the defendant, which affirmatively invoked by the defendant, which affirmatively invoked by the defendant, and the hypothetical the defense of an assumption of the risk, state of facts on which the jury asked and gave the following charge: "A for instructions, raised the question railroad employee is bound to use, in whether the plaintiff had assumed the caring for his own safety while in such risks of the defect); Chicago, I. & L. R.

An instruction in an action for death his employment, among which is the risk of a switchman from stepping into a of any injury that may result to him hole in a side track should not direct a from working in a place which he knows verdict for plaintiff in case the jury to be in such an unsafe condition as made certain findings which did not inwould render it probable to a man of clude one that deceased did not know ordinary prudence that to work there of the defect, or have equal means with would be attended with danger, and, defendant for such knowledge, though should he go upon or into such a place, they were required to find that he nad knowing it to be unsafe, he is bound to been in the exercise of ordinary care. use all the care which a man of ordinary Lake Erie & W. R. Co. v. Wilson (1901) prudence would exercise under like cir189 Ill. 89, 59 N. E. 573, Reversing cumstances, and prevent injury to himself." The court sustained the objection of the defendant to this instruction, low covered bridge, it was error to that it "confounds the distinction has above that the work relativity in the court that the confounds the distinction has a barre that the work relativity is the court to the court of the distinction has a charge that though relativity in the court that the confounds the distinction has a charge that though relativity is the court of the court that it "confounds the distinction be- charge that, though plaintiff might have tween an assumed risk and contributory known of the existence of the bridge, negligence, to the prejudice of defend- and assumed the risk of being struck by ant, inasmuch as defendant's contention it, yet he had the right to recover, if, is, and was, that the hole in the plat- owing to the escape of steam from the form was an obvious defect, and appar- engine, or darkness, or fog at the time ently dangerous, and that its defective of the accident, he could not, by ordicondition was known to plaintiff so as nary care, discover his approach toto preclude recovery by him when he ex- wards the bridge. Norfolk & W. R. Co. posed himself to the danger, irrespective v. Marpole (1899) 97 Va. 594, 34 S. E. of any negligence on his part." 462.

308. Cases not giving due effect to this principle.— The principle explained in the preceding section being, in a logical point of view, perfectly plain and unassailable, it is not a little remarkable that there should be so many cases in which it has been either wholly ignored, or has not been given its proper effect. Such are the cases in which the theory on which the plaintiff is denied recovery is contributory negligence, although the evidence shows that there was no breach of duty

care, he could recover. Under these instructions the jury rendered a verdict for the plaintiff. A new trial was ordered, the court saying: "If the servant knows of the defect, and it is of such a nature that a prudent person could be avoided by due care on his will not abandon the service on account of it, then no negligence can be charged to the master for permitting the defect to continue. If the plaintiff was justified in concluding that he could ascend the pole and return with safety by using extra care, the defendant had the right of draw the same conclusion, and, in that event, the defendant was in no fault. If the peril was of such imminated in the plaintiff's knowledge being raised by the defendant's counsel, the nent character that it was imprudent on the plaintiff to attempt to ed the jury "that, if the deceased did this exception upon the general rule in- court said: "That instruction the servant into this discussion, which not assume the risk of working at a is a circumstance, in my judgment, dangerous place, known to him to be wholly foreign to it. The immunity of dangerous; and it put the subject defithe master rests upon the contract of nitely before the jury in such a way as

Co. (1892) 54 N. J. L. 411, 24 Atl. 487, hiring, and not upon the absence or the jury was directed to inquire whether presence of negligence in either party. the danger arising from the absence of The master says to the servant: You a step on a lamp pole was of such immium derstand fully the nature of the emnent character that a person of ordinary ployment and the danger attending it; prudence, having regard for his own will you enter upon it? The servant safety, would have declined to use it. says: I accept it; and the law implies If so, they were told that the plaintiff that he accepts it, with all the risk incicould not recover; but if it were otherdent to it, without regard to the magni-wise, if the peril was not so imminent tude of the danger. The question is not and threatening but that he might with whether it was prudent on his part to safety go up to the light and trim it and encounter the peril. In contemplation get back again by the exercise of extra of law, his undertaking to assume the care, he could recover. Under these in- apparent risk of the work was general

the part of the plaintiff to attempt to ed the jury "that, if the deceased did ascend the pole, then, under the rule laid know of the existence of that window down by the trial judge, the verdict is [in the roof], and nevertheless underwrong. If the plaintiff acted as a prutook to work there, he assumed the risk dent man in undertaking to ascend the of the apparent danger;" and "it is for pole, the injury must be ascribed to you, therefore, to say whether the decemere accident, the casual slipping of dent did know of the existence of that his foot. In that case neither he nor peril." But at a subsequent stage of his employer is to be held guilty of a the trial he retracted this instruction, want of care. The servant and the mas- and specifically charged the jury that it ter had equal means of forming a cor- was an erroneous statement of the law; rect judgment. Therefore, whatever and that, even if the decedent did know want of prudence in taking the risk is of the existence of the skylight, but exchargeable to the one must be imputed ercised due care to avoid accident, the to the other. The attempt to engraft plaintiff might recover. The appellate troduces the element of the absence or tantamount to saying that, if the decepresence of due prudence on the part of dent were free from negligence, he did

on the master's part; or in which it is laid down that if a servant is injured, when obeying the orders of a superior in a branch of business for which he was "specially" employed, his knowledge of the danger will be considered in estimating the degree of care he should use to avoid it.2 Nor is this principle properly taken into account,

vor of the plaintiff), the question of the against a circular saw); Loring v. Kanassumption by the decedent of the risks sas City, Ft. S. & M. R. Co. (1895) 128 attendant upon his working in a known Mo. 349, 31 S. W. 6 (section hand faplace of danger. The learned judge vir-miliar with the usages of yards and the tually eliminated from the case the en-dangers from passing trains, held neglitire question of the assumption of the gent in crossing a track in front of an

ter for consideration, but it does not al- open and obvious to the servant, and ways establish contributory negligence. that, if he failed to adapt himself to the If one undertakes to pass a known dancircumstances, it was his own fault). ger so great that no person of ordinary 2 Mann v. Oriental Print Works prudence would voluntarily encounter (1875) 11 R. I. 153. See also Crowe v. it, then he is guilty of contributory neg-ligence, for no person possessing knowledge of danger has a right to go into a track repairer was held unable to reencounter it, then the attempt to pass it as will defeat the action. But if he does attempt to pass it, he must exercise care proportioned to the known danger." 26 N. E. 210,

<sup>1</sup> Jones v. Sutherland (1895) 91 Wis. any precaution against its breaking, or 587, 65 N. W. 496 (servant familiar observation as to its then condition, was with sawmills stepped, without looking, negligent, and added: "The libellant

to authorize them to ignore altogether on a slanting floor which was usual and (if they found on the other issues in fa- necessary at the place, and, slipping, fell risk, and made that issue identical with engine in motion without looking. But the one relating to contributory neglitives also found that the men in charge gence, and thus inadvertently the jury of the train were not negligent, and were misled on that subject."

An instruction is also erroneous by anyone for whose conduct the comwhich gives the jury to understand that pany was responsible); Chesapeake & the only defense predicable from the O. R. Co. v. Lee (1888) 84 Va. 642, 5 S. servant's knowledge is contributory negligence. Koehler v. New York Elev. R. proach of train drawn by engine which Co. (1896) 9 App. Div. 449, 51 N. Y. had an unusually loud exhaust dis-Co. (1896) 9 App. Div. 449, 51 N. Y. had an unusually loud exhaust disSupp. 209. But an instruction treating the employee's knowledge as affecting servant also held negligent in uncouponly the question of contributory negligence, while erroneous, is not ground for reversal, where other instructions treat this knowledge as affecting the assumption of the risk, and the jury find specially that the employee did not have knowledge of the increased peril. The sinstructions objected to here read thus: of a bridge truss of the usual width); "The fact, if it is a fact, that Leyden had knowledge that the roof was in a dangerous condition does not necessarily preclude a recovery by the plaintiff. Application was extraordinary, went on to Knowledge is always an important mat-Knowledge is always an important mat- say that the elements of danger were

place which ordinarily prudent men cover, on the ground that, being familwould avoid. If, however, the danger is iar with the danger from cars constantknown, but it is not of such a character ly passing in a yard without warning, as that prudent men would decline to he stepped on a track without looking. Yet, in another part of the opinion, that is not, in and of itself, such negligence danger is spoken of as one of those assumed by such an employee.

In The Chandos (1880) 6 Sawy, 554. Deady, J., held that a sailor who went Rogers v. Leyden (1890) 127 Ind. 50, on a crane-line (a rope subjected to a continual chafing); in the dark, without

where it was explicitly held, or the evidence warranted the inference, that the servant had assumd the risk; or, what amounts to the same thing, so far as the right of recovery is concerned, was culpable, as a matter of law, in continuing to work; and yet the actual rationale of the decision is that he failed to take proper precautions to safeguard himself against that risk.3

<sup>3</sup> New York, L. E. & W. R. Co. v. Lyons (1888) 119 Pa. 324, 13 Atl. 205 (flagman who attempted to board a moving engine with a defective step, the condition of which he knew, while his hands were encumbered with two lanhis team onto it); Taylor v. Carew Mfg. when the eyes afford practically no assistance, without attempting, either by

assumed the ordinary risks of his em- 632, 35 N. W. 708 (brakeman, knowing ployment, and the liability of the crane- of position of bridge near track, swung line to part appears to be one of them. himself out so far from a car that he The negligence of the libellant was the came into contact with it—no call of proximate, if not the sole, cause of the duty to go upon the car till after the injury."

\*New York, L. E. & W. R. Co. v. Ly
Co. v. Sentmeyer (1879) 92 Pa. 276, 37 Am. Rep. 684 (railroad servant rode on top of freight train without any call of duty, and was struck by a low bridge the position of which he knew); Louisville & N. R. Co. v. Hall (1888) 87 Ala. 708, 4 L. R. Λ. 710, 6 So. 277 (braketerns, and he might have stopped the 708, 4 L. R. A. 710, 6 So. 277 (brake-train, held negligent as a matter of man, notified of low bridge, failed to Enery (1879) 91 Pa. 185, 36 Am. Rep. struck by it); Quibell v. Union P. R. 662 (plaintiff, who knew that a bridge ('o. (1891) 7 Utah, 122, 25 Pac. 734 was defective, held negligent in driving (servant failed to look out for call his team onto it); Taulor v. Carcon 145 Co. (1885) 140 Mass. 150, 3 N. E. 21 track); Helfrich v. Ogden City R. Co. (held that appropriate precautions were (1891) 7 Utah, 186, 26 Pac. 295 (ennot taken by a servant who walked gineer who knew that there were telequickly into a dark basement room, graph poles close to the track, and had been warned to keep his head inside the cab, was killed by striking his head hands or feet, to find a hole which he against one of the poles while he was knew to be somewhere in the room, al- leaning out); Paland v. Chicago, St. L. though he could not tell exactly where); & N. O. R. Co. (1892) 44 La. Ann. 1003, Pingree v. Leyland (1883) 135 Mass. 11 So. 707 (one employed as keeper of 398 (servant injured through his inad- a building to prevent trespassers from a building to prevent trespassers from vertence in handling unboxed machinvertence in handling unboxed machindiapidating and stripping it is guilty or, of the condition of which he was of such contributory negligence as will fully cognizant); Odell v. New York C. prevent a recovery, where the building & H. R. R. Co. (1890) 120 N. Y. 323, 24 fell and killed him, owing partly to his N. E. 478 (servant injured by the unexpected starting of a sawing-machine while he was engaged in changing saws, having been apparent for sometime bewas guilty of such contributory negligence as will prevent a recovery, if he risk one of those incident to the servence when he placed his hand upon the saw); Co. (1894) 80 Hun, 152, 29 N. Y. Supp. Alcorn v. Chicago & A. R. Co. (1891) 1126 (brakeman negligent if, seeing that 108 Mo. 81, 18 S. W. 188 (servant aware a car is crippled, he does not take propof the constant dangers caused by the of the constant dangers caused by the er precautions to avoid the consequences wearing away of the blocking of frogs, of handling it in that condition); Ray but held unable to recover because he v. Jeffries (1887) 86 Ky. 367, 5 S. W. failed to use proper care in the manner 867 (servant injured by his careless of making the coupling); Clark v. St. handling of a compound of nitro-glyce-Paul & S. C. R. Co. (1881) 28 Minn. rine the nature of which he under-131, 9 N. W. 581 (trackman knew of stood); Evans v. Chessmond (1890) 38 roof projecting over track and through Ill. App. 615 (servant worked under his inattention was struck); Illick v. loose rock in mine, the condition of Flint & P. M. R. Co. (1888) 67 Mich. which was as well known to the servant

In view of the division of functions between court and jury under the common-law system of procedure, a failure to raise the preliminary defenses of assumption of risks or of culpability in continuing to work may often be seriously prejudicial to the master, for although the circumstances may show that one or both of these defenses was available, it may be impossible to say, as a matter of law, that the servant did not act prudently in dealing with the known perils. It is manifest that, where the facts disclosed warrant both the inference that the servant had assumed the risk or was guilty of contributory negligence in continuing to work, and the inference that he was lacking in proper care with respect to the act which was the immediate cause of the injury, the proper course for the trial judge to follow is

as to the master, without making any but ground of decision was that the acnia Coal Co. (1888) 1 Monaghan, 234, because the end of the track had become accidents by using blocks to arrest the end); Kraeft v. Meyer (1896) 92 Wis. 252, 65 N. W. 1032 (stevedore fell down cising greater caution. a scuttle which he should have known was left open while the vessel was loadunderstanding that trains were constantly passing, unnecessarily stepped

examination, or asking the master to re-cident might have been obviated by commove it); Way v. Chicago & N. W. R. mon prudence); Louisville & N. R. Co. Co. (1888) 76 Iowa, 393, 41 N. W. 51 v. Law (1893) 14 Ky. L. Rep. 850, 21 S. (car repairer, who knew that the W. 648 (negligence in coupling held a ground was slippery with ice, and who bar to the action of a brakeman, the had complained of the absence of his as- danger of coupling being also said to be sistant, attempted to raise a heavy one of the ordinary risks of the employdraft-iron, and slipped); Wormell v. ment); St. Louis, A. & T. R. Co. v. Maine C. R. Co. (1887) 79 Me. 397, 10 Mara (1891; Ark.) 16 S. W. 196 (fish-Atl. 49 (servant held to have carelessly plate fell from and derailed a hand car put himself in the way of obvious perwinch the plaintiff knew to be defective in the state of the sta il); Nolan v. Shickle (1879) 69 Mo. 336 in such a way as to render it likely that (unnecessarily going on obviously dan- objects would fall, he himself being the gerous scaffold); Carroll v. Pennsylva- person who had supervised the loading).

In Wannamaker v. Burke (1886) 111 15 Atl. 688 (men engaged in dumping Pa. 423, 2 Atl. 500, where recovery was coal from a track upon trestles, and denied on the ground that the risk was knowing that the track was dangerous appreciated by the servant, the court superfluously introduces the consideradepressed, failed to take the obvious and tion that the fact that alterations were simple precautions necessary to obviate being made in the building in the presence of the employees was notice to cars, or by raising the track at the them of the possibility of danger of some sort, and of the necessity of exer-

A similar failure to realize the supererogatory nature of the defense of coning); Chicago & N. W. R. Co. v. Dona-tributory negligence in cases where an hue (1874) 75 Ill. 106 (yard switchman assumption of the risk is established is apparent in the following extract: "Minor servants are held to assume, by on a track and was run down by one of their contract of employment, those them); Peoria, D. & E. R. Co. v. Puck-ordinary risks of their service which are ett (1893) 52 Ill. App. 222 (brakeman obvious to them, or have been pointed who knows that there is a cattle guard out in a manner suited to the compreat a designated place bound to guard hension of their youth and inexperience. against it in performing his duties, al- They cannot ignore the dictates of comthough it is not properly constructed; mon prudence or the instructions of instruction disapproved which made their superiors to guard themselves right of recovery dependent on the from these apparent dangers, and "proper construction"); La Pierre v. charge the consequences upon their em-Chicago & G. T. R. Co. (1894) 99 Mich. ployers." Beckham v. Hillier (1885) 212, 58 N. W. 60 (conditions known, 47 N. J. L. 12. to differentiate the defenses clearly, and to explain by suitable language that they are cumulative in their operation.4

fore he stepped upon it." But the views bridge, and failed to stoop sufficiently); prevailing in this state with regard to Oven v. New York R. Co. (1869) 1 the two defenses are decidedly peculiar Lans. 108 (same decision on like facts); ruling cannot be estimated with refer- 78 Va. 709, 49 Am. Rep. 394 (same deence to the standpoint of other courts.

want of signal flag, held negligent in going under a car without inquiring about cial precautions were not taken to sigthe movements of cars); Nuss v. Rafnal approaching trains).

snyder (1896) 178 Pa. 397, 35 Atl. 958 Of course, under the Missouri docsnyder (1896) 178 Pa. 397, 35 Atl. 958 Of course, under the Missouri doc-(risk of defective scaffold first declared trine, by which the rights of a servant assumed the risks arising from the situ- to look out). ation of the building; (2) that he was performance of the act); Brossman v. Plank v. New York C. & H. R. R. Co. Lehigh Valley R. Co. (1886) 113 Pa. (1875) 60 N. Y. 607, holding that a

The following instruction, which was 490, 57 Am. Rep. 479, 6 Atl. 226 (servheld in De Berry v. Carolina C. R. Co. ant knew of low bridge, but, his mind (1888) 100 N. C. 310, 6 S. E. 723, to being on his work, he was paying no athave been rightly given, seems to be also tention to the impending danger); Deopen to the same criticism: "Even if tention to the impending danger); Deopen to the same criticism: "Even if tention to the impending danger); Deopen to the step or platform was split, yet, if a prudent man, knowing its condition, caught while sitting on the brake in would not have stepped upon it, the broad daylight with his face towards plaintiff was guilty of negligence, provided he knew, or could by the exercise of the bridge); Williams v. Delaware, L. vided he knew, or could by the exercise of W. R. Co. (1889) 116 N. Y. 628, 22 of reasonable care and caution have known, the condition of the platform benotice of the height of a low overhead fore he stepped upon it." But the views bridge, and failed to stoop sufficiently): (see § 310, infra), and the effect of this Clark v. Richmond & D. R. Co. (1884) cision on like facts); Chesapeake & O. In the following cases the inferences R. Co. v. Hafner (1894) 90 Va. 621, 19 deducible respectively from the conduct S. E. 166 (brakeman raised his head too of the servant previously to, and at the soon while passing under a low bridge time of, the accident, are separately men- which he knew to be dangerous); Nortioned: This has often been done. folk & W. R. Co. v. McDonald (1891) Woodley v. Metropolitan Dist. R. Co. 88 Va. 352, 13 S. E. 706 (mismatched (1877) L. R. 2 Exch. Div. 384, 46 L. J. couplings handled in an unnecessarily Exch. N. S. 521 (servant held to have dangerous manner); McGrath v. New assumed the risks of the situation, and York & N. E. R. Co. (1884) 14 R. I. to have been guilty of a "want of partic- 357 (1885) 15 R. I. 95, 22 Atl. 927 (reular care" in regard to the act which covery denied, where injured trackman immediately preceded the accident); rode on a hand car knowing that there Marean v. New York, S. & W. R. Co. were no general regulations as to warn(1895) 167 Pa. 220, 31 Atl. 562 (car ing train hands that cars were on the inspector, who had assumed risk of track, and was careless, like the other men on the car, in not seeing that spe-

to be assumed and then plaintiff held who has continued work with knowledge negligent in using it); Rumsey v. Delaof a risk are viewed entirely from the ware, L. & W. R. Co. (1892) 151 Pa. standpoint of contributory negligence, 74, 25 Atl. 37 (brakeman, who was deand such negligence is not inferable clared to have assumed the risk of the from the mere fact of such continuance, want of a watchman at a crossing, was the servant's want of care in respect to held negligent in being in a place of taking appropriate precaution against danger on the pilot of the engine); the known danger may be the only the-Kelly v. Baltimore & O. R. Co. (1887; ory on which the master can escape lia-Pa.) 10 Cent. Rep. 56, 11 Atl. 659 (serv-bility. See, for example, Gleeson v. Exant injured by being caught between a celsior Mfg. Co. (1887) 94 Mo. 201, 7 building near the track and a car, while S. W. 188 (watchman in building, knowdescending from the car, the location of ing that hatchways were frequently left the building being familiar to him, was open, and charged with duty of closing nonsuited on the grounds (1) that he them, fell into one, owing to his failure

For an instance in which the master negligent in not paying proper atten- might have escaped liability by raising tion to the risk he was incurring in the one of the preliminary defenses, see

309. Defenses confused owing to inaccuracies of terminology.-The word "assume" and its various equivalents, which are used to define the position of a servant with regard to a known risk to which he exposes himself by accepting or continuing in a given employment, are responsible for the injection of a vast amount of unnecessary obscurity and confusion into a subject which is already quite sufficiently encumbered with difficulties.

In the vast majority of the cases in which such knowledge has been held to bar the action, this term simply expresses a predicament resulting from an implied contract.<sup>2</sup> It is apparent that most of the courts in the United States have at some time or other employed the phrase "assumption of risk" to express the conception that the servant was guilty of contributory negligence. The italics are in every instance our own.3

about the statement that, "if the serv- the word has acquired,—will be apparant will engage in the hazardous under- ent from the cases collected in the subtaking, he must be considered as doing joined note. it at his peril." Conroy v. Vulcan Iron
Works (1876) 62 Mo. 35.

We will be a substituted by the substitute of the substit

The objection of the learned author is the supposed knowledge, it was a quesrather hypercritical, and opposed to the tion for the jury whether or not, under weight of authority. But, even if we the circumstances, he ought to have atsuppose it to be well-founded, the legal tempted to make the coupling, and in relation created by an election must, so doing was himself negligent, or to be

brakeman's knowledge of the existence primarily at least, be quasi-contractual, of a trench across a railroad track was and therefore quite distinct, in the asof a trench across a railroad track was and therefore quite distinct, in the asnot sufficient to charge him with contributory negligence in failing to govern
his conduct, while coupling cars, with
does not express a predicament arising
due reference to the fact of the dangerous condition of the place of work, inasmuch as the act of coupling cars necesthe same word has also acquired,
sarily required his whole attention and
thought.

"Such as continues work at his own to whose conduct it is applied has
risk" (Lineoski v. Susquehanna Cool been acting carclessly, and many 1 "Such as continues work at his own to whose conduct it is applied has risk" (Lineoski v. Susquehanna Coal been acting carclessly, and many Co. [1893] 157 Pa. 153, 27 Atl. 577); courts, not being sufficiently alive "or takes the risk" (Griffiths v. Gidlow to the importance of a scientifically ex- [1858] 3 Hurlst. & N. 648, 27 L. J. Exch. act terminology, have, unfortunately, al-N. S. 404 [Pollock, C. B.]; Taylor v. lowed this loose and untechnical signi-Carew Mfg. Co. [1885] 140 Mass. 150, fication to insinuate itself into their 3 N. E. 21; Bunt v. Sierra Butte Gold judgments. The extraordinary preva- Min. Co. [1891] 138 U. S. 485, 34 L. ed. lence of this phraseological error—for 1032, 11 Sup. Ct. Rep. 464).

There is also a want of precision view of the specialized meaning which There is also a want of precision view of the specialized meaning which about the statement that, "if the serv- the word has acquired,—will be appar-

it at his peril." Conroy v. Vulcan Iron

Works (1876) 62 Mo. 35.

This is the meaning attached to the phrase "assumption of risks" in the leading case of Farwell v. Boston & W. dent man . . . would have avoided R. Corp. (1842) 4 Met. 49, 38 Am. Dec. them. . . . He will be deemed in 339, and there can be no question but that this has always been its normal import ever since.

Mr. Beven (1 Negligence, 774) thinks the facts in this class of cases more often indicate election than agreement.

The objection of the learned author is involved in such heedless exposure of himself to danger." Kane v. Northern C. R. Co. (1888) 128 U. S. 91, 32 L. ed. 339, 9 Sup Ct. Rep. 16.

"Besides, even if he [the servant] had the supposed knowledge, it was a ques-<sup>3</sup> Federal courts:—An employee is

It is abundantly evident from the illustrations here collected of this incorrect terminology, that unless the practice of the courts is

"assumption of risks" and "contributory was in consequence of such disobedinegligence" are used interchangeably, see ence of instructions, he would be guilty Atkyn v. Wabash R. Co. (1889) 41 of contributory negligence." Louisville Fed. 193; The Serapis (1891) 49 Fed. & N. R. Co. v. Woods (1894) 105 Ala. 393; The Chandos (1880) 6 Sawy. 554; 561, 17 So. 41. Fed. 193; The Seraps (1891) 49 Fed. 393; The Chandos (1880) 6 Sawy. 554; Richmond & D. R. Co. v. Finley (1894) 12 C. C. A. 595, 25 U. S. App. 16, 63 Fed. 228; Great Northern R. Co. v. Kasischke (1900) 43 C. C. A. 626; 104 Fed. 440; Southern P. Co. v. Yeargin (1901) 48 C. C. A. 497, 109 Fed. 436; Mason & O. R. Co. v. Yockey (1900) 43 C. C. A. 228, 103 Fed. 265 C. C. A. 228, 103 Fed. 265.

A court of appeal has laid it down that the dangers from a defective railroad track must have been so obvious the operation of trains thereon that a reasonably prudent man in his situa-tion would have avoided them, in order to charge him with contributory negligence because he continued in the discharge of his duty, and thereby assumed 423.

Alabama:—A servant who "voluntarily undertakes to perform a duty not tion, it cannot be said, as a matter of within the scope of his employment assumes the risk." Alabama G. S. R. Co. v. Hall (1894) 105 Ala. 599, 17 So. 176 (discussing the defense of contributory negligence).

Plaintiff was under no obligation to obey it [the order] without assuming the risk himself, if, by so doing, he incurred the risks of obvious peril, such as a reasonably prudent man would regard as extra hazardous." Davis v. Western Railway of Alabama (1894) 107 Ala. 626, 18 So. 173.

him, at any time, to put on the brakes, in his employ. It is, on the other hand, and if it is necessary to traverse a car negligence in the complaining servant

considered as having voluntarily as-filled with coal in order to reach the sumed the risk of his act. The question brake, from a point where the brakeman was essentially one of contributory neg- properly is, we cannot say, as matter of ligence, and the instruction should have law, he assumes the risk of a jerk or been so framed as to leave it to the lurch of the train caused by the negli-jury." Louisville & N. R. Co. v. Kel- gence of the engineer, if the jury so ly (1894) 11 C. C. A. 260, 24 U. S. App. find, while walking across the ear. If, 103, 63 Fed. 409. "The evidence would however, the conductor or engineer diwarrant no other conclusion than that rected the brakeman to remain at the he took the risks of the work, and that first and second brakes, as some of the his negligence was the direct cause of evidence tends to show, and if of his his death." Bunt v. Sierra Butte Gold own accord he left and attempted to Min. Co. (1891) 138 U. S. 485, 34 L. reach a third brake, we would say, uned. 1032, 11 Sup. Ct. Rep. 464. der these circumstances, he assumed the For other cases in which the phrases risk of the venture, and, if the injury

> Where the servant fails to quit the service, after a reasonable time has elapsed for making promised repairs, "is it illogical to presume he agrees to incur the risk? And would he not thereby be guilty of proximate contributory negligence?" Woodward Iron Co. v. Jones (1885) 80 Ala. 123. See also Eureka Co. v. Bass (1886) 81 Ala. 200,

60 Am. Rep. 152, 8 So. 216.

ance.

California:—If the servant and threatening to a servant engaged in knowledge of the circumstances, he is equally culpable, and he assumes the risk." McGlynn v. Brodie (1866) 31 Cal. 376.

In Goggin v. D. M. Osborne & Co. (1896) 115 Cal. 437, 47 Pac. 248, it was said to be a question for the jury the risks. Chicago G. W. R. Co. v. whether the plaintiff knew of the danger Price (1899) 38 C. C. A. 239, 97 Fed. of using an appliance, and so assumed the danger consequent upon such use, and, "what is much the same proposilaw, that a person of ordinary prudence would have refused to use" the appli-

Illinois:-If the master refuses to remedy the dangerous conditions after the servant has complained of them, the latter "will have no alternative but to quit the master's employ. If he does not, he will be deemed to have assumed the extra hazard of his position thus occasioned. The case suggested, it will be perceived, is one of mutual negligence. On the part of the master, it is "The duty of a brakeman requires negligence to retain the derelict servant now to be regarded as justifiable, upon the principle Communis error facit jus, there is an urgent necessity for a reform. The examples

to continue longer in the master's serv- v. Saalfeldt (1898) 175 Ill. 310, 48 L. ice, unless he intends to assume the ex- R. A. 753, 51 N. E. 645. tra risk himself." United States Roll-100, 5 N. E. 92.

where he has to use defective agencies, v. Simmons (1882) 11 Ill. App. 147. he "assumes the risk, and must bear the consequences." PennsylvaniaCo.Lynch (1878) 90 III. 333. There, in the P. R. Co. v. Clark (1882) 11 III. App. first part of his opinion, Scholfield, J., 104: Illinois C. R. Co. v. Jones (1882) lays down the rule that the servant as- 11 Ill. App. 324; Chicago, B. & Q. R. sumes the known risks of the service, and after stating the evidence, asks the 205; Howe v. Medaris (1898) 82 Îll. "If appellant [the master] was negligent in not furnishing different platforms, in what respect does that 535; Wabash R. Co. v. Propst (1900) negligence differ from appellee's negligence in continuing to use them, without objection, and without an effort to tual knowledge of its [the appliance's] change or improve them?"

"The general rule is that an employee who continues in the service of his employer after notice of a defect augmenting the danger of the service assumes the risk, as increased by the defect. But this rule is subject to qualifications. The servant is not chargeable that defects exist, but does not know, or cannot know by the exercise of ordinary prudence, that risks exist." IllinoisSteel Co. v. Schymanowski (1896) 162 III. 459, 44 N. E. 876.

In Swift & Co. v. O'Neill (1900) 187 111. 337, 58 N. E. 416, the case was held to be for the jury, inasmuch as the servant can only be held to have as-sumed such risk when the defect of mand of the master, the same court has which he had notice makes a continuused this language: "Where the maswork.

of his foreman is not required by law sarily follow that the servant either asto disobey him; or, by obeying, assume sumes the increased risk, or is negligent the hazard of obedience, unless the dan- in obeying the order. If the apparent ger to which he was so exposed was so danger is such that a man of ordinary imminent that a man of ordinary pru- prudence would not take the risk the dence would not have incurred the lisk. servant acts at his peril. But, unless William Graver Tank Works v. O'Don- the apparent danger is such as to deter

on pain of assuming the risk." Dallemand compelled to abandon the service, or as-

"A party who voluntarily exposes ing Stock Co. v. Wilder (1886) 116 Ill. himself to a danger that he knows, or by reasonable attention to the means The employer's breach of duty "fur- might know, assumes all the risks. nishes no excuse for the conduct of an . . . Such voluntary exposure is necemployee who voluntarily incurs a essarily incompatible with the exercise known danger." If he enters a service of ordinary care." Chicago & T. R. Co.

See also Camp Point Mfg. Co. v. Balv. lou (1874) 71 Ill. 417; Chicago, R. I. & Co. v. Montgomery (1884) 15 Ill. App. App. 515; Pioneer Fireproof Constr. Co. v. Howell (1901) 189 III. 123; 59 N. E. 92 Ill. App. 485.

Indiana:--"If the employee had acunsafe condition, then it would be negligence to use it, and if, knowing the unsafe condition of the appliance, the employee attempted to use it, he would assume the extra hazard in so doing." Ohio & M. R. Co. v. Pearcy (1890) 128 Ind. 197, 27 N. E. 479.

"When an employee has within his with contributory negligence if he knows own control the manner of using an obviously defective tool, and the means of securing safety if he choose to employ them, if he neglects the means of security to himself, he elects to take the risk." Jenney Electric Light & P. Co. v. Murphy (1888) 115 Ind. 570, 18 N. E. 30.

ance of work so dangerous that no orditer orders a servant to do something narily prudent person would remain at which involves encountering a risk not contemplated in his employment, al-In one case it was laid down that a though the risk is equally open to the servant acting under the specific orders observation of both, it does not necesnell (1901) 191 Ill. 236, 60 N. E. 831. a man of ordinary prudence from en-The servant was "not bound to disobey countering it, the servant will not be of this form of judicial blunder mentioned in the last note are, however, less reprehensible than one found in those cases in which it has

sume all additional risk, but may obey precision in the use of words was espethe order, using care in proportion to cially necessary. the risk apparently assumed." Nall v. Louisville, N. A. & C. R. Co. (1891)129 Ind. 268, 271, 28 N. E. 183, 611 (repeated in Brazil Block Coal Co. v. Hoodlet (1891) 129 Ind. 327, 336, 27 N. E. 741).

"If the risk is great, or is such as a prudent person would not assume, then the person who does assume it is guilty of such contributory negligence as will Kansas:—In Rush v. Missouri P. R. preclude a recovery." Lake Shore & M. Co. (1887) 36 Kan. 129, 12 Pac. 582, the

In Sheets v. Chicago & I. Coal R. Co. (1894) 139 Ind. 682, 39 N. E. 154, the court speaks of a plaintiff who had negligently placed himself in front of moving cars as having assumed all the dangers incident to such exposure.

In another case "assumption of a needless risk" is spoken of. Spencer v. Ohio & M. R. Co. (1892) 130 Ind. 181, 29 N. E. 915.

In the following passage the confusion of terms is particularly objectionable. The phrase "assume the risk" is used in different senses in sentences which are in immediate juxtaposition: "There is a class of cases where a man has no right to assume the risk. Society has an interest in the lives of its members, and no citizen has a right to knowingly and voluntarily place himself in a position of immediate and certain danger. . . . Where the danger is not immediate and certain, a man may assume the risk without violating the rule last stated, but, in doing so, he devests himself of a right to recover from his employer in cases where the danger is fully and seasonably brought to his knowledge, since the known danger becomes in such cases one of the risks he assumes as an incident of his service. He may not be guilty of contributory negligence in taking some risk, since he may be doing what other reasonably prudent men likewise do; but, like all the others in the common service in which he engages, he assumes all the risks arising from dangers of which he has full notice, by continuing in service after he obtains that knowledge." Louisville, N. A. & C. R. Co. v. Sandford (1888) 117 Ind. 269, 19 N. E. 770. The distinction Ind. 269, 19 N. E. 770. The distinction 51. See also *Pollich v. Sellers* (1890) between the two defenses is plainly in- 42 La. Ann. 623, 7 So. 786, where the tended to be noted here, and therefore defense was contributory negligence, but

Iowa:-In Šedgwick v. Illinois C. R. Co. (1888) 76 Iowa, 340, 41 N. W. 35, the court speaks of the negligent conduct of the plaintiff in remaining in a position of danger as being an "assumption of the risk." There is a similar confusion of terms in Brownfield v. Chicago, R. I. & P. R. Co. (1899) 101 Iowa, 254, 77 N. W. 1038.

S. R. Co. v. Pinchin (1887) 112 Ind. court uses the phrase: "If the danger 596, 13 N. E. 677. is such that an ordinarily prudent man could assume it without being guilty of negligence," etc.

Kentucky: Undoubtedly, if the employee, after discovering the defective condition of machinery furnished to him for his use, continues to use it without complaint or giving notice to the employer, or the proper officers of a company, he will be guilty of such contributory negligence as will prevent a recovery for an injury arising from the defect. He will be regarded as having assumed the risk of danger arising from its defective condition. Lawrence v. Hagemeyer & Co. (1892) 93 Ky. 591, 20 S. W. 704.

Louisiana:-Sufficient knowledge on the part of the deceased is not established to justify the assertion that he had assumed the risk of danger, and was consequently guilty of contributory negligence, whereby the defendants are exonerated. Erslew v. New Orleans & N. E. R. Co. (1897) 49 La. Ann. 86, 21 So.

The phrase "unnecessary a sumption of risks" is used in discussing the defense of contributory negligence in Dandie v. Southern P. R. Co. (1890) 42 La. Ann. 686, 7 So. 792.

"Even in the presence of a known danger, to constitute contributory negligence it must be shown that the plaintiff voluntarily and unnecessarily exposed himself to it, unless it is of that character that the plaintiff must assume the risk from the very nature of the danger to which he is exposed." Clements v. Louisiana Electric Light Co. (1892) 44 La. Ann. 692, 697, 16 L. R. A. 43, 11 So.

been laid down that the question of the servant's "waiver"—meaning thereby, as is shown both by the context and by the authorities cited,

the risk.

Maryland:-In State use of Hamelin v. Malster (1881) 57 Md. 287, the court wealth, if he knew and appreciated this denied the servant's right of recovery risk, and continued to work for the on the ground that, upon the undisputed length of time and under the circumfacts, the servant directly contributed to stances that appear in this case, he must his misfortune by his own want of cau- be held voluntarily to have assumed it, the opinion proceeds thus: "Now with ery, if the use of the saw by the defend-this knowledge and this plainly apparant constituted negligence." Tenanty v. ent risk open to the senses of the de-Boston Mfg. Co. (1898) 170 Mass. 323, ceased, upon which principle can the de- 49 N. E. 654. fendants be made liable for the accident is concerned."

Massachusetts:—"It is for the plain- v. Duckworth (1894) 162 Mass. 251, 38 tiff to show, not merely that the place N. E. 510. was unsafe, and that he was injured ing and appreciating the danger arising dence, they could not say, as matter of therefrom, he voluntarily exposes him- law, that the plaintiff assumed the risk, man engages in it, he takes the risks precise point of view is indicated by the which he must know are incident there- remark of Holmes, J., that even if the untarily uses a machine which, by rea- not complain of the consequences." held to assume and take the risk of in- culpability an essential element of neg-. . In the ligence? jury from that source. case at bar the plaintiff knew of the defect [a well-hole], and he consented to particular employment assumes the risk incur the risk which he ran in passing and perils usual thereto, when the usual along the floor, in the uncertain light, and customary means to guard against to examine and aid in putting on the accidents are adopted. If the servant

the plaintiff was said to have "assumed" belts." Taylor v. Carew Mfg. Co. (1885) 140 Mass. 151, 3 N. E. 21.

"Under the decisions in this commontion, yet, after reviewing the evidence so that his share in the responsibility which showed that the servant fully un- for the accident charges him with negderstood the dangers of the situation, ligence, and precludes him from recov-

"Due care depends on what is reasonthat happened to the deceased in conse-able under the circumstances, and is quence of the risk thus knowingly as- generally a question of fact for the jury. sumed by him? The principle is per- It cannot be said, we think, as matter of fectly well settled that an employee who law, that the probability that Duckcontracts for the performance of hazard- worth would leave an unexploded carous duties assumes such risks as are in- tridge in one of the chambers was so cident to their discharge from causes great as to require the plaintiff to exopen and obvious, the dangerous charac- amine them himself, or that, by continter of which causes he had an opportu- uing in the defendant's employment aftnity to ascertain. And so, if a man er finding an unexploded cartridge in a chooses to accept an employment or con-revolver handed to him by the defendant tinue in it with the knowledge of the James after testing it, he thereby asdanger, he must abide the consequences sumed the risk from such unexploded so far as any claim against the employer cartridges as might be accidentally left in revolvers by said James." Anderson

In Ferren v. Old Colony R. Co. (1887) thereby, but that he himself was in the 143 Mass. 197, 9 N. E. 608, the court, exercise of due care. His evidence fails after declaring that, supposing certain to show this, if it appears that, know- inferences to be deducible from the eviself thereto. Business is sometimes car- said that the evidence was sufficient to ried on in buildings or places obviously be submitted to the jury upon the quesunsafe, and if, with a knowledge that a tion whether he was in the exercise of business is thus conducted, the work- due care. It is not easy to say what to. . . . Where one capable of choos- servant's conduct "was not negligent in ing and contracting for himself, with the sense of culpable, still, as it infull notice of the risk he assumes, vol- volved danger manifest to him, he could son of a known defect, exposes him to a Boyle v. New York & N. E. R. Co. (1890) particular and obvious danger, he is 151 Mass. 102, 23 N. E. 827. Is not

Michigan:—A party entering upon a

with full knowledge of the danger, and tion whether the servant's knowledge of understanding the increased risk occa- a defect rendered him chargeable with sioned thereby, consents to enter into contributory negligence, the court rethe employment, then he voluntarily in- marked that it was "for the jury to curs the risk, and, if he suffers damages in consequence of injury received sumed the risks." Laning v. New York thereby, he will be without remedy. The fact that he remains in the master's employment under such circumstances. and with such knowledge, is what constitutes contributory negligence on his part. In such a case the master, in permitting his machinery to be thus more than ordinarily dangerous, is guilty of negligence; but the servant, with full knowledge thereof, by remaining, contributes thereto, and hence he cannot recover if he has such knowledge. King v. Ford River Lumber Co. (1892) 93 Mich. 172, 182, 53 N. W. 10.

In the following cases negligence and assumption of risks are used to express the same conception: Burnside v. Novelty Mfg. Co. (1899) 121 Mich. 115, 79 N. W. 1108 (last paragraph but one); Leppala v. Cleveland Iron Min. Co. (1900) 122 Mich. 633, 81 N. W. 553 (first paragraph); Deering v. Canfield & W. Co. (1901) 126 Mich. 373, 85 N. W. 874; Chilson v. Lansing Wagon Works (1901) 128 Mich. 43, 87 N. W. 79; Sweet v. Michigan C. R. Co. (1891) 87 Mich. 559, 49 N. W. 882.

Minnesota:—If a servant enters upon and continues in the service of the company with knowledge of the unsuitableness or inadequacy of the instrumentalities furnished for the operation of the road, it is his own negligence, and he assumes the known risks of the employment. Fleming v. St. Paul & D. R. Co. (1880) 27 Minn. 111, 6 N. W. 448.

Missouri:—Hurst v. Kansas City, P. & G. R. Co. (1901) 163 Mo. 309, 63 S. W. 693; Pauck v. St. Louis Dressed Beef & Provision Co. (1901) 159 Mo. 467, 61 S. W. 806; Hamman v. Central Coal & Coke Co. (1900) 156 Mo. 252, 56 S. W. 1091. See also cases cited in

§ 310, note 7, infra.
Nebraska:—"Where a servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances which, although dangerous, are not of such character that they may not be safely used, by the exercise of reasonable skill and caution, he does not, as a matter of law, assume the risk of injury from accident resulting from the master's negligence." Lee v. Smart the defect as being "assumption of the (1895) 45 Neb. 318, 63 N. W. 940 (syl- risks." In another case, while discusslabus by court).

say whether or not he voluntarily as-C. R. Co. (1872) 49 N. Y. 521, 10 Am. Rep. 417.

"It would seem to be unreasonable that one who has undertaken a service which, in itself, has some elements of danger, whenever he shall see that the danger has been increased through some negligence of his employer, must either stop his employment or be deemed to have accepted the increased risk. do not think that this is the rule. And it seems to us that the plaintiff had a right to go to the jury on the question whether he was, under the circumstances, justified in going on with his work." McMahon v. Port Henry Iron Ore Co. (1881) 24 Hun, 48.

In Cullen v. Norton (1889) 52 Hun, 9, 4 N. Y. Supp. 774, the court stated the defendant's contention to be that the deceased knew all about the facts and voluntarily assumed the risks, and thus, by his contributory negligence, preclud-

ed recovery.

In Guenther v. Lockhart (1891) 40 N. Y. S. R. 942, 16 N. Y. Supp. 717, the court first remarked that the risk was assumed, and then that the plaintiff failed to show the decedent to have been free from contributory negligence.

"A servant does not assume the risks unless he can be properly charged with negligence arising from the master's negligence in accepting the place of labor assigned to him by his master." Heavey v. Hudson River Water Power & Paper Co. (1890) 57 Hun, 339, 10 N.

Y. Supp. 585.

For similar instances of this confusion of terms, see Farley v. New York (1896) 9 App. Div. 536, 41 N. Y. Supp. 622; Wallace v. Central Vermont R. Co. (1892) 43 N. Y. S. R. 639, 18 N. Y. Supp. 280; Cleary v. Long Island R. Co. (1900) 54 App. Div. 284; Baker v. Sutton (1896) 11 App. Div. 271, 42 N. Y. Supp. 116.

North Carolina:-In Crutchfield v. Richmond & D. R. Co. (1878) 78 N. C. 300, the court, while holding the plaintiff unable to recover on the ground of contributory negligence, speaks of his continuance at work with knowledge of ing the negligence of the plaintiff, this New York:—In discussing the ques- court said that the circumstances "must

his contributory negligence,—is for the jury.4 This mistake has not even the imperfect excuse which popular usage supplies in cases where assumption of risks and contributory negligence are treated as synonymous phrases.

## 310. Doctrinal confusion between the defenses.— The inexactness of

had full knowledge of the unusual risk, negligence, contributed to his injury. and deliberately assumed it." Sims v. Lindsay (1898) 122 N. C. 678, 30 S. E. 19. See also Lloyd v. Hanes (1900) 126 N. C. 363, 35 S. E. 611.

Pennsylvania:-In Nuss v. Rafsnyder (1896) 178 Pa. 397, 35 Atl. 958, as applicable to the case, the court, after laying down the rule as the assumption of known risks, declared the plaintiff to be jury occurs to him through their use."

In Davis v. Baltimore & O. R. Co. (1893) 152 Pa. 314, 25 Atl. 498, the court, after declaring the plaintiff negligent in using the appliance, summed up by saying that he accepted the risk leged to be negligent.

of the employment.

to continue working in a dangerous place or employment, and if he did so he assumed the risk himself. He could not excuse his own want of care by the allegation that someone else had promised to care for him." Reese v. Clark (1892) 146 Pa. 465, 23 Atl. 246.

"The very fact of the plaintiff's youth and weakness is one of the elements that go to make up the charge of negligence speaks of the servant's "folly" in underon the part of the defendant in putting such a person upon such a service. It seems to us the master, in such circumstances, and not the servant, must be held to have assumed the risks of the service." Kehler v. Schwenk (1892) 151 Pa. 505, 25 Atl. 130.

The sentence, "The plaintiff has no one but himself to blame," occurs in a case where the risk was said to be assumed. Beittenmiller v. Bergner & E. Brewing Co. (1888) 22 W. N. C. 33, 12 Atl. 599.

Rhode Island:—The phrase assumption of risk is used in a case where the defense raised was contributory negligence. Laporte v. Cook (1899) 21 R. I. 158, 42 Atl. 519.

South Carolina:—In Donahue v. Enterprise R. Co. (1890) 32 S. C. 299, 11 S. E. 95, it was said that a servant who right of action is for the jury, where continued to work with knowledge of two inferences are possible; and in supthe dangerous character of the appliport of this doctrine cites Bussey v. ances assumed the risks of the situation, Charleston & W. C. R. Co. (1898) 52 S. and that his knowledge defeated his ac-C. 438, 30 S. E. 477, where the defense

be such as to show that the employee tion on the ground that he had, by his

Texas: - When a servant remains in an employment known to be dangerous because of defective machinery, implements, or appliances not sufficient for the safe conduct of the business, 'he is said to assume the risks incident to the business thus conducted, and to be guilty of contributory negligence, if an innegligent in using the appliance under Gulf, C. & S. F. R. Co. v. Brentford the circumstances. (1891) 79 Tex. 619, 15 S. W. 561.

In St. Louis & S. F. R. Co. v. Doyle (1894; Tex. Civ. App.) 25 S. W. 461, the court uses the phrase "assumption of risk" as a description of an act al-

Virginia:--"If he continued the work The plaintiff "was under no obligation without exercising ordinary prudence and care for his own safety, he must be held to have assumed not only the risks ordinarily incident to the service," but such as became known to him, actually or constructively, in the progress of the work. Russell Creek Coal Co. v. Wells (1898) 96 Va. 416, 31 S. E. 614.

In one case the phrase "assumption of the risk," is used, though the court also taking the work. Robinson v. Dininny (1898) 96 Va. 41, 30 S. E. 442.

Washington:—This court has used "assumption of the risk" as the verbal equivalent of contributory negligence, in Lewis v. Simpson (1892) 3 Wash. 641, 29 Pac. 207; Richardson v. Carbon Hill Coal Co. (1893) 6 Wash. 52, 20 L. R. A. 338, 32 Pac. 1012.

West Virginia:-In Graham v. Newburg Orrel Coal & Coke Co. (1893) 38 W. Va. 273, 18 S. E. 584, the phrase "assumption of risk" occurs in a discussion of the defense of contributory negligence.

Wisconsin: - See next section, note 7. In Mew v. Charleston & S. R. Co. (1898) 55 S. C. 90, 32 S. E. 828, the court lays down the rule that the question whether the servant had waived his terminology which has been discussed above is doubtless responsible, principally, if not altogether, for the doctrinal confusion between the two defenses, which is frequently found in the arguments of judges. Indeed, it will be seen from an examination of some of the passages quoted in the notes to the preceding section, that some of the courts to which a merely verbal confusion has been attributed might, without applying any very vigorous standards, be treated as chargeable with the more serious error which now invites attention. That error manifests itself under various forms.

In some cases the reasoning is vitiated by the misconception that the servant's duty to use care may be referred to as a standard by which to test the fact of his assumption of the risks of the employment.1

In another case, after saying that the thereby waived his right to redress servant did not waive all right to damagainst the defendant in case of injury ages, the court remarked that the jury arising to him from that servant's reck-would have been authorized to find that less act. But by thus remaining in the would have been authorized to find that less act. But by thus remaining in the he was not guilty of contributory neglidefendant's service he was negligent as gence. Anderson v. Illinois C. R. Co. to his own safety." The elaborate ac (1899) 109 Iowa, 524, 80 N. W. cumulation of erroneous language in 561. The correct logical situation is, this passage may fairly be described as however, recognized in earlier Iowa a veritable piling of Pelion upon Ossa. cases. Perigo v. Chicago, R. I. & P. R. Other cases bearing upon this partic-Co. (1879) 52 Iowa, 276, 3 N. W. 43 ular form of the confusion of terms will (see § 307, note 3, supra); Crabell v. be found cited in the next section, Wapello Coal Co. (1886) 68 Iowa, 751, note 6.

28 N. W. 56 (see § 306, note 1, supra).

The Particle V. Western North Carolina. perform labor that is necessarily attend-

it was urged that the facts ascertained sumes the risks as to require the exerby one of the special findings did not, in
legal effect, constitute contributory negon his part. The employee is not bound
ligence, but was, in effect, a finding that to engage in work that places his life in
the intestate of the plaintiff "agreed
with the defendant company to risk the
consequences of this dangerous contact
and association" with the engineman. damages upon the ground of negligence,
The court thus explained its reasons for
if, by the exercise of ordinary vigilance,
declining to accept this view as correct:
he could have avoided the accident."
The law implies that the servant agrees
Sullivan v. Louisville Bridge Co. (1872) to accept the ordinary risks incident to 9 Bush, 81. This statement is plainly the business or service which he engages a blunder either in phraseology or docto do, but it does not imply that he shall trine. It is erroneous on the former or will take upon himself extraordinary score, if it is intended to embody the hazard, and especially such danger as principle that the master is not warthe employer is bound to prevent and ranted in exposing the servant to any avert by the exercise of reasonable dilirary preserve himself by the exercise of due

raised and discussed was contributory intestate, by remaining in the defendnegligence. In one part of its opinion ant's service after he had certain knowl-the court puts the alternative: "Wheth- edge of the unfitness of his fellow-servof waiver or by the law of negligence?" hazard as to his fellow servant, and

28 N. W. 56 (see § 306, note 1, supra).

In Porter v. Western North Carolina
R. Co. (1887) 97 N. C. 74, 2 S. E. 584, ed with danger to himself, he so far asit was urged that the facts ascertained sumes the risks as to require the exergence on his part. . . . The most that preserve himself by the exercise of due can be said in this respect is that the care. It is erroneous on the latter score,

A still more serious error is the partial or complete obliteration of the boundary line between the defenses themselves. The mildest form of this logical heresy is the view that, although there may be a distinction between the two defenses, it often becomes too subtle to be

if the implication is that the servant's upon the servant himself. The power of exercise or omission of such care can the employee to assume known risks of affect in any degree his rights as regards his employment and the consequent exrecovery for an injury resulting from a risk assumed.

The "rule (as to the assumption of augmented perils) rests upon the principle that, while it is the duty of the employer to furnish reasonably safe machinery, and to make reasonable inspections for the discovery of defects, yet it is equally the duty of the employee to be vigilant for his own safety; and if he carelessly overlooks or silently acquiesces in a dangerous situation that results in his injury, the fault is laid at his door, and he cannot recover therefor." McFarlan Carriage Co. v. Potter (1899) 153 Ind. 107, 53 N. E. 465. Other instances of the same perverted

logic are not wanting.

In the case of perils incident to the employment, assumption of risks has been spoken of as "the acquiescence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract;" while contributory negligence is "that action or nonaction in regard to personal safety by one who, treating the known danger as a condition, acts with respect to it without due care of its consequences." Narramore v. Cleveland, C. C. & St. L. R. Co. (1899) 37 C. C. A. 499, 48 L. R. A. 68, 96 Fed. 298, Certiorari Denied in 175 U. S. 724,

44 L. ed. 327, 20 Sup. Ct. Rep. 1021. In Fleming v. St. Paul & D. R. Co. (1880) 27 Minn. 114, 6 N. W. 448, the court, after using the language quoted in note 2 to § 302, supra, proceeded thus: "This is not against public policy, for while public policy is concerned for the safety of human life and limb, it will not offer a premium for negligence or recklessness by relieving a eyes, undertakes a service under the circumstances mentioned, from the consequences of his own folly by charging them upon his employer. One of the ferred to in note 4, infra, and the Mismost effectual ways to discourage such souri cases reviewed in note 6, infra. negligence and folly and thereby to prewhether fellow servants or passengers,

emption of the master from liability in such cases is well settled in law."

In McDermott v. Hannibal & St. J. R. Co. (1885) 87 Mo. 285, the court in one part of its judgment (p. 296) adopts a statement of Judge Cooley that a servant who goes on working with a knowledge of a fellow servant's incompetence takes upon himself all risk of injury from that incompetence, "as much as if he had expressly contracted with reference to possible injury from such unfitness." Then, in another passage (p. 299), it sums up its conclusion by declaring that, if the servant knew that he was constantly exposed to peril by such incompetence, he could not continue in the service without complaint, and not be chargeable with contributory negligence.

In Stager v. Troy Laundry Co. (1901) 38 Or. 480, 53 L. R. A. 459, 63 Pac. 645, the court enunciated the doctrine that if the servant voluntarily continues to work, without complaint or objection, after obtaining knowledge of the existence of a risk superadded to the employment after he has begun work, under conditions which charge him with an appreciation of the danger, "and where ordinary prudence would require of him a different course," he is held to take upon himself the responsibility entailed by the risk he continues to incur.

In Russell Creek Coal Co. v. Wells (1898) 96 Va. 416, 31 S. E. 614, it was laid down that a servant who continues work in an unsafe place, without exercising prudence and care for his own safety, must be held to have assumed not only the risks ordinarily incident to his employment, but such as become servant who, voluntarily, and with open known, actually or constructively, to him during the progress of the work. See also Rush v. Missouri P. R. Co.

(1887) 36 Kan. 129, 12 Pac. 582, re-

Not less objectionable are the statevent injurious consequences both to the ments that, if the servant knew of the servant and to others upon the train, defects in the cars or machinery, and, "without taking the necessary and propis to throw the whole risk in such cases er precaution to guard against danger,

of any practical importance, or that it is not of much practical value. But the transition from the point of view in which the distinction is regarded as being immaterial, to the conception that the distinction is

continued to use them, he took upon any phase of his defense, and it can himself the risk, and waived his right serve no good purpose to more minutely as against the company" (Mad River divide the issues. . . . It would & L. E. R. Co. v. Barber [1856] 5 Ohio rather serve to confuse the jury. The St. 541, 565, 67 Am. Dec. 312); and jury readily comprehend that, by the that the servant "assumed . . . the issue of contributory negligence, they dangers incident to the employment," are asked to find whether the plaintiff's and "undertook to observe all proper fault was the proximate cause of his incare for his own personal safety" (Chi-jury, and it is immaterial whether that cago & E. I. R. Co. v. Maloney [1898] fault was carelessness or a reckless as-77 Ill. App. 191).

See also Northern P. Coal Co. v. Richof contributory negligence, remarked phases. 'Reckless assumption of risk' that he only assumed the risk of services which he contracted to perform, and not those which neither he nor his father had reason to believe that he would be required to encounter.

 McMullen v. Missouri, K. & T. R. Co. (1895) 60 Mo. App. 231.
 Rush v. Missouri P. R. Co. (1887) 36 Kan. 129, 12 Pac. 582. A corollary drawn by one court from the immateriality of the distinction is that a trial ment." For the phrase "reckless asjudge is justified in refusing to grant sumption of risks" there is the respectathe defendant's request for a specific charge on the issue of an assumption of Michigan, which in one case speaks of the risk, when an instruction dealing circumstances under which the servant with contributory negligence has already been given. Rittenhouse v. Wilmington ly or voluntarily assumed the risk." Street R. Co. (1897) 120 N. C. 544, 26 Schlacker v. Ashland Iron Min. Co. S. E. 922. There the plea of volenti non fit injuria, which counsel seem to have regarded, though, it would appear, in-phrase, arguerdo, in a case where the correctly (see § 371, post), as the addition of the antithetical word "volequivalent of "assumption of risks," had untarily" at once indicates that the disbeen expressly relied on, and a request tinction between the two defenses was had been made to the defendant to submit to the jury this issue: Did plain-proved of the singular proceedings which tiff's intestate voluntarily attempt to are here described as taking place on the cross the railroad bridge, knowing the trial. That the North Carolina court condition of track and car? Clark, J., wholly misunderstood the true import "It is true that in strict parlance, and logically, there is a distinction between contributory negligence of guage used by Judge Clark presupposes the intestate and his voluntarily taking that the only question requiring an anarisk which he knew to be dangerous. swer was whether the plaintiff's injury.

. . . But upon the issue of 'contributory negligence' both phases of the charge asked for presented an issue matter, negligence and voluntary as-which was entirely independent of the sumption of risk, could be submitted to culpability or nonculpability of the the jury, and the charge shows that the plaintiff. It was an attempt by counsel, judge did so submit this case. The de- in short, to induce the court to apply

sumption of risk, provided the jury are given to understand (as they were in mond (1893) 7 C. C. A. 485, 15 U. S. this case by the evidence, the argument App. 262, 58 Fed. 756, where the court, of counsel, the prayers for instruction, after declaring that the plaintiff, a mi- and the charge of the court) that the nor, was not, as a matter of law, guilty issue was broad enough to cover both has always been taken in our courts as being embraced in the issue of contributory negligence. Burgin v. Richmond & D. R. Co. (1894) 115 N. C. 673, 20 S. E. 473; Doster v. Charlotte Street R. Co. (1895) 117 N. C. 651, 34 L. R. A. 481, 23 S. E. 449; Turner v. Goldsboro Lumber Co. (1896) 119 N. C. 387, 26 S. E. 23. No harm has come from this course, and there is no need of further refineble authority of the supreme court of cannot be said to have "either heedless-(1891) 89 Mich. 253, 50 N. W. 839. But this court, although it has used this and rationale of the request for the instruction refused is evident. The lanfendant was not cut off from presenting the doctrine of assumption of risks unnonexistent, is manifestly short and easy. This crowning error is exemplified in some of the cases already cited, as well as in others.4

It will be remarked that the concluding sentence of the passage quoted in the Kansas case cited below embodies a conception of the meaning of waiver for which it is safe to say there is no authority to be found outside the line of employer's liability cases which are now under review. That word is commonly understood to import a voluntary and intentional renouncement of a right of action. It is evident that there is an essential difference between the position of a person who deliberately abstains from claiming damages for an injury, and the position of a person whom the law declares to have forfeited, by his own breach of duty, the right to maintain an action for that injury.<sup>5</sup> Nor is this the sole flaw in the argument.

tion, and the charge of the twelve boni et legales homines suffer many things from the perverse ingenuity with which verbose, hair-splitting instructions are accumulated in employer's liability cases, but they can rarely, we should imagine, have been raduced to profounder depths of mental court of appeals, assumption of risks was spoken of as being a "species of contributory negligence." Greef Bros. V. Brown (1897) 7 Kan. App. 394, 51

tration of the illogical position into which the confusion between the two defenses has led the courts is furnished by a Wisconsin case, where it was held that where the danger is not obvious or imthe defendant in an action against a minent the servant may rightfully conrailroad company for negligently caustinue in the employment of the master ing the death of a railroad employee is without being chargeable with contribuentitled to have an interrogatory pre-tory negligence, and that, if the servant sented to the jury on the question of the has full knowledge of the danger, and decedent's assumption of risk, where the question has not been covered by the instructions on contributory negligence. Mr. W. R. Co. sumes the risk himself of the known (1898) 99 Wis. 109, 74 N. W. 554. The danger, and waives any negligence that argument by which this conclusion was might otherwise be imputable to the justified was that, while assumption of master, proceeded thus: "This distincrisks is a form of contributory neglition between contributory negligence, it is a specific phase of such negtine part of the servant and the waiver ligence, and is not likely to be so conformal to the master's negligence on the part sidered by a jury without careful and of the servant has been recognized in special instructions. It was therefore some of the books; but while it may be Vol. I. M. & S.-49.

der circumstances in which, whether by considered not to be enough to submit accident or design, the plaintiff's rights to them the general question of the servhad always, in North Carolina, been con-sidered solely from the standpoint of where the defendant asks for a special contributory negligence. It would be of finding in answer to the question whethcontributory negligence. It would be of the deep psychological interest to learn precisely what ideas on the subject of assumption of risks and contributory negligence the jury carried with them to their consulting room, after "the argument of counsel, the prayer for instruction, and the charge of the court." The assumption of risk appearance of contributory negligence, tion, and the charge of the court." The and that, if they found the servant did assume the risk of such unusual danger, many things from the perverse incent.

<sup>5</sup> In Rush v. Missouri P. R. Co. (1887)

ment contained in the final clause of the same sentence is not correct, for there are many cases in which the servant is unable to recover damages for the master's negligence, although he be entirely free from negligence,—at least under the doctrine accepted by the vast majority of the states, including Kansas itself. But even if the statement were correct, the circumstance mentioned would merely furnish one more illustration of what is an extremely common situation in jurisprudence, viz., that the same set of facts is often susceptible of being considered under more than one juridical aspect.<sup>6</sup> This, however, is very far from being an adequate reason for altogether throwing down the barrier between the fundamental logical conceptions upon which, according as the case is approached from one side or the other, the rights and liabilities of the parties depend.

Obvious and elementary as these considerations are, the authorities in favor of this theory as to the practical identity of the defenses are quite numerous.7

cept such as I will wholly assume my-

relation between the two defenses:

The opinion was expressed by Brewer, ment? See § 308, supra.

J., that there was some force in the docWaiver and contributo J., that there was some force in the doctrine that there was really no such thing as a separate and distinct defense of waiver, and that what was called waiver was imply one form of "contributory to danger on the faith of such a promise negligence;" that the difference between waiver and contributory negligence is the difference between passive and active negligence; that what was meant by waiver was passive negligence, in omitting to do a thing which the employee ought to have done. In the plaintiff omitted to call for a flag,—omitted to take precautions which

admitted that there is ample room for he ought to have taken, and that this such a distinction, still it is doubtful was nothing more nor less than passive whether the distinction can be of much negligence. O'Rorke v. Union P. R. Co. practical value. In all cases of contributory negligence the employee has in put forward, it will be observed (see some sense waived the negligence of the note 5 to this section), is similar to that master; for by encountering the danger of the supreme court of Kansas, of which he says in effect, 'there is no danger ex- the learned judge had been a member before he was transferred to the Federal self;' and in all cases of the waiver of bench. But he has contrived to go even the master's negligence, the servant has further than that court in the wrong diin some sense, by his own negligence, rection, inasmuch as it is evident, from contributed to the resulting injury." the concluding reference to the concrete the concluding reference to the concrete <sup>8</sup> See the remarks of Bowen, L. J., in facts of the case, that he failed to dif-Thomas v. Quartermaine (1887) L. R. ferentiate clearly in his mind the 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. two separate questions, What inference 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516. In addition to the cases already cited, vironment known to be dangerous? and, the following may be referred to as em- What particular precautions a prudent bodying an erroneous conception of the man would have taken to protect himself while he remained in that environ-

Waiver and contributory negligence

311. Concluding remarks.— The foregoing summary sets in a strong light two deplorable consequences, sometimes amounting to a miscarriage of justice, which an inaccurate terminology and logical laxity have combined to produce, and shows that it is high time for every lawyer who attaches a proper value to clarity of thought and precision of language to devote special attention to seeing that, both in the conduct of trials and in the examination of cases in courts of review, the defenses shall be properly differentiated. The present confusion is a state of affairs for which counsel seem to be mainly responsible, as a court is naturally apt to discuss a case solely upon the theory under which the record and the arguments present it. It is not too much to say that, in view of the very appreciable advantages which the master obtains in most instances by relying on the defense of assumption of risks, an advocate who does not take care that, whenever the evidence admits it, that defense is presented as an alternative and entirely separate ground for denying the right of action is guilty of in-

accepted is that assumption of risks is the work with the reduced force such as "a form of contributory negligence." will necessarily charge him with negli-Nadau v. White River Lumber Co. gence." Yet the opinion immediately af-(1890) 76 Wis. 120, 43 N. W. 1135; terwards notices the fact that recovery Parcey v. Farmers' Lumber Co. (1894) has been denied in other cases on the 87 Wis. 245, 58 N. W. 382; Hazen v. different grounds of waiver or assump-West Superior Lumber Co. (1895) 91 tion of the risk, and of contributory Wis. 208, 64 N. W. 857; Peterson v. negligence. Sherry Lumber Co. (1895) 90 Wis. 83, 62 N. W. 948; Kraeft v. Mayer (1896) 92 Wis. 252, 65 N. W. 1032.

in § 309, note 3, supra.

The theory of a large group of Missouri cases, though to some extent similar to that of the courts just referred to, is in other respects sui generis. In one of these cases it was regarded as an open question, whether the defense of assumption of risks is based upon the doctrine of waiver, or upon the doctrine of contributory negligence, but it was considered immaterial what answer was given to that question, as "the facts which, in the one set of cases are held which, in the one set of cases are held to show the waiver, are such, in effect, as are held to constitute the concurring negligence in the other." Thorpe v. Missouri P. R. Co. (1886) 89 Mo. 650, 58

Am. Rep. 120, 2 S. W. 3. "The question then is," it was said, "whether the plaintiff, in remaining at work under these tiff, in remaining at work under these may be said to represent the high-water

although not necessarily or per se neg-circumstances, must be held to have ligent, may or may not become negli- waived the discharge of defendant's duty gent, according to the circumstances of to him in this behalf, and to have asthe particular case." Eureka Co. v. Bass sumed the risk incident to the perform- (1886) 81 Ala. 200, 60 Am. Rep. 152, ance, . . . or, in other words, was 8 So. 216. So, also, in Wisconsin the theory now involved in his undertaking to carry on

In another case the phrase "contribu-N. W. 948; Kraeft v. Mayer (1896)
Wis. 252, 65 N. W. 1032.
See also the South Carolina case cited \$\$ 309, note 3, supra.
tory negligence," or, what is tantamount thereto, "waiver," occurs. Alcorn v. Chicago & A. R. Co. (1891) 108 Mo. 81, 18
S. W. 188. Yet the court recognizes the doctrine commonly applied, that the effect of the servant's knowledge of extraordinary risks is to convert them into ordinary risks, so far as the master's liability is concerned. This doctrine certainly does not rest on the contributory negligence of the servant. Compare Warmington v. Atchison, T. & S. F. R. Co. (1891) 46 Mo. App. 159, where, in the argument, the servant's assumption of the risk and waiver of claim for

excusable remissness. Few courts, if any, are irrevocably and unreservedly committed to the doctrine that, where the master has been guilty of a breach of duty, the servant can be debarred from recovery only by his own negligence; and it can scarcely be supposed that the peculiar theories which prevail in North Carolina (see preceding section, note 3), as to the absence of any necessity of differentiating the defenses in instructions to a jury, will ever find acceptance in other states. As long as both defenses remain open in the jurisdiction where the action is brought, an employer's counsel ought always to in-

mark of the confusion between the de- it." Derlin v. Wabash, St. L. & P. R. fenses. Stated in its simplest form, that Co. (1885) 87 Mo. 545. doctrine is that the servant does not, as

Vulcan Iron Works (1876) 62 Mo. 35, contains the earliest formulation of this doctrine: "Where the defect is so glar-

See also the following passage: "Unmatter of law, "assume a risk" due to der former rulings of our supreme court, a breach of duty on the master's part, and of the courts of most other jurisunless it was such that no prudent man dictions, if the defect in the fellow servwould have remained in an employment ant, or in the machine, was equally apin which it was necessary to encounter parent to the servant and to the master, "The servant does not assume the the servant was deemed, as matter of risk of danger from the use of unsafe law, to accept the risks of injury from machinery, unless the defects are so such defect, as one of the risks of his emglaring or obvious that a reasonably ployment; and, if injured in consequence prudent man would not attempt to use of it, he could not recover damages from them." Bender v. St. Louis & S. F. R. the master. This rule declined to recog-Co. (1896) 137 Mo. 240, 37 S. W. 132. nize any inequality in the situation of The following extract from Conroy v. the master and the servant, but placed alcan Iron Works (1876) 62 Mo. 35, them on an equal footing. It was anntains the earliest formulation of this alogous to the well-known rule in redoctrine: "Where the defect is so glar-spect of contributory negligence, under ing that with the utmost care and skill which any negligence on the part of the the danger is still imminent, so that person injured, materially contributing none but a reckless man would incur it, to the injury, was a bar to a recovery then, if the servant will engage in the of damages. But later decisions of our hazardous undertaking, he must be considered as doing it at his peril. But if seemingly recognizing the inequality in the defective machinery or appliances, the situation of the master and the serv-though dangerous, are not of such a ant, and proceeding upon conceptions character that they may not be reason more just and humane, are to the effect ably used by the exercise of skill and that the servant is not, as matter of diligence, the servant does not assume law, deemed to accept the risks of in-the same risk. He is required to take, jury from the unfitness of the fellow and will be held responsible for, the servant, the machine, or the appliance, care incident to the situation in which unless such unfitness is so glaring and he is placed, and whether he exercised palpable that a prudent man would not that degree of caution is a fact for the remain in the service; and that, whether determination of the jury. The timbers the servant does accept the risks by rein the present case, though loose and not maining in the service is ordinarily a properly fastened, had been used and question to be submitted to a jury." were still being used and the plaintiff Hughes v. Fagin (1891) 46 Mo. App. might have supposed that by using care 43. See also the majority opinion in they would be entirely safe." Compare Fugler v. Bothe (1890) 43 Mo. App. 44; the ruling that an engineer is "not bound McMullen v. Missouri, K. & T. R. Co. to quit the service, nor did he assume (1895) 60 Mo. App. 231. If this state-all risks from want of repair [in a ment be construed liberally, it must, actrack], unless the track was so far out cording as the phrase "assume the risk" of repair . . that it would be nec- is taken in one or other of its two posessarily dangerous, to the mind of a sible senses, either express the bald truprudent person, to run an engine over ism that the servant's action is not

sist that their client shall receive the benefit of a consideration of his rights with reference to each of them. There are doubtless cogent reasons of abstract justice and public policy in favor of the doctrine that the servant's claim should be barred only by contributory negligence, and that this should not, except in the clearest cases, be inferred, as a matter of law, from mere knowledge of the dangerous conditions, and the present writer owns that he would be glad to see this doctrine everywhere accepted. But, until the day of that acceptance arrives, counsel are in duty bound to take every advantage of the more stringent doctrine, and never to pass by an opportunity of utilizing it.1

barred on the ground of contributory tempt to link together two wholly disnegligence unless he was imprudent, or tinct ideas by means of an ambiguous amount to the assertion of a doctrine phrase. which would be an entirely novel addiwhat the court really means, as is shown by all the decisions embodying the doctrine in question, is simply that whenever the servant was imperiled by a servant's want of actual knowledge of breach of duty on the master's part, the conly ground on which his recovery can be barred is that his own want of care either in remaining in the employment, or in failing to take proper precautions at the time of the accident, was an efficient cause of the injury. See § 301. It was important, was not a prepondersupra. In the formulation of this doctrine any reference to the conception of an assumption of the fore, were presented upon wholly differents to bear its usual technical signification, be wholly beside the mark. It would be difficult, if not impossible, to find in the books a more singular to find in the books a more singular Another curious misuse of a precedent example of confused logic than that is mentioned in § 309, note 3, supra. which has here resulted from this at-

<sup>1</sup> A very instructive example of the extion to the law of contracts, since it tremely slipshod way in which the two would imply that the intention of the defenses are sometimes dealt with is servant to include the given risk among furnished by the case of *De Forest* v. those covered by his agreement may de-Jewett (1882) 88 N. Y. 264, where the pend upon whether a prudent man would court, in denying the servant's right to have accepted the risk under the cirrecover on the ground that the risk was cumstances. See note 1, supra. But known and assumed, thought it neceswhat the court really means, as is shown sary to distinguish Plank v. New York

## CHAPTER XIX.

## CONTRIBUTORY NEGLIGENCE AT THE TIME THE INJURY WAS RECEIVED.

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As to contributory negligence considered with reference to the right of the servant to be at the place where he was when the accident occurred, see chapter xxxIII., post.

As to the burden of proving contributory negligence, see chapter XLIII., post.

As to the availability of the defense of contributory negligence under the French law, see chapter XLVII., post.

The cases dealing with cortributory negligence as an inference from the fact that the servant was, when injured, in a place where he was not required by his duties to be, are collected in chapter xxxIII., post.

312. Introductory.— The third defense available to a master is that the servant's conduct in respect to the particular act which was the immediate cause of his injury was negligent. As already noticed (see §§ 307, 308, ante), this defense is not infrequently suggested by the evidence in cases where one or both of the defenses discussed in the last two chapters may be put forward. This situation is a natural result of the fact that, in any given instance, the servant's comprehension of a risk, which is an essential element of those defenses, is very likely to point to the conclusion that he knew or ought to have known how he could have avoided it. Obviously, if he did not make a proper use of the knowledge, he must have been wanting in due care. In other words, he did something which, in view of his possession of a knowledge of the dangerous conditions, indicated carelessness.2

Some of the cases which we shall have occasion to cite in this chapter involve circumstances which render it extremely difficult to say whether they should be treated as illustrations of that species of negligence which is examined in the preceding chapter, or of that which now claims our attention. It is manifest that, in differentiating these two kinds of negligence, the essential point to be decided is whether the servant was guilty of a breach of the duty to refuse altogether to

¹ In Northern P. R. Co. v. Mares taken proper precautions at the time of (1887) 123 U. S. 710, 31 L. ed. 296, 8 the accident.

Sup. Ct. Rep. 321, it was alleged that 2 See the language used in Helfrich v. the plaintiff had been negligent in two Ogden City R. Co. (1891) 7 Utah, 186, particulars,—first, that he had continued to work with knowledge of the reviewed in the ensuing sections,—more incompetence of the delinquent fellow especially those cited under §§ 331-339, servant; and secondly, that he had not infra.

do the act which led to his being injured, or of the duty to do that act in a prudent manner. Theoretically, it may be said that the former duty becomes a binding obligation the moment he discovers the existence of an abnormal risk which is certain, or very likely, to result in injury. But in practice the time given for forming an opinion as to the prudence or imprudence of continuing to work is often so short that it is virtually impossible to go through a process of mental deliberation, having for its object the determination of the question whether such continuance is justifiable under the circumstances. The present writer is of the opinion that, whenever such a predicament is encountered by the servant, the quality of his conduct ought in reason and fairness to be tested exclusively by considering whether he did the work in hand in a proper manner.

## A. General principles.

313. Servant is bound to use proper care in performing his duties .-In Priestley v. Fowler<sup>1</sup> it was laid down by Lord Abinger that "the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself," and in later cases this statement has been frequently repeated, either in the same words or in a logically equivalent form.<sup>2</sup> It is apparent, therefore, that from the earliest period in the development of this branch of the law. it has been recognized that the right of a servant to maintain an action against his master for a personal injury is conditioned upon its being shown that the former did not contribute to his injury by his own want of care. In other words, a servant injured as a result of his own negligence, in whole or in part, cannot recover damages from his master.3

This defense is available whether the occupation is dangerous or not.4 It also remains open to the master, although, on account of his

<sup>1</sup> (1837) 3 Mces. & W. 1, Murph. & H. Atl. 49; Russell Creek Coal Co. v. Wells 305, 1 Jur. 987, 7 L. J. Exch. N. S. 42. (1898) 96 Va. 416, 31 S. E. 614 (in-<sup>2</sup> See, for example, Karr Supply Co. v. struction approved).

Kroenig (1897) 167 Ill. 560, 47 N. E.

<sup>3</sup> Shaffer v. Haish (1885) 110 Pa. 575, 1051, Reversing (1895) 63 Ill. App. 219;

Lureka Co. v. Bass (1886) 81 Ala. 200,

A verdict for the plaintiff was set 60 Am. Rep. 152, 8 So. 216. The servaside where the answer to one of the ant "is under as great obligation to provide for his own safety from such danwas "a certain amount of contributory gers as are known to him, or discoverable by the exercise of ordinary care on Times L. R. 202. his part, as the master is to provide it 'Craven v. Smith (1894) 89 Wis. 119, [such safety] for him." Wormell v. 61 N. W. 317 (instruction leaving jury Maine C. R. Co. (1887) 79 Me. 397, 10 to suppose otherwise, held erroneous).

having given a promise to remedy the dangerous conditions (chapter XXII., post), or for some other reason, he is unable to rely upon the plea of assumption of risks.<sup>5</sup>

It is error to instruct a jury in words which allow them to suppose that an absolute right of recovery is established, as soon as it appears that the servant was injured by abnormal conditions which the employer might have discovered and remedied by the exercise of ordinary care.6

On the other hand, any instruction is proper which informs the jury sufficiently of the consequences of contributory negligence, as creating a bar to the action.7 A refusal to give a charge to this effect

<sup>5</sup> McPeck v. Central Vermont R. Co. ligence of the employer's representative, (1897) 25 C. C. A. 110, 50 U. S. App. will prevent a recovery by the employee. 27, 79 Fed. 590. In Washington & G. R. Co. v. Mc-

to make, the plaintiff was guilty of contributory negligence, it is error, in giv-was occasioned by a defect in the maing the charge, to annex the qualification: "This is true, provided, however, reasonable care and prudence as would that the defect was not only unknown have prevented the happening of the acto the defendants, but was also one which cident. they would not have known by the exercise of ordinary care." Cooper v. Butler (1883) 103 Pa. 412. An instruction was without merit, where the court had that, if defendant was negligent, plaintiff could recover, though he himself may result of any imprudent, careless, or neglevel of the triendants, but was also one when the contribution as to contributory negligence had been given was without merit, where the court had instructed that the plaintiff could not recover if the injury was received as the have been negligent, is erroneous. Texas result of any imprudent, careless, or neg-

the following effect was approved: That, if the jury believed plaintiff's own

In Washington & G. R. Co. v. Mc-Where the defendant has requested Dade (1890) 135 U. S. 554, 34 L. ed. 235, a charge that, if the defect was unknown 10 Sup. Ct. Rep. 1044, the jury was held to the defendant, but could have been to have been properly instructed that discovered by the plaintiff by an in- an employee injured while attempting to

spection which he was bound, but failed, place a belt upon a moving pulley cannot

App.) 63 S. W. Massouri P. R. Co. 38 S. E. 430. It is not error for a trial (1885) 87 Mo. 588, an instruction to judge, after instructing the jury that to entitle the plaintiff to recover he must be free from fault or negligence contribnegligence contributed directly to the uting in any material degree to the ininjury, he could not recover; that, in jury, to fail further to charge that if determining whether he was negligent, the plaintiff, by the use of ordinary they should consider and determine, care, could have avoided the injury, he from the evidence, whether he knew of could not recover. Louisville & N. R. the danger, or might have known of it, Co. v. Thompson (1901) 113 Ga. 983, 39 and have avoided it by the exercise of S. E. 483. An instruction that, if cerordinary care and caution under the cir- tain facts were found, then plaintiff was cumstances in evidence; that, if he could entitled to recover for injuries received have seen the danger and avoided it by while working with defendant's mathe use of such care, then he was neglichinery, unless it were also found that gent; and that, if such negligence con-tributed to the injury, they should find a volunteer, and that he was guilty of for defendant. In Deep Min. & Drainage contributory negligence, was erroneous, Co. v. Fitzgerald (1895) 21 Colo. 533, since either fact alone would have destruction to the effect that the omission (co. v. Chalkley (1900) 98 Va. 62, 34 by an employee to perform some act S. E. 976. Where plaintiff was injured which, if performed, would have prowhich, if performed, would have prowhich if performed, and in an action for the injuries defendis deemed to be prejudicial error. But it is not a misdirection to tell a jury without qualification in one paragraph of a charge that, if the master was negligent the plaintiff was entitled to recover, if the charge also includes other paragraphs negativing the right to recover if the servant was guilty of contributory negligence.9

Where it appears from a portion of the facts established that the injured servant was guilty of contributory negligence, the propriety or relevance of other testimony introduced at the trial for the purpose of showing that the employer was culpable is manifestly not a point which it is necessary for a court of review to consider. 10

- 314. Local doctrines as to contributory negligence.—The simple doctrine, accepted in most jurisdictions, that the servant's action cannot be maintained if it is proved that his own negligence was an efficient cause of his injury, is now, or was at one time, subject in a few of the American states to some qualifications. The effect and scope of these will be briefly explained.
- a. Alabama.—In this state it has been laid down that an action for an injury caused by wilful and wanton negligence on the part of an employee for whose acts the master is responsible is not barred by proof merely of the injured servant's contributory negligence.1

ant requested an instruction that, if placed his hand into the refrom falling into an elevator well not cesses of a going machine without knowing what he would meet, defendant was the evidence showed that the plaintiff not liable, such instruction was properly was not in the exercise of proper care, modified by the statement that defendant the fact that all the other floors of the would not be liable unless the jury found factory were provided with self-closing the act was one of ordinary prudence, hatches was immaterial. Taylor v. the act was one of ordinary prudence, hatches was immaterial. Taylor v. and that, if they found a person of ordinary prudence would not have thrust 10 N. E. 308.

10 N. E. 308.

1 Louisville & N. R. Co. v. Markee (1893) 103 Ala. 160, 15 So. 511 (endone, the verdict should be for defendant. Bennett v. Warren (1901) 70 N. avoid running over section foreman);

1 H. 564, 49 Atl. 105.

2 As where the instruction asked for 200 Ala. 68, 8, So. 240 (engineer range are section foreman);

dent of which he complained by his own them); Louisville & N. R. Co. v. York negligence or carelessness, and that such (1900) 128 Ala. 305, 30 So. 676. negligence or carelessness was the proximate cause of his injuries, and could contributory negligence is no defense to have been avoided by the use of ordinary an action for the death of an employee, care on plaintiff's part, defendant was where it was caused by such gross negnot liable. Southern R. Co. v. Mauzy ligence on the part of the employer as (1900) 98 Va. 692, 37 S. E. 285.

generally, as to instructions in which Ala. 400, 18 So. 30. the imperfections of one part of the statement of the law are rectified by the part of a fireman, precluding a plea of words of another, chapter XLV., post.

8 As, where the instruction asked for 90 Ala. 68, 8 So. 249 (engineer ran cars was that, if the evidence showed that together with unnecessary force, after plaintiff contributed towards the acci- he saw that brakeman was between

In one case the language used is that <sup>9</sup> Chicago, M. & St. P. R. Co. v. Dowd ence to the safety of human life. Jones (1886) 115 Ill. 659, 4 N. E. 368. See, v. Alabama Mineral R. Co. (1895) 107

> Wanton or wilful misconduct on the contributory negligence, is not shown by

reason assigned for this doctrine is that the "theory of contributory negligence, as a defense, is that, conjointly with negligence on the part of the defendant, it conduces to the damnifying result;" that "if defendant's conduct is not merely negligent, but worse, there is nothing for plaintiff's want of care to contribute to,-there is no lack of mere prudence and diligence of like kind on the part of defendant to conjunctively constitute the efficient cause;" that, in short, "mere negligence on the one hand cannot be said to aid wilfulness on the The theory thus propounded as to the nature of the defense is evidently not that which is accepted by the majority of courts. See § 323, infra. An examination of the facts of the cases cited, however, shows that the circumstances which are deemed appropriate for the application of the doctrine based upon the different degrees of negligence of the parties are really the same as those which, in other jurisdictions, are deemed to indicate that the plaintiff is entitled to recover because the defendant might, by the exercise of ordinary care after the dangerous position of the plaintiff was discovered, have avoided inflicting the injury. See § 327, infra.3 It would seem,

a count of complaint for the death of a gence, and not with his intentional by giving a proper signal or information R. Co. v. York (1900) 128 Ala. 305, 30 to the engineer his safety would have been conserved in spite of the perils which his position involved, and that clared that contributory negligence was with a consciousness that the engineer was unaware of the situation, the fireman failed to give such signal or information, it not being averred that he wilfully or wantonly so failed, or that he was conscious of the failure. Louisville failed, after the peril of such person beden N. R. Co. v. Brown (1898) 121 Ala. merely after they should have known it. 221, 25 So. 609.

brakeman, which merely avers that the wrong,—to the relief from liability of fireman knew the deceased's peril, that the common employer." Louisville & N. by giving a proper signal or information R. Co. v. York (1900) 128 Ala. 305, 30

merely after they should have known it, A charge to the effect that an injury to resort to all reasonable effort to avoid was caused "negligently, carelessly, and injuring him. Georgia P. R. Co. v. Lee recklessly" is not the equivalent of a (1890) 92 Ala. 262, 9 So. 230. The limcharge that it was done wantonly, wil- its of the doctrine and its real signififully, or intentionally. Kansas City, M. cance are also shown clearly enough by & B. R. Co. v. Crocker (1891) 95 Ala. the following extract from the opinion 412, 11 So. 262. in Anniston Pipe Works v. Dickey A plea of contributory negligence to (1890) 93 Ala. 418, 9 So. 720, where the a complaint charging a wilful infliction court thus discussed the doctrine: "To of injury by the defendant is bad on a recovery notwithstanding such neg-demurrer. Alabama G. S. R. Co. v. Fra- ligence on the part of the plaintiff, it zier (1890) 93 Ala. 45, 9 So. 303 (ac- was essential to be shown that Calahan, tion by stranger). with respect to be shown that Cardinal, with respect to running his crane against that operated by plaintiff, acted Ala. 262, 9 So. 230. Compare the following statement: "Negligence on the that the law imputes to him a willingpart of the injured employee can only ness to inflict the injury, or an intencoalesce and combine with the same qualtion to do so. We have had occasion ity of act on the part of the employee at this term to consider with much care inflicting the injury,—with his neglithe elements necessary in the constitutherefore, that the difference between the doctrines of the Alabama and other courts is more apparent than real.

- b. Florida.—See chapter xxxv., post.
- c. Georgia.—The cases dealing with contributory negligence as a defense to actions brought under the statute which enables servants of railway companies to recover for injuries caused by the negligence of their coemployees are collected in chapter xxxv., post. rights of servants of employers other than railway companies are controlled by the principle which is deemed to be applicable wherever a defendant, whether a railway company or not, is being sued by a stranger, viz., that the consequence of the contributory negligence of the injured person is merely to diminish the amount of damages recoverable.4 For the purposes of this rule a servant off duty is considered to be a stranger.5

tion of that recklessness or wantonness quired to keep a look-out for the crane which will neutralize and overcome the and keep out of the way of it, had always defense of contributory negligence. Our previously done so, and could easily get conclusion was that knowledge of the out of the way at any time, he had no probable consequences of the wrongful right to assume, and is not chargeable act was essential to the imputation of with reckless indifference to consewilfulness in respect to it; that there quences in failing to assume, that plainmust be a consciousness on the part of tiff, in violation of his duty, would in the person charged with misconduct, resulting in injury, that his conduct will of danger; and without such gratuitous necessarily or probably produce the assumption, it cannot be said that he harmful result complained of, before the acted with a consciousness that the relaw will impute to him a willingness to sult complained of would ensue. inflict the injury. Georgia P. R. Co. v. course, if, after seeing that plaintiff con-Lee, 92 Ala. 262, 9 So. 230; Richmond tinued in a position of peril, Calahan & D. R. Co. v. Vance (1890) 93 Ala. had omitted any effort calculated to 144, 9 So. 574; Alabama G. S. R. Co. v. avoid the collision, such omission would Hill (1890) 93 Ala. 514, 9 So. 722. We have been conscious wrongdoing on his Hill (1890) 93 Ala. 514, 9 So. 122. We have been conscious wrongdoing on his find nothing in the evidence adduced in part, of which such willingness to inthis case to justify the conclusion that jure the plaintiff as would authorize a Calahan was conscious the injury susrecovery notwithstanding the latter's tained by the plaintiff, or any injury to negligence could be predicated. Georgia the plaintiff, would probably result, or P. R. Co. v. Lee, 92 Ala. 262, 9 So. 230; that he had any cause to believe or an-tanner v. Louisville & N. R. Co. 60 Ala. ticipate that such injury would result, 621. But the evidence is satisfying to from the manner in which he operated the point that, as soon as plaintiff's the crane on the occasion in question. peril became manifest, Calahan not only It is true the crane was moved rapidly, hallooed to him, but used every effort to but not more so, it appears, than was stop the crane before it reached him, usual, or than the exigencies of the servand in so doing broke the machine so ice reasonably required. have been moved in that way for a con- of contributory negligence is not oversiderable length of time, without casuborne by proof of recklessness of wantonalty of any kind. It is also true that ness on the part of Calahan." he must have known that plaintiff and 'Atlantic & R. Air Line R. Co. v. the must have known that plaintiff and others were near the point to which the Ayers (1874) 53 Ga. 12; Pierce v. Atcrane was being moved; but, in view of lunta Cotton Mills (1887) 79 Ga. 782, the fact that, to his knowledge, those 4 S. E. 381. See Shearm. & Redf. Neg. employees, including plaintiff, knew the § 103, for the cases involving injuries crane was then being operated, and must to strangers.

have expected it to be swung back to 

Savannah, F. & W. R. Co. v. Flanthat place at any moment, and were renagan (1889) 82 Ga. 579, 9 S. E. 471;

It seems to that he lost control of it. The defense

- d. Illinois.—Under the doctrine formerly applied in Illinois the contributory negligence of a servant was a complete defense to his action where his negligence was gross,6 but not where his negligence was slight, and that of the employer was gross by comparison.<sup>7</sup> This doctrine has been specifically rejected in the majority of the American states, and is now abolished even in Illinois.8 Under the present doctrine in that state a servant who has been guilty of contributory negligence is allowed to recover only when his employer has been wilfully negligent.9
- e. Kentucky.—In chapter xxxv., post, it is shown that a servant's failure to exercise ordinary care is not sufficient to bar an action brought under the statute of 1854 for causing his death by wilful neglect. But the want of ordinary care will prevent recovery in a common-law action, however high the degree of negligence on the part of the defendant may have been,10— provided, that is to say, the circumstances were not such as to show a proper case for the application of the rule exemplified in § 327, infra,
- f. Tennessee.—The rule prevailing in this state is that, if the defendant was guilty of a wrong by which plaintiff was injured, and the plaintiff was also in some degree negligent or contributed to the injury, the plaintiff's negligence should go in mitigation of damages, but cannot justify or excuse the wrong.11

the train).

<sup>6</sup> Foster v. Chicago & A. R. Co. (1876) 84 Ill. 164; Chicago & N. W. R. Co. v. Donahue (1874) 75 Ill. 106; Illinois C. R. Co. v. Patterson (1879) 93 Ill. 290. In one case a new trial was ordered, where the terms "want of ordinary care" and "gross negligence" were used as equivalents of one another in stating to a jury the rule of contributory negligence. Chicago, B. & Q. R. Co. v. Avery

gence. Chicago, B. & Q. K. Co. v. Avery (1880) 8 Ill. App. 133.

<sup>7</sup> Calumet Iron & Steel Co. v. Martin (1885) 115 Ill. 358, 3 N. E. 456; Illinois C. R. Co. v. Hoffman (1873) 67 Ill. 287; Chicago, B. & Q. R. Co. v. Gregory (1871) 58 Ill. 272; Chicago, B. & Q. R. Co. v. Warner (1887) 123 Ill. 38, 14 N. E. 206.

<sup>8</sup> Soo Shearm & Redf. Neg. 8 102. Ap.

186. The abolition of the doctrine in terchangeable terms. Illinois involves the consequence that "Louisville, N. & G. S. R. Co. v.

Central R. & Bkg. Co. v. Henderson the failure of a servant to exercise or (1882) 69 Ga. 715 (putting the case dinary care will always prevent recovor a servant traveling on a pass and ery. Hence, an instruction that an eminjured by the negligent operation of ployer is responsible for an injury to an employee resulting from the negligence of his servants, except when caused by a fellow servant of the injured party, or when the latter himself is guilty of gross negligence, is erroneous. Chicago, B. & Q. R. Co. v. Ruttka (1895) 59 Ill. App. 56.
<sup>a</sup> Chicago & A. R. Co. v. Myers (1901)

95 Ill. App. 578.

For a general review of the cases, showing how far the doctrine as to com-

snowing now far the doctrine as to comparative negligence has been adopted in the United States, see Whittaker's Smith, Neg. ed. 1896, p. 463, note.

10 Louisville & N. R. Co. v. Coniff (1894) 16 Ky. L. Rep. 296, 27 S. W. 865. In this case it was said that gross neglect was not a synonym of the wilful neglect specified in the statute, the \*See Shearm. & Redf. Neg. § 102. An latter phrase denoting a higher degree instruction implying that nothing but of neglect than was known to the comequality in negligence can prevent a remon law. But in the report of the same covery has been held erroneous in Cata- case in (1890) 90 Ky. 560, 14 S. W. 543, wissa R. Co. v. Armstrong (1865) 49 Pa. gross and wilful neglect are used as in-

The doctrine of the French law, as administered in Quebec, is stated in chapter xLVII., post.

- 315. Rule in the case of seamen .- Except in Tennessee (see chapter xxxv., post), the effect of contributory negligence, in the case of ordinary employees, is not merely to diminish the amount of damages recoverable, but to prevent recovery altogether. But it is held in the Federal courts of the United States that the servant of a shipowner, who is injured by the negligence of agents for whose acts the employer is responsible, may recover damages, although his own negligence contributed to the injury. The amount recoverable depends on circumstances.<sup>2</sup> The rule thus applied seems to be different from that followed in England. See Beven, Neg. p. 207.
- 316. Contributory negligence of deceased servant bars action by personal representative. The right of action given by the damage acts being coextensive with that which the injured person would have possessed if he had survived the accident, the personal representative of a servant killed through the negligence of his master or of an employee representing the master ad hanc vicem cannot recover if the decedent was guilty of contributory negligence.1

was applied in an action by a servant in Saratoga (1898) 87 Fed. 349; The Julia

cases cited passim in this chapter.

<sup>2</sup> The Max Morris (1890) 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29. application of the ordinary rule as to scientious discretion. divided damages in cases of marine tort. But the amount in dispute was not suf-ficient to give the Supreme Court juris-diction of the whole case, the decision Sawy. 275, 5 Fed. 523, hold that contribbeing simply as to whether the contributory negligence of the plaintiff barred entirely from a recovery must be rehis action for damages; and the case garded as being overruled by the above leaves it an open question whether a judge might not, in his discretion, award a greater or less amount than one half Fed. 277, in which it does not appear But the inability of the servant to re-that the amount was fixed by any rigid cover was really put upon the ground Fed. 277, in which it does not appear rule of division.

same principle are *Wm. Johnson & Co.* servant's want of caution have no mav. *Johansen* (1898) 30 C. C. A. 675, 58 terial bearing upon the decision.

U. S. App. 104, 86 Fed. 886; *The Cy-prus* (1893) 55 Fed. 332 (partial dam-El. 385, 28 L. J. Q: B. N. S. 139, 5 Jur.

Fleming (1884) 14 Lea, 128. This rule ages allowed,-admiralty rule); The East Tennessee, V. & G. R. Co. v. De Fowler (1892) 49 Fed. 277; Anderson v. Armond (1887) 86 Tenn. 73, 5 S. W. The Ashebrooke (1890) 44 Fed. 124; 600; Louisville & N. R. Co. v. Wallace The City of St. Louis (1893) 56 Fed. (1891) 90 Tenn. 53, 15 S. W. 921. This doctrine is assumed in all the incurred in being cured); The Explorer (1884) 20 Fed. 135; The Wanderer The Max Morris (1890) 137 U. S. (1884) 20 Fed. 140; The Truro (1887) 31 Fed. 158; The Eddystone (1887) 33 The lower court in that case allowed one Fed. 925, in which the amount of the half the damages sustained, and the Su-damages was treated as a matter in preme Court seems to approve of this which the court might exercise a con-

The cases of Peterson v. The Chandos utory negligence debarring the plaintiff decisions.

In the recent case of The Samuel S. Thorpe (1900) 99 Fed. 108, some lanthe actual damages. This case was fol-guage is used which seems inconsistent lowed in *The Julia Fowler* (1892) 49 with the doctrine of the Supreme Court. that the ship owner was not negligent; Other cases which have applied the and the remarks with reference to the

317. Contributory negligence as a defense to actions by parents for loss of services .- It is well settled that, where a parent is suing for loss of services arising from an injury received by his infant child, the law will not permit him to recover damages, if the evidence shows that the child's own negligence was an efficient cause of that injury.<sup>1</sup> This rule is applicable where the loss of services was the consequence of the parent's allowing a child of tender years to undertake an employment for which he was unfitted.2 But in considering the question of the parent's negligence, he is entitled to the benefit of the presumption that the child will not be exposed to any risks but those properly incident to the position for which he is hired. The parent's failure to inquire as to the duties the latter would be required to perform in that position is not such contributory negligence as will prevent recovery

N. S. 172, 7 Week. Rep. 261, the avail- court of Pennsylvania, in holding that a

in the following cases: Central R. & Such sufferance is said to have the sense Bkg. Co. v. Kitchens (1889) 83 Ga. 83, of permission, and where the danger is 9 S. E. 827 (where Bleckley, Ch. J., great, and the child is of tender years, made the characteristic remark that "in- it is said to be negligence per se. Philadirect suicide gives no title to a post delphia & R. R. Co. v. Long (1874) 75 mortem award"); Central R. Co. v. Pa. 257; Smith v. Hestonville, M. & F. Sears (1878) 61 Ga. 279; Devine v. Sa- Pass. R. Co. (1880) 92 Pa. 450, 37 Am. vannah, F. & W. R. Co. (1892) 89 Ga. Rep. 705. The father owes to his in-541, 15 S. E. 781; Georgia, C. & N. R. fant child the duty of protection, and Co. v. Hallman (1895) 97 Ga. 317, 23 this includes restraint from exposure to S. E. 73. It is also taken for granted dangers, with which one of its years and in numerous cases cited in this chapter. discretion is unfitted to cope. When this

Redf. Neg. § 71, note 1.

ability of the defense under such circum- father who suffers his son of tender stances is thus discussed: "We conceive years to engage or continue in a danthat the legislature, in passing the stat- gerous service cannot recover for loss ute on which this action is brought, in- of his services where he is killed by gotended to give an action to the repre- ing without direction to a dangerous sentatives of a person killed by negli- place to comply with a proper order, gence only where, had he survived, he when there was a perfectly safe place, himself, at the common law, could have used the following language: "If the maintained an action against the per- unfortunate boy, for the loss of whose son guilty of the alleged negligence, services the father seeks compensation Under the circumstances of this case in this suit, had escaped death, and were could the deceased, if he had survived, here asking indemnity for injuries re-have maintained an action against the ceived while in the service of the defenddefendant for what he suffered from the ant, it might be a question whether the accident? We think that he could not; employer did not owe him the duty of for although the negligence of the de- exercising such watchfulness and overfendant might have been an answer to sight, or at least giving such instruction the defense that the accident was chiefly caused by the negligence of a fellow servant, the negligence of the plaintiff himself which materially contributed to the accident would, upon well-established principles, have deprived him of any consider.

The accident was chiefly obtained against serious harm. But it is not his cause that is to be passed upon; it is that of an adult father, who, if he did not actually place his son in a dangerous service, at least suffered him to angerous and continue in such service. This rule has been explicitly affirmed engage and continue in such service. the following cases: Central R. & Such sufferance is said to have the sense <sup>1</sup> See the cases cited in Shearm. & duty is neglected the father is said to be in pari delicto with a negligent de-<sup>2</sup> In McCool v. Lucas Coal Co. (1892) fendant, and though the infant may re-150 Pa. 638, 24 Atl. 350, the supreme cover against a wrongdoer for an injury

for an injury to the child, while engaged in performing duties which were outside the scope of the employment.3

The contributory negligence of a minor servant is a bar to an action brought by his parent for loss of services resulting from the injury.4

318. Negligence of another person; when imputed to servant .-A full discussion of the nature and scope of the doctrine of imputed negligence does not fall within the scope of this treatise. For a review of the authorities, the reader is referred to general treatises on the law of negligence. But it will not be amiss to state the effect of the few cases in which the doctrine has been applied in actions by servants against their employers. One well-established rule is that the negligence of a superior servant in regard to matters affecting the safety of his subordinates cannot be imputed to them. Another is that a servant is not chargeable with the negligence of a coemployee of the same grade as himself, even though the former may, for the time being, have a right to exercise some degree of control over the latter, in respect to the performance of the duties in which they are both engaged.2

In an action against a stranger the negligence of a coemployee is imputed or not to the injured servant, according as the former was or was not the agent of the latter. Such agency must be proved by specific evidence, and cannot be inferred merely from the fact of coservice.3

<sup>4</sup> Chicago & G. E. R. Co. v. Hurney (1867) 28 Ind. 28, 92 Am. Dec. 282, and cases cited in Shearm. & Redf. Neg. § 71, note 3.

¹ Hoben v. Burlington & M. River R. Co. (1866) 20 Iowa, 562 (section boss 927. managed hand car negligently); Galveston, H. & S. A. R. Co. v. Garteiser
(1895) 9 Tex. Civ. App. 456, 29 S. W. the owner of a steamboat for injury by
939 (section boss failed to send out flaga collision caused by such owner's negman in foggy weather).

objection, gets on a hand car after a regineer).
mark of the foreman which does not <sup>3</sup> See (

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caused partly by his own imprudence, amount to a command, but is a mere sugthe father cannot. Smith v. O'Connor gestion, put interrogatively to ascertain (1864) 48 Pa. 223, 86 Am. Dec. 582; if the men are willing to take the car Glassey v. Hestonville, M. & F. Pass. R. without taking the precautions pre-Co. (1868) 57 Pa. 172." scribed by the rules to guard them <sup>2</sup> Texas & N. O. R. Co. v. Wood (1893; against the regular trains, becomes a participator in the breach of such rules, and cannot recover for injuries caused by a collision with a special train which would have been avoided if the rules had been observed. McGrath v. New York & N. E. R. Co. (1885) 15 R. I. 95, 22 Atl.

a collision caused by such owner's negligence, although negligence on the part A negligent disregard of rules by the of other employees on the tugboat consuperior servant who was in immediate tributed to the disaster. Perry v. Lancontrol of the plaintiff cannot be imsing (1879) 17 Hun, 34. See also Chiputed to him, but he will be debarred cago, St. P. & K. C. R. Co. v. Chambers from recovery if he voluntarily joins (1898) 15 C. C. A. 327, 32 U. S. App. his superior in breaking the rule. Thus 253, 68 Fed. 148 (fireman's negligence a sectionman who, without hesitation or contributed to the injury of his en-

<sup>3</sup> See Gray v. Philadelphia & R. R. Co.

319. Negligence not predicable unless servant was aware of the conditions which caused his injury.— (Compare §§ 279a, 279b, 295-298, ante, and § 366, infra.)—It is manifest that a servant cannot be deemed to have been in fault for the reason that he failed to take precautions which he did not know to be necessary for his safety. Hence his action will not be barred on the ground that he was guilty of contributory negligence in respect to the act which was the immediate cause of his injury, unless it is shown that he knew, or ought to have known, of the material conditions which rendered the act, so done, an imprudent one.2

In the majority of instances the only specific subject of investigation is the servant's knowledge of the conditions from which his injury resulted. Obviously, if his excusable ignorance of those conditions is a proper inference from the facts in evidence, he cannot be declared, as a matter of law, to have been guilty of contributory negligence. Under these circumstances it is unnecessary for a court to pursue the inquiry into the second stage, by considering whether he comprehended the danger to which the conditions exposed him. This is the situation involved in the cases cited in the note below.<sup>3</sup>

29, 55 Am. Rep. 169, 4 N. E. 172; Dowling v. Allen (1878) 6 Mo. App. 195.

\* Gagnon v. Scaconnet Mills (1896) bled over plank projecting slightly above 165 Mass. 221, 43 N. E. 82; Hawkins the general level of a platform); Erslew

(1885) 23 Blatchf. 263, 24 Fed. 168 v. Johnson (1886) 105 Ind. 29, 55 Am. (fireman held not to be chargeable with Rep. 169, 4 N. E. 172; Bryce v. Chicago, the negligence of his engineer); Chicago, M. & St. P. R. Co. (1897) 103 Iowa, St. P. & K. C. R. Co. v. Chambers 665, 72 N. W. 780; Hollenbeck v. Mis-(1895) 15 C. C. A. 327, 32 U. S. App. souri P. R. Co. (1897) 141 Mo. 97, 38 253, 68 Fed. 148 (engineer held not to S. W. 723, 41 S. W. 887; Johnston v. 253, 68 Fed. 148 (engineer held not to be chargeable with negligence of fire-chargeable with negligence of fire-drawn).

In Abbitt v. Lake Erie & W. R. Co. (1892) 23 Or. 94, 31 Pac. 283; Crouse v. Chicago Or. 94, ter; but on the second appeal (1898) 259, 67 N. Y. Supp. 782; Galveston v. 150 Ind. 498, 50 N. E. 729, it was held Hemmis (1889) 72 Tex. 558, 11 S. W. that the jury should have been directed 29; Ford v. Fitchburg R. Co. (1872) to consider whether the relation of prin- 110 Mass. 240, 14 Am. Rep. 598 (defeccipal and agent existed between the neg-ligent and the injured servants.

\*\*Hawkins v. Johnson (1886) 105 Ind. in (1898) 176 Ill. 127, 52 N. E. 927 o, 55 Am. Rep. 169, 4 N. E. 172: Dow- (unsuitable coupling pin); Horan v. 19 v. Allen (1878) 6 Mo. App. 195. Chicago, St. P. M. & O. R. Co. (1893)

2" Negligence can only be affirmed in 89 Iowa, 329, 56 N. W. 507 (defective respect of situations and conditions railway track); Brown v. Ohio & M. R. known to the party to whom it is im- (o. (1894) 138 Ind. 648, 37 N. E. 717, known to the party to whom it is im- (°o. (1894) 138 Ind. 648, 37 N. E. 717, puted." Brown v. Louisville & N. R. 38 N. E. 176 (brakeman, in hastily disco. (1895) 111 Ala. 275, 19 So. 1001. mounting from a moving train, stumv. New Orleans & N. E. R. Co. (1897) blocking wheels of car in mine caught in servant struck guy wire of another com- nel, while running alongside a car); 2 Silv. N. Y. 260, 21 N. E. 425, Affirming (1888) 47 Hun, 632 (car coupler fell into a ditch); Leak v. Carolina C. R. Co. (1899) 124 N. C. 455, 32 S. E. 884 (brakeman, while attempting to get on a moving car, was injured by the giving away of a defective stirrup); Bomar v. Louisiana N. & S. R. Co. (1890) 42 La. Ann. 983, 8 So. 478 (defective car belonging to another company); Illinois 50 N. E. 1011, Affirming (1896) 69 III. App. 256 (brakeman's foot caught in a hole in the track while he was endeavoring to couple moving cars); Herrick v. Quigley (1900) 41 C. C. A. 294, 101 Fed. 187 (brakeman stumbled over upturned plank after he had coupled two moving cars); Donahue v. Boston & M. R. Co. (1901) 178 Mass. 251, 59 N. E. 663 (switchman injured by pile of stones near track, while attempting to jump on a moving engine); North Chi-(1898) 83 Ill. App. 528 (similar accident, where conductor of street railway G. R. Co. v. McDade (1889) 135 U. S. trench fell on servant working in it). 554, 34 L. ed. 235, 10 Sup. Ct. Rep. testimony was that he did not know it mail crane unusually close to track). was open, and that he had been sent to (1893) 100 Ala. 187, 14 So. 175 (boy 428, 50 N. W. 404,

49 La. Ann. 86, 21 So. 153 (railway a dangerously narrow place in the tunpany, which his own employers allowed Salem Stone & Line Co. v. Griffin to be maintained over the track); Harr (1894) 139 Ind. 141, 38 N. E. 411 (seryv. New York C. & H. R. R. Co. (1889) ant who has no knowledge which would suggest that he should look for dangerous projections upon cars passing alongside an otherwise safe walk is not negligent in going upon the walk without looking to see if any car is approaching); Jaroszeski v. Osgood & B. Mfg. Co. (1900) 80 Minn. 393, 83 N. W. 389 (hood over blower of planer being defective, sleeve of servant's coat was drawn into it by the current of air, and C. R. Co. v. Cozby (1898) 174 Ill. 109, his arm was injured); Folk v. Schaeffer (1898) 186 Pa. 253, 40 Atl. 401 (knot uniting two pieces of rope by which a weight was supported, slipped); Cote v. Lawrence Mfg. Co. (1901) 178 Mass. 295, 59 N. E. 656 (servant, not knowing that on the occasion of a former fire in a factory chimney, several burning planks had been thrown down by the man sent to put it out, stepped inside the chimney while the same man was putting out a second fire, and was struck and killed by a plank); Lore v. cago Street R. Co. v. Dudgeon (1900) American Mfg. Co. (1901) 160 Mo. 608, 184 Ill. 477, 56 N. E. 796, Affirming 61 S. W. 678 (rods covering gearing had become so bent as to leave an opening); McKeever v. Westinghouse Electric & car tried to mount a moving car); Sul. Mfg. Co. (1899) 194 Pa. 149, 44 Atl. livan v. Thorndike Co. (1899) 175 Mass. 689 (servant's sleeve caught by broken 41. 55 N. E. 472 (overloaded elevator edge of pulley across which he was fell,-operator did not know how much reaching); Flynn v. Shaw (1901) 22 it would carry safely); Washington & R. I. 328, 47 Atl. 883 (stones piled near

A railway servant is not negligent, as 1044 (inexperienced servant was in- a matter of law, in failing to look out jured in putting a belt on a pulley at- for a structure dangerously close to the tached to a countershaft while it was track, where he has no knowledge, acin motion, there being no loose pulley tual or constructive, of the existence of and lever or shifter as there should have such structure. Boss v. Northern P. R. been); Dowling v. Allen (1878) 6 Mo. Co. (1891) 2 N. D. 128, 49 N. W. 655; App. 195 (servant injured by project- Pikesville, R. & E. G. R. Co. v. State ing setscrew); Tully v. New York & T. (1898) 88 Md. 563, 42 Atl. 214 (street S. S. Co. (1900) 162 N. Y. 614, 57 N. E. car conductor injured, while collecting 1127, Affirming (1896) 10 App. Div. fares, by a pole unusually near the 463, 42 N. Y. Supp. 29 (inexperienced track); International & G. N. R. Co. v. laborer fell down an open hatchway in Stephenson (1899) 22 Tex. Siv. App. a ship he was helping to load, -his own 220, 54 S. W. 1086 (engineer struck by

Contributory negligence is not inferthat part of the ship without any warn- able, as a matter of law, where, owing ing); Baker v. Maryland Coal Co. to the servant's having no time for ex-(1896) 84 Md. 19, 35 Atl. 10 (miner in- amination, and being obliged to look jured by being crushed between a car down to see where to step, he was caught and the side of a tunnel at a place where between a car which he was pushing and it had always been safe before the track a bank beside the track. Stuckman v. was straightened); McNamara v. Logan Chicago & N. W. R. Co. (1891) 80 Wis. on the front of a flat car as it ap- breaking of a chain, caused by a defect proaches him, for the purpose of mount- of which he could not have been exing the car as his duties require him to pected to be aware. Rooney v. Allan do, and in the manner that he is ex- (1883) 10 Sc. Sess. Cas. 4th Series, pected to mount, is not, as matter of 1224; Haskell v. Cape Ann Anchor law, guilty of contributory negligence, although the staff is loose in its socket 1113 (chain broke from inherent deand is bent, where it appears to him to fect). be straight, as the bend is directly away 43 Pac. 81.

An effort by a railroad employee to couple cars with a drawbar which, just previously, had become fixed and failed to operate, is not necessarily negligent, he had any knowledge as to the condi-where the bar had been shaken loose, tion of the chain. Vincent v. Alden and, had it been in order, it would probably have remained loose long enough plaintiff was warranted in making the Ousley v. Central R. & Bkg. Co. (1890) 86 Ga. 538, 12 S. E. 938.

A brakeman is not, as matter of law, guilty of negligence in stepping between the rails of a smooth track to walk cars moving at a rate of speed much less than his own, so as to prevent recovery for injuries from his foot being caught between the guard and main rails beexistence of which he was ignorant, and which he had no reason to apprehend. Mich. 420. Kroener v. Chicago, M. & St. P. R. Co. (1893) 88 Iowa, 16, 55 N. W. 28.

To give a water spout used in filling engines and water cars, a start upward in the usual manner after using it, by an employee who knows of no defect therein, is not negligence. Texas & P. R. Co. v. Crow (1893) 3 Tex. Civ. App. 266, 22 S. W. 928.

An inexperienced employee was not, as a matter of law, negligent in again attempting to feed a machine in the usual manner, after an indication of danger in doing so, where he did not know what he ought to do, and first applied for advice to the superintendent by a look, and received a laugh in reply, his knowledge of English being imperfect. might not have known to what the unnor what he ought to have done under could not have anticipated. the circumstances. 41 N. E. 265.

A servant is not negligent in failing

A switchman who grasps a brake staff to provide for the contingency of the Works (1901) 178 Mass. 485, 59 N. E.

A servant injured by the breaking of from his. Prosser v. Montana C. R. Co. a supporting chain while he was hand-(1895) 17 Mont. 372, 30 L. R. A. 814, ling iron girders cannot be declared negligent, as matter of law, in adopting a method of doing the work which was dangerous in case the chain gave way, where the evidence fails to show that tion of the chain. Vincent v. Alden (1901) 62 App. Div. 558, 71 N. Y. Supp. 149. On the first appeal (1899) 45 App. to make the coupling. It is at least Div. 627, 61 N. Y. Supp. 62, the plaina question for the jury whether the tiff had been declared guilty of negligence, principally, as it would seem, second effort to effect the coupling. from a comparison of the two decisions, because his own testimony showed that he knew the method of procedure to be unsafe.

Where a servant in a sawmill, while pulling backwards a slab that was too 20 or 25 feet to a switch in advance of heavy for one man to carry, slipped on some wet bark and fell against certain cogwheels, his contributory negligence for the jury, if there is evidently that he had not been warned and did cause of a defect in the blocking, of the not know that the wheels were uncovered. Swoboda v. Ward (1879)

The defendant in an action for injuries caused by the bursting of a check valve in an air hoist was not excused from liability on the ground that plaintiff, who was operating the hoist, had the full pressure on, in violation of directions previously given, and hence was making an improper use of the apparatus, the evidence being that it was impossible for the operator to know the amount of pressure being used. Slattery v. Walker & P. Mfg. Co. (1901) 179 Mass. 307, 60 N. E. 782.

A servant is not to be held guilty of negligence in returning to protect his master's property (see § 361, infra) after he has reached a place of safety, because some unforeseen cause inter-Under such circumstances, he venes which, concurring with the master's negligence, produces an injury usual action of the machine was due, which reasonable and prudent foresight PullmanBjbjian v. Woon- Palace Car Co. v. Laack (1892) 143 socket Rubber Co. (1895) 164 Mass. 214, Ill. 242, 18 L. R. A. 215, 32 N. E. 285, Affirming (1891) 41 Ill. App. 34.

Dropping the reins and gently lift-

Where several dangerous conditions combine to produce an injury the servant cannot be held guilty of contributory negligence, as a matter of law, where he knew of only a part of those conditions.4

the road, after first applying the brakes chinery; and that his general duties to his wagon, by one employed as a were not such as to require him to have driver and peddler, who has been informed and believes that he is driving that he was not guilty of contributory a gentle team, is not such negligence, as negligence will not be disturbed. matter of law, as will prevent a recovery against the employer for injuries inflicted by their running away. Martin Tex. Civ. App. 185, 23 S. W. 387.

jured by inhaling bad air while in the remove some boards from the upper part interior of a mine, was held not guilty of a building, he having no knowledge of contributory negligence in going to of the presence or existence of the gases, his work because he knew that the air it is immaterial that he might have was bad at the entry, where it had been bad at the entry on previous occasions while it was safe in the interior. Mosgrove v. Zimbleman Coal Co. (1899) Citizens' Gaslight & Heating Co. v. 110 Iowa, 169, 81 N. W. 227.

The question of contributory negli-Newark Electric Light & P. Co. v. Mc- 203, 57 N. E. 366.
Gilvery (1898) 62 N. J. L. 451, 41 A complaint which, in an action
Atl. 955, Affirmed in (1899) 63 N. J. L. against a railroad company to recover
591, 44 Atl. 637. Whether a lineman at for injuries sustained by an employee in been worn off, were not observable to 866. one standing on the ground, and that 'Where a brakeman attempted to unthe deceased had no knowledge of the couple a car at night, with knowledge of conditions, notwithstanding that he did the absence of its drawhead and that it not use gloves, it appearing that none was coupled with an iron chain, and was were used by the employees of the telegraph company. Dwyer v. Buffalo Gencars, an action may be maintained for eral Electric Co. (1897) 20 App. Div. his death unless he also knew that the 124, 46 N. Y. Supp. 874. Where the deadwood, bumpers, and crossbeam, evidence on the part of plaintiff tends which, if in place and in proper condito show that he was never before in that tion, were sufficient to hold the cars particular part of a room where he was apart, were lost or worthless for the injured by coming into contact with purposes intended. Harney v. Missouri machinery which he did not see, owing P. R. Co. (1899) 80 Mo. App. 667. to the obscurity; that he had no actual In Illinois Steel Co. v. Schymanowski

ing a sapling that has been bent across knowledge of the location of the masuch knowledge,—a finding of the jury son v. Schwabacher (1893) 99 Cal. 419, 34 Pac. 104.

Where a servant comes to his death by v. Wrought Iron Range Co. (1893) 4 inhaling poisonous gases permitted to escape by the negligence of the master, A mine employee, who has been in- while obeying an order of the master to shortened the period of his exposure by ascending to the place of danger on a longer ladder than the one he used. O'Brien (1886) 118 Ill. 174, 8 N. E. 310.

Evidence that plaintiff had said soon gence on the part of a lineman killed by after the accident that he knew that the a shock from an electric current received hole into which he fell was there is adfrom a wire he took up with his bare missible, not only to contradict his testihands is for the jury, where he had, mony that he did not know of it, but to shortly prior thereto, seen another per- show his knowledge thereof. Barker v. son handle the wire without injury. Laurence Mfg. Co. (1900) 176 Mass.

work on a telegraph pole was guilty of coupling cars, avers that the injury was contributory negligence precluding recov- occasioned by stumbling over certain ery for his death due to a shock of elec-rubbish left on the tracks, which comtricity communicated through an iron plainant had requested the company to brace on the pole from an electric-light remove, and which he supposed had been wire not borne by the pole, but which removed, and that, being between the came in contact with the brace, is for cars, he could not see the rubbish when the jury upon the evidence that the facts he was injured, is not defective, as showthat the electric-light wire and brace ing that the employee was negligent. were in contact, and that the insulation Pittsburgh, C. C. & St. L. R. Co. v. Elof the wire at the point of contact had wood (1900) 25 Ind. App. 671, 58 N. E.

crushed between the ends of the two

An instruction on contributory negligence is not required where there is no evidence that the servant had any knowledge of such defective condition.<sup>5</sup> But it is not error to leave a case to the jury under those circumstances with instructions that, if the servant knew of the defect and comprehended that it was dangerous to attempt to perform the duty which he was engaged upon when the injury was received, unless he took certain precautions, he was guilty of contributory negligence if, notwithstanding his knowledge, he undertook to perform the duty in question without observing the proper precautions.6

Where the servant was not chargeable with notice of the fact that the circumstances under which the course of action prescribed by the rule was to be followed had arisen at the time when the accident occurred.7

320. — and understood the dangers created by those conditions.— In cases where the servant's knowledge of the conditions is not disputed, or is so apparent that a jury cannot be permitted to declare that he did not know of them, the essential question is whether he also comprehended the danger to which those conditions would subject him, if he pursued a certain course of conduct. Whenever the evidence is not such as to justify a court in saying that only an affirmative answer can be rendered to this question, it is for the jury to determine the quality of his act.1

(1896) 162 Ill. 459, 44 N. E. 876, the firming (1900) 91 Ill. App. 171, it was court, after remarking that the servant held that negligence was not predicable, court, after remarking that the servant usually "assumes" the risks of the servant is not case as increased by a known defect, a brakeman who transgressed a rule of states that this rule is subject to the the company in descending a moving car qualification that "the servant is not on the side towards a coal chute, the evicangeable with contributory negligence" if he knows that defects exist, but does not know, actually or constructively, that risks exist. See § 298a, ante. But as the actual ruling was that "Collins v. Greenfield (1898) 172 the plaintiff's knowledge of the insufficiency of the lights furnished for work on a dark and stormy night did not indicate that he knew of the unset on the side towards a coal chute, the evidence being such that it was not certain that he knew or ought to have known that risks exist. See § 298a, ante.

1 Collins v. Greenfield (1898) 172 the plaintiff's knowledge of the insufficiency of the lights furnished for work on a dark and stormy night did not indicate that he knew of the untestimony not contradicted); Chicago & safe condition of the pile of ore and of E. I. R. Co. v. Knapp (1898) 176 Ill.

that not indicate that he knew of the air testingly hot contributed, of the pile of one and of E. I. R. Co. v. Knapp (1898) 176 Ill. the risk in working near it, it is plain 127, 52 N. E. 927, Affirming (1897) 74 that the decision might better have been Ill. App. 148; Leonard v. Minneapolis, put on the ground that the material conditions creating the danger were not Minn. 489, 65 N. W. 1084; Sneda v. fully known to him.

St. P. & S. Ste. M. R. Co. (1896) 63 ditions creating the danger were not Minn. 489, 65 N. W. 1084; Sneda v. Libera (1896) 65 Minn. 337, 68 N. W. \*\*Denver Tramway Co. v. Crumbaugh 36; Wuotilla v. Duluth Lumber Co. (1897) 23 Colo. 363, 48 Pac. 503. (1887) 37 Minn. 153, 33 N. W. 551; 

\*\*Herrick v. Quigley (1900) 41 C. C. Pruke v. South Park Foundry & Mach. A. 294, 101 Fed. 187. (Co. (1897) 68 Minn. 305, 71 N. W. 276; A. 294, 101 Fed. 187. Co. (1897) 68 Minn. 305, 71 N. W. 276;

TIN Chicago & A. R. Co. v. Stevens Durant v. Lewington Coal Min. Co.
(1901) 189 Ill. 226, 59 N. E. 577, Af- (1888) 97 Mo. 62, 10 S. W. 484; Victor

The instructions should be couched in such language as to make it clear to the jury that the servant cannot be precluded from recovering on the ground of contributory negligence, unless he was chargeable with a knowledge not only of the defective conditions, but also of the dangers created by those conditions.2

Coal Co. v. Muir (1894) 20 Colo. 320, only when the danger was visible and 26 L. R. A. 435, 38 Pac. 378; Greenleaf avoidable, so that a man with ordinary v. Dubuque & S. C. R. Co. (1871) 33 care of his own safety would avoid it, Iowa, 58; Crocker v. Banks (1888) 4 and be chargeable with want of ordinary Times L. R. 324 (girl in soda-water care if he did not. Lord Young in factory failed to protect her face by a Grant v. Drysdale (1883) 10 Sc. Sess. factory failed to protect her tace by a mask); Bartolomeo v. McKnight (1901) 178 Mass. 242, 59 N. E. 204 (unshored trench); Scott v. Springfield (1899) 81 Mo. App. 312 (side of trench fell in, owing to the bursting of a water pipe which was caused by blasting in the neighborhood); Hobbold v. Chicago Sugar Ref. Co. (1892) 44 Ill. App. 418 (dust and refuse matter, not being thoroughly removed from a kiln, ignited and

not, as a matter of law, guilty of negligence in using a wooden crane and chain furnished him for holding up heavy matter while working thereon, instead of on the car, sufficiently states a cause of using trusses, while working upon a action, since the servant is not bound to shaft much heavier than usual, or in allege his ignorance of the defect in the

damages for personal injuries sustained by a machinist who was engaged to rewhere at the time of the accident he was at work on machinery, facing another workman, with his back to a passenger is not inconsistent with the absence of elevator, and was caught and pressed against the crossbar of the freight elevator by the elongation of the pieter. of the other elevator, which he testified he did not know was dangerous, or he

i. e., unnecessarily, encounters a seen ages, is properly modified by adding the danger, which by or linary care and at-conditional clause, "if he appreciated tention to his own safety, he might have the danger, or in the exercise of reasonavoided, shall not recover, is applicable able diligence ought to have been aware

Cas. 4th series, 1159.

A servant is not guilty of contributory negligence where, owing to the lack of instruction, he does an act which he does not know to be likely to injure him. Cleveland Rolling Mill Co. v. Corrigan (1889) 46 Ohio St. 283, 3 L. R. A. 385, 20 N. E. 466, the court remarking: "Ignorance may be a misfortune, but when it is not wifful, and no duty arises (dust and refuse matter, oughly removed from a kiln, ignited and exploded when water was thrown on it); Gulf, C. & S. F. R. Co. v. Newman mation at hand, it is not negligence of (1901; Tex. Civ. App.) 64 S. W. 790 which the person charged with the duty (rod was used to lift off the balance wheel of an engine and set the machin
wheel of an engine and set the machin
complain or take advantage."

A complaint alleging that plaintiff,

A complaint alleging that plaintiff, while engaged in unloading boxes from a dump car, was injured by their having been carelessly and negligently placed shaft much heavier than usual, or in allege his ignorance of the defect in the standing close to it while supervising machinery, but merely his ignorance of the work. Nicholds v. Crystal Plate the risk of using it. Devore v. St. Louis (ilass Co. (1894) 126 Mo. 55, 27 S. W. & S. F. R. Co. (1900) 86 Mo. App. 429.

A general allegation that the plaintiff

The question of contributory negli- was free from contributory negligence is gence is for the jury in an action not overthrown by a specific averment of against an elevator proprietor to recover facts, unless they show that he knew, or had opportunity to know, of the danger. Salem Stone & Lime Co. v. Griffin (1894) 139 Ind. 141, 38 N. E. 411.

314.

<sup>2</sup> A requested instruction that an emwould not have worked there. Kann v. ployee who voluntarily puts himself in Meyer (1898) 88 Md. 541, 41 Atl. 1065, a place of danger, and is injured in con-The rule that a man who voluntarily, sequence thereof, cannot recover dam-

In determining whether the danger was comprehended, it is, of course, material to consider the extent of the servant's experience. See chapter xx1., post. And compare §§ 394-397, post. Ordinarily, a servant who possesses special skill and experience will be unable to recover damages for an injury caused by his improper handling of an appliance with the properties of which he may be presumed to be perfectly well acquainted.3 On the other hand a dangerous mode of dealing with an appliance does not necessarily betoken negligence, where the servant was unfamiliar with the instrumentality which he was required to use.4

Another element for consideration in this connection is the opportunity which the servant may have had for acquainting himself with the peril incident to the situation which led to his being injured. See chapter xxi., post, and compare §§ 401-404, post.

## 321. Unexpected situations; negligence not predicable in regard to.—

testate's contributory and preterdard in a particular way, and pretermitting all inquiry as to the fact of whether or not he had knowledge that sets were negligent, are erroneous.

\*\*Jones\*\* (1901)\*

\*\*J

It is not error to charge that though v. Southern P. Co. (1901) 23 Utah, 94, the appliance was defective, and plaintiff knew, or by the use of ordinary care could have known, of the defect, yet, if the danger was not apparent, and would not have been apparent to him by the use of ordinary care, then he would not be guilty of negligence in trying to use of ordinary care, then he would not be guilty of negligence in trying to use ciently acquainted with the piling of it, if he otherwise used reasonable care. Important of the fall way is liable to fall. Pilling v. (1899) 21 Tex. Civ. App. 579, 54 S. W. Narragansett Mach. Co. (1896) 19 R. I. 666. 36 Atl. 130. Whether an inexperi-

of it." Murphy v. City Coal Co. (1899) nounced objectionable on the ground 172 Mass. 324, 52 N. E. 503. that it did not direct the attention of Instructions which predicate the in-the jury to the necessity of proving that testate's contributory negligence on his the servant was chargeable with a com-doing certain acts, with which he was prehension of the dangers created by the

10 Ala. 456, 30 So. 586.

Lizzie Frank (1887) 31 Fed. 477; Hill It is not error to charge that though v. Southern P. Co. (1901) 23 Utah, 94,

17. 666, 36 Atl. 130. Whether an inexperi-In an action for injuries caused by a enced person set to work at a planer, defective machine, it was held to be im- and injured while attempting to reproper to instruct a jury that, if they move the shavings when the machine found that the servant was negligent was in operation, was guilty of contrib-and that his negligence was the direct utory negligence, is a question for the cause of his injury, then, even though jury. Bennett v. Warren (1901) 70 this machinery was defective, the serv- N. H. 564, 49 Atl. 105. It is prop-ant was not entitled to recover if he er to instruct that in determining knew of the defects. The position of the whether an employee injured by put-court was that, under such an instructing his hand in a linter to remove tion, the servant's negligence would only motes, as he had seen others do, was neguon, the servant's negligence would only motes, as he had seen others do, was negdefeat recovery in case he knew of the ligent, the breast board of the linter defects, which is not the law. Chrishaving been caused to jump by an actions on v. Pioneer Furniture Co. (1896) cumulation of motes, of which he was 92 Wis. 649, 66 N. W. 699. It would unaware, his inexperience may be conseem, however, that such an instruction sidered. Hillsboro Oil Co. v. White might have been more properly pro- (1899; Tex. Civ. App.) 54 S. W. 432.

Where the injury resulted solely from abnormally dangerous conditions of an essentially temporary and sporadic character, or from such conditions operating in combination with permanent defects in the plant, the absence of contributory negligence may often be referred to the conception that the situation which thus supervened was not one which the servant was required to anticipate.1

swerable at law for failure to avert or ing recovery for his death from being avoid peril that could not have been crushed between such post and car, owforeseen by one in like circumstances, ing to the sudden and violent striking of and in the exercise of such care, as other cars against the standing car, would be characteristic of a prudent Murray v. Fitchburg R. Co. (1896) 165 person so situated." Turner v. Golds- Mass. 448, 43 N. E. 190. The consider-boro Lumber Co. (1896) 119 N. C. 387, ations emphasized were that the em-

sion and deaden his sense of hearing, which thus caused the injury were unhis grasp and change his position. usual. Jeffrey v. Keokuk & D. M. R. Floettl v. Third Ave. R. Co. (1896) 10 Co. (1881) 56 Iowa, 546, 9 N. W. 884. App. Div. 308, 41 N. Y. Supp. 792. The In a case where defendant's tracks at a decision on the second appeal (1897) 19 certain point in a yard were frequently App. Div. 136, 45 N. Y. Supp. 980, was certain point in a yard were frequently covered with smoke, and plaintiff's decedent was on a hand car which proceeded along the main track through the smoke, behind an incoming train, side a machine for the purpose of cleanand collided with a switch engine which ing it is not, as matter of law, guilty

utory negligence, as matter of law, in prevent his recovery for injuries from attempting to pass between a bunting the sudden starting of the machine by post and a standing car about 3 feet distant, upon which the brakes were set, intendent of the factory, where he is not

1 "A person is not culpable and an- in the performance of his duty, precludployee had no reason to anticipate such A car repairer is not, as matter of an accident, that the route taken was law, guilty of contributory negligence in apparently a safe one, and that cars applacing a plank a foot wide edgewise on proaching the stationary ones could not his shoulder next to cars on a side track be seen on account of a curve. One crossed by him, so as to cut off his vi-working in a shallow trench under the tracks of a cable-car line in reliance upwhere he had good reason to believe that on the assurance of his superior that no such cars would not be moved because car will pass over the place where he is of the presence of a flag showing that working is not, as matter of law, guilty they were being repaired. Southern P. of contributory negligence in instinctive-Co. v. Wellington (1896; Tex. Civ. ly placing his hand on the track under a App.) 36 S. W. 1114. In a case where a car in consequence of the vibration of servant was thrown off a car in a work the cable near his head, in the absence train by a sudden jerk resulting from of timely notice to him of the approach the fact that a car was cut off behind of the car, or of knowledge on his part and more steam put on it is not error to that the car having stanged would recommend the standard would be st and more steam put on, it is not error to that the car, having stopped, would proallow him to show that the occurrences ceed in its transit before he could relax put upon a different ground. See § 360,

came on to the same track from the op- of negligence, so as to be unable to reposite direction, immediately after the cover for injuries caused by the machine incoming train had passed, it was held starting of itself, when she had never that a charge which purported to show known it so to start, although she did all the circumstances which, if proved, know that other machines equipped with would prevent recovery, was properly re-other pulleys and belts had started in fused, for the reason that it made no this manner. Donahue v. Drown reference to the unusual speed of the (1891) 154 Mass. 21, 27 N. E. 675. An switch engine in coming out on to the employee is not, as matter of law, guilty main track. Woodward Iron Co. v. of negligence in proceeding to oil a ma-Herndon (1901) 130 Ala. 364, 30 So. chine, in accordance with orders and in the usual manner, while the belt is off An employee is not guilty of contrib- from the machine for repairs, which will

322. Incurring of known danger; negligence not necessarily predicable with regard to.— (Compare § 341, note 1, infra.)—The cases to which the principle discussed in the last three sections is exclusively applicable are those in which it is assumed not only that the dangers in question were avoidable if the servant had acted prudently after he had become aware of them, but also that they were such as no prudent man would have encountered. It cannot be laid down as a universal rule that knowledge of a danger is conclusive evidence of negligence in failing to avoid it,1 or that the fact that the servant vol-

ger where there was no reason to suspect ercise of due care. Murphy v. Greeley it. Winkelmann & B. Drug Co. v. Colla- (1888) 146 Mass. 196, 15 N. E. 654. it. Winkelmann & B. Drug Co. v. Colladay (1898) 88 Md. 78, 40 Atl. 1078. round and facing the machine, which was working regularly, where this mait was about to do so. Denning v. Midvale Steel Co. (1899) 192 Pa. 182, 43 (1869) 102 Mass. 572, 3 Am. Rep. 506.

aware that such superintendent has Atl. 965. Whether an employee was come with another belt and has no intiguilty of contributory negligence in not mation that he is about to put the machine in motion, and, because of his anticipating and avoiding injury is a question of fact for the jury to deterstooping position and the attention required by his work, he does not see the of steel projected from the worn edges superintendent come into the room, or of a claw-bar used in his employment, the belt put on. Hughlett v. Ozark when it was struck a blow with a ham-Lumber Co. (1893) 53 Mo. App. 87. mer. Booth v. Kansas City & I. Air That a machine which an employee is Line (1898) 76 Mo. App. 516. The repairing is set in motion by power comforeman in a dimly lighted kiln room, municated by him to any part thereof whose duty requires him to keep the municated by him to any part thereof whose duty requires him to keep the does not prevent a recovery for an in- shafting clean and oiled, is not, as matjury which would not have happened ter of law, guilty of contributory neglibut for the fact that the power was on gence in getting so close to an unguardwithout his knowledge, and contrary to ed shafting that his clothing is blown in-his reasonable expectation. *Martineau* to it by a draft of wind, while he is at-v. *National Blank Book Co.* (1896) 166 tempting to discover by means of his Mass. 4, 43 N. E. 513. An employee en- hearing the exact location of a squeakgaged in driving piles is not, as a mat- ing noise in the shafting. Knuth v. gaged in driving piles is not, as a matter of law, guilty of negligence in plac-ing his hand on the top of a pile, direct-ly in the line of descent of the driving penter in leaving the building where he hammer 5 feet above his hand, while he is working, by a dark passageway, be-is swinging the pile into position, as the comes confused as to his whereabouts fall of the hammer at such time is not and falls through an opening in the to be expected. McPhee v. Scully floor, testimony going to prove that it is (1895) 163 Mass. 216, 39 N. E. 1007. not the custom of builders to light up One who, as was customary, inclined such openings in a building which is unhis head within an elevator shaft to hear der construction is competent, in connection orders given from another floor, and was tion with testimony as to the carpenter's injured by the fall of an unloaded dumber experience in such work, since it tends waiter, is not guilty of contributory neg-ligence because he did not look for dan-and therefore whether he was in the ex-

A plea is sufficient as an allegation of An experienced machinist did not, as contributory negligence, where it states matter of law, voluntarily assume the that the plaintiff went under a car at danger from flying chips of steel from nighttime to repair it, without putting his machine by leaving the head of the out a signal flag or notifying anyone, machine and going to a lunch box some when he knew, or ought to have known, 8 or 10 feet distant, and then turning that cars would "probably" be switched at any moment on to the side track was working regularly, where this mawhere the car was standing. Alabama chine only threw chips occasionally, and G. S. R. Co. v. Roach (1895) 110 Ala. gave notice by its irregular action when 266, 20 So. 132. See also § 355, infra. 1 Coombs v. New Bedford Cordage Co.

untarily took some risk is conclusive evidence, under all circumstances, that he was not using due care.2

His knowledge of the abnormal conditions is only one of the probative facts from which the ultimate fact of negligence must be determined.3 That he exposed himself to dangers which he could have avoided imports negligence only where they were so great or so imminent that a man of ordinary prudence would have refused to encounter them in the performance of his duty.4 But if a servant is advised of a particular danger, and of the proper precautions to avoid it, it is no excuse for a negligent exposure of himself to this danger, or for a negligent omission of such precautions,

A special finding to the effect that the plaintiff, by the exercise of ordinary part of a servant to attempt, in compliprudence, could have known that it was ance with a request, to repair a machine dangerous to do work in a certain way is which is out of order. Martineau v. not necessarily inconsistent with a gen-National Blank Book Co. (1896) 166 eral verdict against the defendant. Mass. 4, 43 N. E. 513. eral verdict against the defendant.

Barnes v. Rembarz (1894) 150 III. 192, An employee is not charge in a negligence in respect to working in a

a brakeman was injured by the overlapping of drawheads, it was held that the proper place. Kaiser v. Flaccus following instruction was properly modi- (1890) 138 Pa. 332, 22 Atl. 88. following instruction was properly modified by the insertion of the clause in The fact that a servant knows there brackets: "If the plaintiff knew that is some danger in passing over stairs the drawbars were of unequal height, slippery with ice does not, as a matter and that there was danger of their passquired of him, and it was necessary that infra. the cars should be moved quickly to have to pass each other before the car of that issue. The complete facts of and engine would come so near together each case must be noted to determine as to injure him, the speed at which the engine was moving, the knowledge he knowledge should have." Alcorn v. that the engineer knew the danger, the confidence he was entitled to have that the engineer would so manage the engine as not to injure him, the reliance the hobs (1891) 3 Ind. App. 445, 29 N. E. Hobbs (1891) 3 Ind. App. 445, 29 N. E. he was reasonably entitled to place upon 934. his ability to make the connection so as to prevent the bunters passing, and probably other circumstances."

37 N. E. 239.

\* negligence in respect to working in a 

\* In Lawless v. Connecticut River R. dangerous place, merely because he Co. (1883) 136 Mass. 1, a case in which works under a running belt, if there is nothing more to indicate that it is not a

of law, show that he is negligent in ating each other [and knew the probabil-tempting to make the passage. To war-ity and extent of the danger thereby], rant the court in pronouncing him to be and rode upon the platform of the en- negligent, it must appear that he knew gine when about to make the coupling, that the stairs were so slippery that it then he was not in the exercise of due would be careless to try to use them. care. The court said: "The plaintiff Mahoney v. Dore (1892) 155 Mass. 513, was engaged in performing the duty re- 30 N. E. 366. See also § 341, note 17,

's Sanborn v. Madera Flume & Trading make way for an expected train. If the Co. (1886) 70 Cal. 261, 11 Pac. 710. plaintiff had the knowledge supposed in "Knowledge of a danger possessed by a the requests for instructions, the ques- given person whose conduct comes into tion of his due care depended to some question forms a very important element extent upon the view the jury might to consider in ascertaining whether his take of his necessity for immediate according in its presence was careful, or the tion, the distance the bunters would reverse, but it is not always conclusive have to pass each other before the car of that issue. The complete facts of

that he did not realize the full magnitude of the injury which would result therefrom.5

323. Servant's negligence not a bar to his action unless it was an efficient cause of his injury.—(See also chapter XI.II., post.)—In one case it was said that a "servant takes the chances of his own negli-In another it was laid down that a servant assumes the risk of his own negligence.2 In others the availability of the defense of contributory negligence has been referred to the theory of an implied undertaking on the servant's part to exercise reasonable care to avoid injury.3 But it seems to be unnecessary, if not logically erroneous, to introduce in this connection, the notion of a duty resting upon a contract.4 submitted that there is no adequate reason for taking the position that the defense of contributory negligence, when viewed as a bar to an action by a servant against his employer, is based upon a conception different from that to which it is always referred when the action is brought by or on behalf of a party between whom and the defendant there were no contractual relations at the time the accident occurred,—the conception, namely, that no one is entitled to recover an indemnity for an injury of which his own want of care was, either wholly or partially, the efficient cause.<sup>5</sup> This incapacity may be treated as being deducible from one or other of two possible theories of the juristic situation.

On the one hand the servant's negligence may be regarded as an efficient cause, in such a sense that the injury would have been avoided if he had not been negligent. This point of view is apparent in those numerous cases in which the servant has been declared or denied to have been guilty of contributory negligence, according as he could

<sup>2</sup> Malcolm v. Fuller (1890) 152 Mass. 160, 25 N. E. 83.

<sup>3</sup> Lake Shore & M. S. R. Co. v. McCormick (1881) 74 Ind. 440; Pittsburgh, C. & St. L. R. Co. v. Adams (1886) 105 Ind. 152, 5 N. E. 187.

<sup>4</sup> The doctrine propounded in the cases

"The plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty Y. 188, sub nom. Stringham v. Stewart, of any negligence or want of ordinary 1 L. R. A. 483, 18 N. E. 870. dent." Radley v. London & N. W. R. Co. (1876) L. R. 1 App. Cas. 754, 46 L. J. Exch. N. S. 573, 35 L. T. N. S. 637, 25 Week. Rep. 147, per Lord Penzance.

"Contributory negligence in a plain-tiff only means that he himself has conwhich the defenses of assumption of risks and contributory negligence have sometimes been treated by the courts. See chapter XVIII., subtitle B, ante.

See 1 Beven, Neg. pp. 168 et seq.; Shearm. & Redf. Neg. § 63. tributed to the accident in such a sense

<sup>&</sup>lt;sup>5</sup> Truntle v. North Star Woolen-Mill Co. (1894) 57 Minn. 52, 58 N. W. 832. <sup>1</sup> Stringham v. Hilton (1888) 111 N. 1 L. R. A. 483, 18 N. E. 870.

or could not have prevented the accident by the exercise of proper care.6

On the other hand the inability of a servant to recover for an injury to which his own negligence contributed may be put upon the ground that, under such circumstances, the injury was the result partly of the negligence of the master and partly of the negligence of the servant, the consequence being that, as they have each been in fault, neither is entitled to recover damages from the other.<sup>7</sup>

Evidence as to the servant's negligence, which could have no bearing on the case if the injury was caused as alleged, is immaterial on the question of contributory negligence.8

The question whether the plaintiff's negligence was an efficient

Contributory negligence on the part of an employee injured through the employer's negligence is the want of ordinary care and prudence, without which the injury would not have occurred. Bomar v. Louisiana, N. & S. R. Co. nary care on part of the employer; and the injury is not so caused when it is caused by the want of ordinary care on part of the employer, complete with want of ordinary care on part of the employer. It is clear the American and colonial statutes modeled upon it, in which a servant is declared to be entitled to recover for an injury "caused" by a defective condition of the plant (see chapter XXXVII., post), it is clear there can be no recovery by either parthat the situation thus indicated does the condition of the part of the employee. If it took the employer and employee to produce the injury, both are at fault, and there can be no recovery by either. Where both parties are negligent, and the injury is defective condition of the plant (see chapter XXXVII., post), it is clear there can be no recovery by either parthat the situation thus indicated does the condition of the parties are negligent, and the injury is defective condition of the plant (see chapter XXXVII., post), it is clear there can be no recovery by either parthat the situation thus indicated does the condition of the parties are negligent, and the injury is not so caused when it is caused by the want of ordinary care on part of the employer; and the injury is not so caused when it is caused by the want of ordinary care on part of the employer. If it took the employer and employee to produce the injury, both are at fault, and there can be no recovery by either parthat the situation thus indicated does the condition of the employer; and the injury is not so caused by the want of ordinary care on part of the employer. If it took the employer are on part of the employer. If it took the employer are on part of the employer. If it took the employer are Contributory negligence on the part of not exist where the immediate cause of the accident was the servant's own negrous.

E. 725.

"A defense of contributory negligence "A defense of contributory negligence "A defense of contributory negligence". ligence. See Martin v. Connah's Quay
"A defense of contributory negligence
Alkali Co. (1885) 33 Week. Rep. 216, is only an amplified form of denial that where this specific ground was assigned the injury was caused by the negligence for denying recovery in a case where the of the defendant." M'Evoy v. Water-plaintiff signaled for the starting of a ford S. S. Co. (1886) Ir. L. R. 18 C. L. locomotive before a brake, known to 159, 165.

him to be defective, had been prepared

To entitle a servant to recover, he

from negligence it always was a defense Fed. 880 (charge to jury). that the plaintiff had failed to show \*Consolidated Coal Co. that the plaintiff had failed to show some consolidated Coal Co. v. Bokamp that, as between him and the defendant, (1898) 181 Ill. 9, 54 N. E. 567, Affirmthe injury had happened solely by the ing (1897) 75 Ill. App. 605. defendant's negligence. If the plaintiff, by some negligence on his part, directly

See, for example, Washington & G. contributed to the injury, it was caused R. Co. v. McDade (1890) 135 U. S. 554, by the joint negligence of both, and no 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; longer solely by the negligence of the Smith v. Irwin (1889) 51 N. J. L. 507, defendant." Lord Esher in Thomas v. 18 Atl. 852; Michael v. Stanley (1892) Quartermaine (1887) L. R. 18 Q. B. 75 Md. 464, 23 Atl. 1094; Louisville & Div. 685, 688, 56 L. J. Q. B. N. S. 340, N. R. Co. v. Fox (1897) 20 Ky. L. Rep. 57 L. T. N. S. 537, 35 Week. Rep. 555, 81, 42 S. W. 922.

"To warrant a recovery, it must ap-

for use by a temporary device.

"In an action for injuries arising in fault. Sunney v. Holt (1883) 15

cause of his injury is for the jury when the facts are in dispute, or more than one conclusion may reasonably be drawn from those facts.9

Otherwise, this question is for the court. See cases cited under next section.

The instructions in any case in which the defense of contributory negligence is relied upon should be couched in phraseology which will make it clear to the jury that, on the one hand, the servant cannot maintain the action if his negligence was an efficient cause of his injury, and that, on the other hand, his negligence will not debar him from recovery, unless it was an efficient cause of his injury.<sup>10</sup>

An independent act of negligence on the servant's part, subsequent

App. 654, 73 Fed. 642, where a brakeman who had, in violation of a sonably have found, from the evidence rule, attempted to couple cars while in motion, caught his foot in an unflocked frog, and was run over, the from the dangers which he had reason court said that the question presented to anticipate, and, therefore, that his was whether the intervention of the unblocked frog was, as distinguished from the dangers which he had reason court said that the question presented to anticipate, and, therefore, that his negligence did contribute to the accident, as a proximate cause. Hence the question of proximate cause should have been submitted to the jury."

10 It is proper to give an instruction that it was the sole proximate cause: in the effect that contributory peglically. and independent a cause of the injury in It is proper to give an instruction that it was the sole proximate cause; to the effect that contributory negliand proceeded thus: "Much reliance gence by an employee precludes recovery an adjacent building fell on him and he he cannot recover,—is not objectionable was injured. The supreme court of eras tending to confuse or mislead the

<sup>9</sup> Lake Shore & M. S. R. Co. v. Parker rors of Connecticut held that his negli-(1890) 131 III. 557, 23 N. E. 237. gence in not heeding the warning was It is for the jury to say whether there not contributory to the injury which is a causal connection between the happened to him. The case is easily breach of a rule which required that em-ployees who entered the blow-pit of a There the injury which happened propulpmill for the purpose of washing the ceeded from a manifestly different cause pulp should shovel the pulp off the from that which the plaintiff had been plank walk on which they stood while warned against, and, while he might doing the washing, and an injury which have assumed the risk from the one, he one of such employees received through did not assume the risk from the other. being forced off the walk into the pulp Here, if the jury were to find that the by a jet of steam from the blow pipe, accident, as it happened, by the catching which would have been cut off by the of the foot in the frog, was entirely dif-time he came opposite the pipe if he had ferent in its character from that which proceeded in the first place to shovel the plaintiff might have expected by off the pulp. Fickett v. Lisbon Falls falling over any obstruction, or by slip-Fibre Co. (1898) 91 Me. 268, 39 Atl. ping, they would be at liberty to do so, and to find that his negligence in going In Lake Erie & W. R. Co. v. Craig between two rapidly moving cars was not (1896) 19 C. C. A. 631, 37 U. S. a proximate cause of the accident. All App. 654, 73 Fed. 642, where a brake that we hold is that the jury might rea-

was placed by the defendant in error on for personal injury resulting in part the case of *Smithwick* v. *Hall & U. Co.* from the employer's neglect of his duty (1890) 59 Conn. 261, 12 L. R. A. 279, 21 to use ordinary care to provide suitable Atl. 924 (see § 324, note 2, infra). In and safe machinery. Mulligan v. Monthat case a workman had been warned tana Union R. Co. (1897) 19 Mont. 135, not to go to the end of an unfenced plat- 47 Pac. 795. A charge that, if the form, because of the danger of slipping plaintiff, in doing the act which he was on the ice which was there, and falling engaged in when the accident occurred, off to the ground below. He went there, was negligent, and if, but for such neg-nevertheless, and while there the wall of ligence, he would not have been injured,

in point of time to the accident, and not committed in the discharge of his duties, is not regarded as a circumstance which interrupts the chain of causation between the employer's negligence and the final results of that negligence.11

The mere fact that, if the servant had not done a certain act, he would not have been injured, is, of course, not a bar to his mainte-

jury. Texas & P. R. Co. v. McCoy Delaware, L. & W. R. Co. (1895) 92 (1897) 17 Tex. Civ. App. 494, 44 S. W. Hun, 74, 36 N. Y. Supp. 339.

charge that he could not recover, if it contributed directly and proximately' thereto. Houston & T. C. R. Co. v. Higgence only contributed to the injury. S. W. 744.

Deeds v. Chicago, R. I. & P. R. Co. (1886) 69 Iowa, 164, 28 N. W. 488.

It is error to give a charge ignoring the effects of the plainties.

cannot recover if he failed to use ordinary care is erroneous. They should dated Coal Co. v. Bokamp (1899) 181 be told that his action is barred, and Ill. 9, 54 N. E. 567, Affirming (1897) 75 then only when his negligence was the Ill. App. 605.
proximate cause of the injury. Smith In Texas an instruction to the effect v. Irwin (1889) 51 N. J. L. 507, 18 Atl. that, if the plaintiff was running his en-852; Farley v. Charleston Basket & Veneer Co. (1897) 51 S. C. 222, 28 S. E. was derailed and injured him, he cannot 193, Rehearing Denied in (1897) 51 S. recover, has been declared erroneous C. 244, 28 S. E. 401; Savannah, F. & W. both on the ground that the trial judge R. Co. v. Barber (1883) 71 Ga. 644; cannot, in that state, declare that any Youngblood v. South Carolina & G. R. Co. (1900) 60 S. C. 9, 38 S. E. 232; Co. (1900) 60 S. C. 9, 38 S. E. 232; and on the ground that it allows the Lowrimore v. Palmer Mfg. Co. (1900) jury to find for the plaintiff irrespective 60 S. C. 153, 38 S. E. 430; Bonner v. of whether the excessive speed was the Moore (1893) 3 Tex. Civ. App. 342, 22 cause of the injury. Gulf, C. & S. F. R. S. W. 272; Gulf, C. & S. F. R. Co. v. Co. v. John (1895) 9 Tex. Civ. App. 342, 29 S. W. 558; Houston & T. C. R. Co. v. S. W. 558; Houston & T. C. R. Co. v. Co. v. The fact that a servant, in an ackellcy (1896) 13 Tex. Civ. App. 1, 34 ion against the master for personal instruction that negligence on the part of an employee contributing to his diseased convert of an employee contributing to his diseased convertibuting to his dise

part of an employee contributing to his diseased condeath will not prevent a recovery damages for the original injury, but is against the employer for his negligence, merely a ground for reducing the where death would have occurred if amount of damages. Standard Oil Co. there had been no negligence on the v. Bowker (1895) 141 Ind. 12, 40 N. E. part of the former, is correct. Kuhn v. 128,

A charge given that, if plaintiff's con-An instruction to the effect that if a duct was the "efficient cause" of the acrailroad employee is injured solely on cident, he could not recover, is not sub-

negligence, where evidence is offered the roof of a tunnel, and the only negli-which tends to sustain the defense. gence alleged on his part to which the Meredith v. Cranberry Coal & I. Co. instruction could apply was that he (1888) 99 N. C. 576, 5 S. E. 659; Louis- tried to operate too long a train of cars, instruction could apply was that he ville & N. R. Co. v. Robinson (1868) 4 it is proper to refuse to charge the jury Bush, 507.

An instruction which tells the jury that plaintiff did any careless or negliwithout qualification that the servant gent act which materially contributed to

gine at a forbidden rate of speed when it act or omission constitutes negligence, and on the ground that it allows the jury to find for the plaintiff irrespective

nance of an action if that act was not a culpable one, considering the circumstances.12

324. Illustrative cases turning upon proximity of cause.— Under one or other of the aspects mentioned in the last section the negligence of the injured servant has been declared or denied to be a bar to his action, on the explicit ground that it was or was not the proximate cause of the injury, in various cases presenting circumstances which bring them under one or other of the categories of culpable conduct enumerated in the next subtitle. The same principle is, of course, impliedly recognized in all the other decisions cited in this chapter.

In a portion of the cases the servant's negligence, which is affirmed or denied to have been the efficient cause, consisted merely in a breach of his general duty to conduct himself as a prudent person would have done under the circumstances.<sup>1</sup> In other cases the servant is charge-

caught between the deadwoods, assumes the risk, and cannot recover because the track was not ballasted, although this made it more difficult to reach the pin and drawbar, Mueller v. Lake Shore & M. S. R. Co. (1895) 105 Mich. 487, 63 N. W. 416. A railroad company is not liable for the death of a brakeman because of its failure to provide whipping injuries which would not have been susstraps for the purpose of giving warning tained but for the concurring negligence

12 A delay of a brakeman, to put on of the approach to a bridge, where there his overcoat and gloves,—rendered necessary by the weather,—after being ordered erect at the center of the car where a to the top of the cars by the conductor, brakeman's duties require him to be, is not negligence contributory to injuries received while climbing a ladder at the condition of the bridge, and was the side of the car, from a rock projecting to onear the track, although by incar with his feet hanging over the edge stant obedience he might have reached the roof before the car passed the obstruction. Georgia P. R. Co. v. Davis (1891) 92 Ala. 300, 9 So. 252.

105. A railroad employee who, while off duty, goes from the coach to the engine, (a) Recovery denied.—An experiduty, goes from the coach to the engine, enced section hand who, knowing the where neither necessity nor duty calls danger, releases his hold on the handle him, and, in negligently attempting to of a hand car upon which he is riding, return to the coach while the train is in which he knows to be necessary to sup- rapid motion on a sharp curve, falls beport his equilibrium, and steps upon the tween the engine and coach and is intrack in front of a moving car, and there jured, cannot recover against the comstands still or walks toward it,—is pany, even though the engineer was also guilty of such negligence as will pre-negligent or although the fall was clude his recovery, notwithstanding neg-caused by a defective air brake. Mc-ligence on the part of the railroad com-Daniel v. Highland Ave. & Belt R. Co. pany in supplying defective cars. Chi- (1889) 90 Ala. 64, 8 So. 41. A miner cago & N. W. R. Co. v. Davis (1892) 3 cannot recover for a personal injury due C. C. A. 429, 10 U. S. App. 422, 53 Fed. to the falling of a portion of the roof of a mine where he was working, when the A brakeman who stands with his left proximate cause was his omission to arm against a stationary car waiting perform his duty, after a blast, of examfor a moving car to come, and while feelining the roof and placing necessary ing for the coupling-pin has his arm props to support it, notwithstanding the mining boss employed did not have the certificate required by the Pennsylvania mining act of 1885, and a stretcher was not kept at the mine as required by the act. Christner v. Cumberland & E. I.. Coal Co. (1892) 146 Pa. 67, 23 Atl. 221. Contributory negligence on the part of the servant is a bar to his recovery for

of an incompetent fellow servant, with Mich. 72, 60 N. W. 286, Affirmed on Rewhich, in the absence of such contribu- hearing in (1894) 102 Mich. 79, 62 N. tory negligence, the master would have W. 1029. Negligence of a brakeman been chargeable. Craig v. Chicago & A. who has general charge of switching R. Co. (1893) 54 Mo. App. 523. Neglect cars, in leaving cars on a switch at a of an employee engaged in drilling holes place with which he is tamiliar, so near for blasting, to make an examination to to cars that pass on the main track that ascertain whether a blast had exploded he is afterwards crushed between them, in a hole which he was directed to clean has such a proximate connection with out, is the proximate cause of his injury the injury that no recovery can be had, by the explosion of such blast while he on account of his death, against the comis holding the drill in cleaning the hole, pany, although when killed he was enwhich will prevent his recovery, al-deavoring to climb upon cars in order to though the foreman directing the work stop them, after they had been kicked was also negligent in making examina- by an engine in disobedience to his ortion. Sexton v. Turner (1892) 89 Va. ders. Newman v. Chicago, M. & St. P. 341, 15 S. E. 862. A master is not lia- R. Co. (1890) 80 lowa, 672, 45 N. W. ble for injuries to an employee who, 1054 (continuing act of negligence, opwhile negligently attempting to shift a erative up to the time of the injury). belt upon a running shaft by hand, instead of using the belt shifter, was mon employment is abolished as to railcaused by the motion of the belt to step way companies the failure of a railway upon the outer edge of a platform which servant to extricate himself from a pertipped under his weight and precipitated ilous situation in which he is placed by him to the floor below, although the the negligence of a coemployee, when he master was responsible for the condition could do so by the use of ordinary care, of the platform. Fleming v. Buswell will prevent his recovering against the (1899) 39 App. Div. 196, 57 N. Y. Supp. company. Parker v. Georgia P. R. Co. 230. A servant who, after being warned (1889) 83 Ga. 539, 10 S. E. 233. against doing so, handles a telegraph engaged for eight or nine weeks in push- to jump off the train when it was moving a coal car into an elevator car which ing at from 8 to 15 miles an hour, will is not provided with automatic gates, as not prevent a recovery, where he was required by statute, running the elevator not at that moment in the execution of to the roof, and pushing the coal car out such purpose. Kansas City, M. & B. R. to a chute, and dumping it and return- Co. v. Burton (1892) 97 Ala. 240, 12 So. ing, for an injury which happens by rea- 88. The defective lever of an engine, son of the elevator's descending without and not the negligence of the servant fault of the employer, and the employ- himself in undertaking repairs on a car ee's pushing the coal car into the ele- without displaying certain signals, is vator well and falling with it. Keenan the proximate cause of an injury due to v. Edison Electric Illuminating Co. the collision of a train with that car, (1893) 159 Mass. 379, 34 N. E. 366. where the train would have been run (The court remarked that, although towards it whether the signals were disvery possibly a guard would have pre- played or not, reliance being placed vented the injury, the servant's conduct upon the lever's acting properly when was nearer to the event.) The negli-the time came to check it. Texas & N. gence of a brakeman in riding on the O. R. Co. v. Wynne (1893; Tex. Civ. brake beam of an engine at a place App.) 22 S. W. 1064. That a switchwhere he could not alight except upon man on a moving switch engine passed an open trestle and out of sight of the from one end of the footboard to the engineer or fireman, and known by him other over the bumpers will not prevent to be dangerous, when a safe place was a recovery for an injury received by him provided in the cab of the engine, is the after crossing, where he was in a proper proximate cause of his death caused by place at the time of the injury. Louiscontact with a gate left unfastened so ville & N. R. Co. v. Bouldin (1896) 110 as to swing across the track. Benage v. Ala. 185, 20 So. 325. An employee of Lake Shore & M. S. R. Co. (1894) 102 a railway company killed while riding Vol I. M. & S..-51.

In a state where the doctrine of com-

(b) Recovery allowed.—The fact that, wire negligently left hanging down over at the time a railway employee was inan electric light wire, cannot recover. jured by being struck by a car left in Henning v. Western U. Teleg. Co. dangerously close proximity to the ad-(1890) 41 Fed. 864. An employer is jacent track on which he was performnot liable to an employee who has been ing his duties, he had formed a purpose

able with having failed to comply with some specific order or warning.<sup>2</sup> In other cases the duty alleged to have been violated was one prescribed by a rule promulgated for the protection of the servants.<sup>3</sup>

A brakeman is not guilty of such contributory negligence as will prevent recovoutside, or from coupling a common drawthe other way, where the accident would Haas (1890) 37 Ill. App. 195. not have happened but for an unknown W. R. Co. v. Guy (1893; Tex. Civ. App.) 23 S. W. 633. A switchman is not prevented from recovering for an injury by negligently attempting to make a dangerous kind of coupling after learning that the cars were negligently loaded, unless his negligence contributed to, or was a contributory cause of, the injury. Houston & T. C. R. Co. v. Kelley (1896) 13 Tex. Civ. App. 1, 34 S. W. 809, 46 S. W. 863.

Evidence which fails to show that a prior act of the servant, alleged to be negligent, was connected with the event which caused the injury, will not suffice to bar the action. Ebert v. Hartley (1899) 72 Conn. 453, 44 Atl. 723.

<sup>2</sup> An employee struck by brick from a falling wall, while standing on a plate except those specially designated, to form helping to put ice in a brick build-ride on an engine. McGucken v. Westing, in consequence of which he was ern N. Y. & P. R. Co. (1894) 77 Hun, knocked or fell to the ground, is not 69, 28 N. Y. Supp. 298. No recovery guilty of contributory negligence which can be had for the death of a railroad will defeat a recovery for his injuries because, in violation of his orders, he had the company, went between cars, one of left the part of the platform which had which was in motion, for the purpose a railing and gone to a part which had of coupling them, instead of using a none, and on which he had been warned coupling pin for the purpose, by the use not to stand on account of the danger of which the accident would have been of falling, where he had no warning of avoided, although he would not have any danger from the wall, and his inju- been injured but for the falling of ries, though chiefly caused by his fall, trucks with which the moving car was would have been greater if he had not loaded. Shorter v. Southern R. Co. fallen out of the way of the brick. (1898) 121 Ala. 158, 25 So. 853. The Smithwick v. Hall & U. Co. (1890) 59 court said that the load and the car to-Conn. 261, 12 L. R. A. 279, 21 Atl. 924. gether made up the element of danger That an employee rode upon an elevator which the rule forbade deceased to enafter being warned not to do so will not counter.

to his work on the platform of a passen-ger car in front of several freight cars, by the giving way of the elevator while all of which are derailed or broken in he was unloading a stone therefrom sevpieces by reason of a defective track and eral minutes after reaching his destinaswitch, is not, as a matter of law, guilty tion. McGonigle v. Kane (1894) 20 of such contributory negligence in riding Colo. 292, 38 Pac. 367. The servant's of such contributory negligence in riding Colo. 292, 38 Pac. 367. The servant's on the platform as will prevent a recovfailure to comply with an order to stand ery for his death. Woods v. Southern in a certain position on a bridge in P. Co. (1893) 9 Utah, 146, 33 Pac. 628. course of erection will not prevent his recovery, where he would in all probability have been injured even if he had ery for an injury resulting from being obeyed the order. Scanlan v. Detroit caught between two cars while attempt- Bridge & Iron Works (1899) Rap. Jud. ing to couple them, because of his enter Quebec, 16 C. S. 264. A laborer who ing on the inside curve instead of the rides on a scraper in violation of orders and is kicked by a vicious horse cannot head to a Miller drawhead, instead of recover. Knickerbocker Ice Co. v. De

3 (a) Recovery denied.—An engineer's defect in the track. Texas, S. V. & N. violation of a rule fixing a maximum for the speed of trains will prevent recovery for an injury caused by a collision at a place which he would not have reached if that maximum had not been exceeded. Sutherland v. Troy & B. R. Co. (1891) 125 N. Y. 737, 26 N. E. 609, on second appeal in supreme court (1893) 74 Hun, 162, 26 N. Y. Supp. 237. The breach of a rule requiring an engineer to stand in "close places" is the proximate cause of an accident caused by the fact that his engine got out of his control on a high trestle, and ran over the stop block at the end. Louisville & N. R. Co. v. Stutts (1894) 105 Ala. 368, 17 So. 29. A servant cannot recover for an injury proximately caused by his breach of a rule forbidding employees, employee who, in violation of a rule of

Co. (1896) 19 C. C. A. 636, 43 U. S. App. 89, 73 Fed. 647, where a rule for- been made here—tending to show that in bidding the coupling of cars in motion this instance the failure of the plaintiff had been violated, it was contended on to comply with the rules of the company behalf of the plaintiff that, even if the was not culpable, or did not contribute course which plaintiff took was negligent, it was not the proximate cause of the accident, because he did not know of the presence of the grade stake over ee's failure to obey a rule will not prewhich he stumbled. But the court said: vent a recovery for an injury due to the "The obstruction offered by the grade master's negligence, where such disobestake was not different from that which dience did not in any manner contribute was offered by the cross ties and the as a proximate cause to the injury. cross rails. It was exactly of the same Fickett v. Lisbon Falls Fibre Co. (1898) character and it was of the class of dan- 91 Me. 268, 39 Atl. 996. In other gers which the plantiff had every reason words, a servant is not debarred from to anticipate in going in between the recovering by the fact that, at the time rails and in front of the moving car, his injury was received, he was acting under the circumstances. It seems to in intentional violation of the master's us clear, as a matter of law, therefore, rules, unless the injury was due, in

connected with it. The court, however, 56 N. W. 507 (same facts); White v. the effect that, to entitle the plaintiff to Miss. 12, 16 So. 248 (same facts). recover, it should appear that the hole

In Gleason v. Detroit, G. H. & M. R. given, and if there were considerations -of which, however, no suggestion has to the injury, they should have been submitted to the determination of the jury."

(b) Recovery allowed.—An employthat his negligence was the proximate whole or in part, to such violation. cause of his injury."

Ford v. Fitchburg R. Co. (1872) 110 In Louisville & N. R. Co. v. Ward Mass. 240, 14 Am. Rep. 598. See Park (1894) 10 C. C. A. 166, 18 U. S. App. v. New York C. & H. R. R. Co. (1895) 683, 61 Fed. 927, the rules of the com- 85 Hun, 184, 32 N. Y. Supp. 482 (engipany required that coupling sticks be neer did not take a position on inside of furnished to employees of certain class- curve as he was approaching it,-coles, and the coupling of cars by hand lision caused injury); Conners v. Burwas strictly forbidden. The injured lington, C. R. & N. R. Co. (1887) 71 servant admitted his knowledge of the Iowa, 490, 60 Am. Rep. 814, 32 N. W. rules in this respect, and testified that 465 (brakeman riding on engine was inhe had been supplied with a coupling jured by derailment); Daniel v. Chesstick, that he did not use it, and that apeake & O. R. Co. (1892) 36 W. Va. when he was hurt he was attempting to 397, 16 L. R. A. 383, 15 S. E. 162 make the coupling by hand. Upon (brakeman out of his place was injured these facts the trial judge was asked, by a collision); Gulf, C. & S. F. R. Co. but refused, to instruct that if the v. John (1895) 9 Tex. Civ. App. 342, 29 plaintiff was injured by reason of his S. W. 558 (engine run at prohibited neglect to use the coupling stick he rate of speed); Southern R. Co. v. Baston could not recover. The contention of (1896) 99 Ga. 798, 27 S. E. 163 (facts the plaintiff was that the cases laying not stated); Louisville & N. R. Co. v. down the rule as to the consequences of Veach (1898) 20 Ky. L. Rep. 403, 46 S. a violation of a rule were not applicable, W. 493 (brakeman did not use coupling for the reason that, under the charge stick); Reed v. Burlington, C. R. & N. which the court gave, the verdict neces- R. Co. (1887) 72 Iowa, 166, 33 N. W. sarily meant that the accident was 451 (same facts); Rome R. Co. v. caused solely by a hole in the track, into Thompson (1897) 101 Ga. 26, 28 S. E. which the servant had stumbled, and 429 (same facts); Horan v. Chicago, St. that the coupling stick was in no way P. M. & O. R. Co. (1893) 89 Iowa, 328, "While the court did instruct to Louisville, N. O. & T. R. Co. (1894) 72

The proximate cause of injury to a cr depression between the ties was the brakeman from being caught between sole cause of the injury, it is impossible cars in coupling or uncoupling them is to say that, if the further instruction the defect in a brake upon the engine, asked had been given, the jury would where the injury was caused by the ennot have found that the plaintiff's neg- gine not operating as the engineer anticlect to use the coupling stick, and his ipated in ordering such brakeman to get undertaking to effect the coupling by between the cars, and not the failure of hand, were efficient contributory causes, the latter to observe a rule requiring The instruction asked should have been him to couple with a stick from the out-

side of the train, where the engineer work is not the proximate cause of an from controlling its movements properly, and is thereby caused to throw his hand between the deadwoods. Wabash & W.R. Co. v. Morgan (1892) 132 Ind. 430, 31 N. E. 661. The violation of a rule requiring employees to examine the coupling apparatus before making a coupling which the shock of the collision between the drawheads detached from one of them, where the uncontradicted evidence shows that immediately before the accicoupling could not be made, and had desisted from the attempt to make it. Denver, T. & Ft. W. R. Co. v. Smock (1897) 23 Colo. 456, 48 Pac. 681. Where a rule of the company prohibits generits officers and employees, the use thereinjuries will not defeat a recovery, un- to less such use contributed in some apprefact so contribute, will not defeat a re- the time of the accident, another engiprepared to stop in case the track is obstructed does not affect the liability of Co. v. Mitchell (1879) 63 Ga. 173. See the company for his death caused by a also cases cited in note 6 to last section. the company for his death caused by a collision with an animal on the track where the road was not fenced as re-tributory negligence upon the existence not have prevented the collision after refused where none of the defendant's the danger appeared. Dickson v. Oma- rules can be construed in such a sense 25 L. R. A. 320, 27 S. W. 476. The vio-dence. In Western & A. R. Co. v. Buslation of a rule requiring car repairers sey (1894) 95 Ga. 584, 23 S. E. 207,

used the appliances most convenient, and injury received through the cars being they failed to operate properly. Finley struck by an engine which would have v. Richmond & D. R. Co. (1893) 59 Fed. been brought to a standstill before The failure of a railroad brake- reaching the car, if the lever had been man to comply with his express contract in good order. Texas & N. O. R. Co. v. to use a coupling knife in coupling cars Wynne (1893; Tex. Civ. App.) 22 S. W. will not prevent his recovery for an in- 1064. The negligence of a brakeman in jury sustained by being caught between being upon the top of a car, engaged in deadwoods, if the use of the knife would setting brakes, instead of being upon not have removed the danger. Bonner v. the ground acting as flagman, as re-Bean (1891) 80 Tex. 152, 15 S. W. 798. quired by a rule of the company, is not Breach of a rule requiring employees to a proximate cause of injury to him use a safety coupler will not prevent recaused by his being thrown to the covery by one who, while about to couple ground while passing from one car to cars, is struck by a car owing to defects the other by their separation because of in the engine which prevent the engineer a defective coupling pin. Terre Haute & I. R. Co. v. Mansberger (1895) 12 C. C. A. 574, 24 U. S. App. 551, 65 Fed. 196, Rehearing Denied in (1895) 14 C. C. A. 306, 24 U. S. App. 687, 67 Fed. 67. Where a brakeman is injured by a collision, the fact that he was not on top of the train, as required by the rules, is not the proximate cause of an injury is not conclusive against him, where received by a brakeman through being there was a dense fog at the time of struck in the eye by a sliver of iron the accident. Phillips v. Chicago, M. & St. P. R. Co. (1885) 64 Wis. 475, 25 N. W. 544. A railroad employee is not guilty of negligence contributing to an accident from his foot being caught in a dent he had in fact ascertained that the frog left unblocked in violation of statute, although he went between moving cars in violation of a rule of the company, and in the nighttime, for the purpose of uncoupling them, where the injury would not have happened had the ally the use of intoxicating liquors by frog been blocked. Lake Erie & W. R. Co. v. Craig (1896) 19 C. C. A. 631, 37 of by an employee who sues for personal U.S. App. 654, 73 Fed. 642 (instruction to jury; new (1894) 1 Tole trial granted). See Toledo Legal News, 326. ciable degree to producing the injury Where an engineer is injured by the sustained. That the violation of such falling of an embankment, the fact that rule might have done so, if it did not in he had with him in the locomotive, at covery. Western & A. R. Co. v. Bussey neer, contrary to a rule of the com-(1894) 95 Ga. 584, 23 S. E. 207. Disopany, will not prevent his recovering (1894) 95 Ga. 584, 23 S. E. 207. Disopany, will not prevent his recovering bedience by an engineer of a rule requirdamages against the company, if the ing a train to be kept under control and presence of the other engineer did not contribute to the disaster. Central R.

An instruction which predicates conquired by law, if the most diligent care of a certain rule prohibiting a particuand careful control of the engine could lar course of action is of course properly ha & St. L. R. Co. (1894) 124 Mo. 140, as to cover the circumstances in evito put out a signal flag when they are at complaint was made that the court erred

Compare §§ 365 et seq., infra. In other cases the servant's dereliction of duty consisted in the breach of a statute, 4 or of a municipal ordinance.5

325. Negligence of fellow servant of injured servant a partial cause of the injury.— The fact that the negligence of a fellow servant of the injured person concurred with that of the latter as an efficient cause of the injury is sometimes mentioned in cases of this type, but obviously it does not affect the right of recovery either one way or the

ant which was in force and effect at the tree to the injury. Bonner v. Hickey time of the accident, of which . . . (1893; Tex. Civ. App.) 23 S. W. 85. [he] had knowledge, which provided that, while passing switches, the speed between moving cars to uncouple them of the train should be slackened, and is irrelevant where there is no evidence this collision was occasioned in whole, or that the plaintiff did enter between the at least in large part, from his not observing this rule, and that from such ton, H. & S. A. R. Co. v. Pitts (1897; collision Bussey received injuries from Tex. Civ. App.) 42 S. W. 255. which he subsequently died, the plaintrack is in bad order, while passing S. F. R. Co. v. Nelson (1899) 20 Tex. switches, and when crossing long bridges Civ. App. 536, 49 S. W. 710. and trestle work, and, when practicable, shut off steam.' There was no evidence injuries received by an employee while condition seems to be established by the *Parsons* (1890) 38 Ill. App. 182. evidence in the case."

use a coupling knife contributed to the city ordinance is guilty of negligence plaintiff's injury, he could not recover, per se, yet, unless that negligence conis rightly refused, where there is no evitributed to his injury, a recovery will dence in the case to show what a coup- not be barred. Lake Shore & M. S. R. ling knife is; how it is used; whether or Co. v. Parker (1890) 131 Ill. 557, 23 N. not the defendants had an established E. 237. rule requiring it to be used; whether

in refusing to charge the jury, at the re- or not such a rule would be a reasonable quest of the defendant's counsel, as fol- rule; whether the failure to use it would lows: "If you believe from the evidence have been negligence under the circumthat . . . the engineer in charge of stances in this case; nor whether the train violated a rule of the defend- failure to use the coupling knife contrib-

A special charge that, if a freight contiffs cannot recover, although the de- ductor violated the rules of the company fendant may have been negligent in not and a bulletin order, by failing to perhaving the switches properly set." But sonally examine his cars and train and the court said: "This request was see that the cars were in order, and that properly refused, we think, for the reather the air cars were connected and put at son that there was no evidence in the the head of the train, he could not rerecord to justify the instruction therein cover for personal injuries of which such contained. The only rule of the com- failure was the proximate cause,-is pany in which we find the expression properly refused where he was injured 'slacken the speed' employed at all is in endeavoring to close a defective angle rule 35, which was introduced in evicock while rearranging the train and dence, and which provides that 'all putting the air cars together, by the entrains will run with great care after gine pushing a car back against the one rains, and slacken their speed when the on which he was working. St. Louis &

submitted, so far as we have been able being hoisted up the shaft of a mine in to gather from the record, that there a cage, he cannot recover where the only had been recent rains, or that the track operating cause of the injury was his of the railroad company was in bad or- carrying a drill upon the cage in violader. Indeed, the contrary of the latter tion of the law. Illinois Fuel Co. v.

5 Although an engineer in running a An instruction that if the failure to train at a rate of speed prohibited by a

other. The inability of the injured person to maintain the action must be precisely the same, whether this element is introduced or not.1

326. Servant's negligence not a bar to the action if it is merely a condition of the injury.—Where the situation resulting from the servant's breach of duty merely amounts to the condition, as distinguished from the cause, of the injury, his action is not barred.1

In Massachusetts it was held, before the Sunday law was repealed as regards railway companies, that an engineer who was injured on Sunday owing to a defect in the track could not recover, as his illegal act contributed to his injury.2 The same doctrine was possibly adopted in an Ohio case.3 But a different view is taken in Indiana,4 in New York, and in Iowa.6

boose on the rear end of the train. St. and should have avoided cannot recover, although the engineer is also in fault. Bauer v. St. Louis, I. M. & S. R. Co. (1885) 46 Ark. 388.

A mill owner which constructs its mill after a common and approved model is not liable for an injury to an employee caused by such employee and his coemployee permitting tools to accumulate on the floor of the mill at a place where their presence is dangerous. Devlin v. excessive rate of speed. Helfenstein v. Phænix Iron Co. (1897) 182 Pa. 109, 37 Medart (1896) 136 Mo. 595, 36 S. W. Atl. 927. A car repairer cannot recover 863, Affirmed in Banc in (1896) 136 Mo. him from injury from moving trains, and partly to the negligence of a car in-

On this ground it has been held that the failure of a servant to follow the incharge of his duties at a later hour. Mc-Elligott v. Randolph (1891) 61 Conn. and counsel that he could not have re-157, 22 Atl. 1094. Similarly, where covered in the absence of this element. plaintiff, who was rear brakeman on a 4 In Louisville, N. A. & C. A. R. Co. v. plaintiff, who was rear brakeman on a freight train, was in the cupola of the caboose when an engine which was to assist in pushing the train up a grade was lated: The fact that one who sustains

<sup>1</sup> A railway company is not liable negligently run against the caboose with where a conductor of a gravel train is such violence as to derail it, by which injured in a wreck caused by a broken plaintiff was thrown to the ground and rail, and the fault is partly his own and injured, it was held that, conceding that partly the engineer's in permitting the plaintiff's duty required him to be on train to go too fast, and the conductor top of the cars, his remaining in the cawas also in fault in not having his ca- boose was not negligence which contributed to his injury in a legal sense, but Louis, I. M. & S. R. Co. v. Morgart was a mere condition of the injury, since (1885) 45 Ark. 318. A car inspector the rule requiring him to be outside was who is struck by a train which he might not made for his protection, and, under any ordinary circumstances, he would be safer inside the caboose than on top of the train. Tullis v. Lake Erie & W. R. Co. (1901) 44 C. C. A. 597, 105 Fed. 554. So, the violation by an employee of a rule forbidding employees to change their clothes before quitting time did not, under the circumstances, prevent a recovery for his death caused by the bursting of a grindstone turning at an for an accident due partly to his own vi- 619, 37 S. W. 829, Affirmed on Rehearolation of a rule promulgated to secure ing in (1896) 136 Mo. 619, 38 S. W.

<sup>2</sup> Read v. Boston & A. R. Co. (1885) 140 Mass. 199, 4 N. E. 227, Following spector in failing to keep a lookout, as 140 Mass. 199, 4 N. E. 227, Following he had promised to do. *Illinois C. R. Day* v. *Highland Street R. Co.* (1883) Co. v. *Winslow* (1894) 56 Ill. App. 462. 135 Mass. 113, 46 Am. Dec. 447.

<sup>8</sup> In McGatrick v. Wason (1855) 4 Ohio St. 566, a servant injured on Sunstruction of his master to go home at a day while loading freight on a steam-certain hour is not, in a legal sense, a boat in an emergency was held entitled contributing cause of an injury which to recover on the ground that he was en-he receives while engaged in the dis- gaged in a "work of necessity." It gaged in a "work of necessity." It seems to have been assumed by court

327. Contributory negligence of servant followed by negligence on the part of the master or another employee.—In a leading English case, Lord Penzance, after laying down the general principle already quoted (§ 323, supra) as to the effects of contributory negligence, proceeded thus:

"There is another proposition equally well established, and it is a qualification upon the first, -- namely, that, though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet, if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."1

In any case, therefore, where the evidence is such as to justify the inference that this rule is available in the servant's favor, the liability of the employer still remains an open question, although the servant may clearly have been guilty of an antecedent act of contributory negligence.<sup>2</sup> The logical situation contemplated by the rule has been

an injury by the negligent or wrongful him to the risk of injury, if such injury act of another may have been, at the was more immediately caused by the detime of such injury, acting in disobedification, after becoming ance of the Sunday laws, will not pre-vent a recovery from one whose wrong
(a) Servant's pointed out that, as the servant's danger was the same on week days as on Sundays, it could not be said that this

the United States. See Shearn. & Redf. Neg. § 99, note 10. In that treatise the ley R. Co. v. Fitzhugh (1895) 61 Ark. learned authors formulate the rule as 341, 33 S. W. 960 (engineer might have follows: The plaintiff may recover stopped his engine in time to have avoid-damages for an injury caused by the deed striking a trackman who did not hear fendant's negligence, notwithstanding it approaching); Louisville & N. R. Co. the plaintiff's own negligence exposed v. Markee (1893) 103 Ala. 160, 15 So.

time of such injury, acting in disobedi-ence of his collateral obligation to the aware of the plaintiff's danger, to use state, which required of him the observ-ordinary care for the purpose of avoid-

(a) Šervant's right to recover afful or negligent act or omission was the proximate cause of such injury. To (1888) 84 Va. 642, 5 S. E. 579 (argusame effect, see Louisville, N. A. & C. R. endo); Louisville & N. R. Co. v. Brown Co. v. Buck (1888) 116 Ind. 566, 2 L. (1898) 121 Ala. 221, 25 So. 609 (fire-R. A. 520, 19 N. E. 453, where the court man failed to give such a signal to the man failed to give such a signal to the engineer as would have prevented his moving his engine in such a way as to injure a brakeman who had gone in between the tender and a car); Greer v. Louisville & N. R. Co. (1893) 94 Ky. 169, 21 S. W. 651 (engineer operated locomotive so carelessly as to injure a brakeman who had gone between cars to couple them); Louisville & N. R. Co. v. McCoy (1883) 81 Ky. 403 (similar facts); White v. Houston & T. C. R. Co. (1898; Tex. Civ. App.) 46 S. W. 382 (train backed before switchman had time to get out of the way); Hissong v. Richmond & D. R. Co. (1890) 91 Ala. 514, 8 So. 776 (servant violated a rule by going between two cars to couple them, and was injured by the sudden starting of the train); Kansas & A. Val-

said to be this—that the antecedent negligence of the injured person merely produces a condition upon which the subsequent negligence which caused the injury operates.3 But the conception thus intro-

ligent, as the means which he had adopted for the purpose of stopping his engine when a collision with a hand car was imminent were such as a prudent man might have selected); Snyder v. Cleveland, C. C. & St. L. R. Co. (1899) 60 Ohio St. 487, 54 N. E. 475 (servant standing on track was struck by a train); Schlerth v. Missouri P. R. Co. (1892; Mo.) 19 S. W. 1134 (servant walking on track was struck by a train); Warmington v. Atchison, T. & S. F. R. Co. (1891) 46 Mo. App. 159 (train run at a rate which was dangerous in view of the position of the negli-& S. F. R. Co. (1889) 39 Fed. 174 (conso as to avoid injuring an employee on a gravel train, who takes up a dangerous position); Denver & B. P. Rapid Transit Co. v. Dwyer (1894) 20 Colo. 132, 36 Pac. 1106, Reversing 3 Colo. App. 408, 33 Pac. 815 (laborer sat with his legs slightly projecting outside a motor car, and was struck by the side of a cutting into which a Y ran); Haden v. Sioux City & P. R. Co. (1894) 92 Iowa, 226, 60 N. W. 537 (section foreman stepped upon the track without looking, after the passage of a train, and was struck by a rear section which had been cut off); Illinois C. R. Co. v. Josey (1901) 22 Ky. L. Rep. 1795, 54 L. R. A. 78, 61 S. W. 703 (foreman checked speed of hand car suddenly, although he had observed that one of his men was not supporting himself by holding the lever); Central R. Co. v. Lamb (1899) 124 Ala. 172, 26 So. 969 (section hand was run down by a hand car while crossing a high trestle); Texas & P. R. Co. v. Gale (1896; Tex. Civ. App.) 35 S. W. 802 (section foreman shoved a tie against laborer's foot, while in a hole where he had negligently put it).

Even if a brakeman was negligent in going between a caboose with a bumper of the ordinary construction and one equipped with a "Miller" coupler, he may recover if his injury was proximately caused by the fact that a fellow employee, without waiting, as he should have done, for a signal from him, signaled to the engineer to back the caboose. Romick v. Chicago, R. I. & P. R.

511 (engineer in this case held not neg- Co. (1883) 62 Iowa, 167, 17 N. W. 458. See also § 314, subds. a, f, supra.

(b) Servant's right to recover denied. -A railroad engineer is not negligent in not sooner concluding that sectionmen on a hand car on the track in front of the train are in danger where they could have removed the hand car and cleared the track before the train reached them if they had seen it when he first began to stop it. Nelling v. Chicago, St. P. & K. C. R. Co. (1896) 98 Iowa, 554, 63 N. W. 568, 67 N. W. 404. Negligence on the part of a railroad engineer on a switching engine in the railroad yard cannot be predicated of his failure to gent servant); Shumacher v. St. Louis stop his engine after having struck a section hand attempting to cross the ductor negligent in not managing train track, in response to warning cries of witnesses of the accident, in the absence of evidence that he understood the signals as meant for him. Loring v. Kansas City, Ft. S. & M. R. Co. (1895) 128 Mo. 349, 31 S. W. 6. A railroad engineer and fireman are not guilty of negligence, toward another employee walking along the track, in failing to keep a lookout ahead, where their attention is otherwise required by the work which they are doing. Chicago, B. & Q. R. Co. v. Maney (1894) 55 Ill. App. 588. An engineer is not negligent in assuming that a section hand will get out of the way of a train, where it is customary for such laborers to work on the track until trains are very close to them. Sharp v. Missouri P. R. Co. (1901) 161 Mo. 214, 61 S. W. 829. The engineer of a switch engine is not required to anticipate that an experienced section man, whose daily observation has taught him that the engine is constantly moving in the yard, will step on the track immediately in front of cars which are being switched, without even looking for them. Loring v. Kansas City, Ft. S. & M. R. Co. (1895) 128 Mo. 349, 31 S. W. 6.

See also Louisville & N. R. Co. v. Wallace (1891) 90 Tenn. 53, 15 S. W. 921 (liability to brakeman injured in trying to get on a moving train was declared to be dependent on whether the conductor could have averted the acci-

dent by ordinary care).

\*\*Louisville & N. R. Co. v. Brown (1898) 121 Ala. 221, 25 So. 609.

duced seems to be somewhat out of place. The rationale of the cases in which the servant has been allowed to recover by virtue of the rule is simply that the person responsible for the last link in the chain of causation was the master.

In any case of this description the instructions given should be so worded as to indicate clearly the effect of the rule.4

It is laid down by some of the authorities that, to entitle the servant to recover by virtue of the rule, it is not necessary that the defendant should have had actual notice of the injured party's fault in time to protect him. It is enough if the defendant could by reasonable diligence have discovered the danger in time to avert the injury<sup>5</sup> But the view has also been expressed that it is only in very exceptional cases that the servant can recover without proving that his dangerous position was actually known to the master or his agent.6 former of these opposing theories seems to be the correct one. is no apparent reason why any exception should be made in cases of this class to the general principle which treats constructive and actual knowledge as being, in a juridical point of view, equivalent factors.

It has been expressly held that a mere volunteer, although he has

\*It is proper to charge a jury that a 169, 21 S. W. 649; Wabash R. Co. v. railroad company is liable to an em- Zerwick (1897) 74 Ill. App. 670. ployee guilty of contributory negligence,

spite of his negligence, by the exercise exercise of reasonable care. Washington of due care on the part of defendant, Mfg. & Min. Co. v. Barnett (1897) 19 then defendant would be liable, as that Ky. L. Rep. 958, 42 S. W. 1120.

would show that plaintiff's negligence did not contribute to the injury, because (1883) 81 Ky. 411; Louisville & N. R. erroneous where it is accompanied by explanations which show that the language thus used meant nothing more (1894) 92 Iowa, 182, 60 N. W. 503, it than that the employee could recover, unless his negligence was the proximate the effect that the defendant was liable cause of the injury. Bodie v. Charlesif, by the exercise of ordinary care, the peril of the injured servant could have

It is error to charge a jury that they where, after becoming aware of his peril cannot find against the plaintiff, though in time to prevent the injury, it negli- he may have been guilty of contributory gently fails to apply means under its negligence, if the delinquent employee control by which the injury might be could have prevented the injury by the prevented, if such employee does all exercise of ordinary care. The proper that he can to prevent the accident and form of instruction is that, if the plainsave himself from harm after becoming tiff was guilty of negligence but for aware of his peril. Louisville & N. R. which the injury would not have been Co. v. Hurt (1893) 101 Ala. 34, 13 So. inflicted, the jury should find for the defendant, unless the delinquent em-An instruction that, if the injury to ployee, after seeing plaintiff's danger, an employee could have been avoided, in could have prevented the injury by the

it was not a direct cause thereof, is not Co. v. Earl (1893) 94 Ky. 368, 22 S. W.

was held to be error to give a charge to 39 S. E. 715.

See also Louisville & N. R. Co. v. Robinson (1868) 4 Bush, 507; Greer v. 262, 9 So. 230. See also § 314, subd. a, Louisville & N. R. Co. (1893) 94 Ky. note 3, supra.

placed himself in a position of danger through his own negligence, can recover of the master for injuries received by reason of the failure of servants to exercise reasonable care to prevent injury to him after discovering the danger.7

The rule now under discussion is generally considered to be applicable only where an appreciable interval of time elapsed between the negligent act of the servant and the final catastrophe, and there was accordingly a specific period during which it was in the defendant's power to prevent the injury by proper care and caution. It cannot be construed in such a manner as to absolve a servant from the consequences of his negligence in a case which presents the ordinary elements of a breach of duty on the master's part, resulting in more or less permanent conditions, and a want of caution on the servant's part in performing his functions during the continuance of those conditions.8 But a different theory has been propounded in North Carolina in respect to a statutory duty.9

## B. What constitutes contributory negligence on the part of A SERVANT.

328. Generally.— The standard which a servant is, like any other person, required to satisfy in doing the acts which a performance of his duties involve, is that expressed by the phrases "ordinary care," 1 or "ordinary care and diligence," or "reasonable and ordinary care,"

N. W. 459. work on which he was engaged, and that such want of care was the proximate cause of the injury. See also Rains v. St. Louis, I. M. & S. R. Co. (1879) 71 Mo. 164, 36 Am. Rep. 459, where it was held error to give an instruction to the effect that, although the servant might Campbell (1898) 121 Ala. 50, 25 So. have failed to exercise ordinary care, 793. and might have been guilty of negligence by differently erecting or maintaining Atl. 598. the bridge which caused that injury, or

<sup>7</sup> Evarts v. St. Paul, M. & M. R. Co. by the exercise of ordinary care and cau-(1894) 56 Minn. 141, 22 L. R. A. 663, 57 tion, have avoided the injury, the jury should find for the plaintiff.

<sup>8</sup> In Cagney v. Hannibal & St. J. R. Co. 
<sup>9</sup> In a recent case it was laid down (1879) 69 Mo. 416, the court held erthat a brakeman's contributory negli-(1879) 69 Mo. 416, the court field erroneous an instruction to the effect that, gence in coupling cars would not preven if the jury should believe that the clude recovery for the continuing act of plaintiff was guilty of negligence which negligence of which the company was contributed to the injury, yet they guilty in having failed to comply with a should find for him, if they also believed statute requiring the use of self-couplers that the defendant might have avoided on its cars. Greenlee v. Southern R. Co. said injury by the use of ordinary care (1898) 122 N. C. 977, 41 L. R. A. 399, in furnishing plaintiff with safe instrumentalities upon which to perform the ern R. Co. (1899) 124 N. C. 189, 44 L. R. A. 313, 32 S. E. 550.

<sup>1</sup>Carr v. Manchester Electric Co. (1900) 70 N. H. 308, 48 Atl. 286; Georgia Cotton Oil Co. v. Jackson (1900) 112 Ga. 620, 37 S. E. 873.

<sup>3</sup>Greenleaf v. Dubuque & S. C. R. Co. which contributed to the injury com- (1871) 33 Iowa, 57; Gates v. Pennsylplained of, yet, if the defendant might, vania R. Co. (1893) 154 Pa. 566, 26 or "ordinary diligence or common prudence." He is bound to exercise that degree of care which a reasonably prudent person would use in order to avoid being injured, or which might, under the given circumstances, be "reasonably expected of an ordinarily prudent person. 226

Instructions are correct or erroneous, according as they recognize or ignore the standard thus fixed.7

Rep. 567, 58 S. W. 444.

(1900) 112 Ga. 620, 37 S. E. 873.

company, to exercise more than ordithe jury should consider whether the nary care. Hall v. Chicago, B. & N. R. servant had exercised due and reason-Co. (1891) 46 Minn. 439, 49 N. W. 239. able care, and that, if they should bedown should fall, it is proper to refuse Missouri P. R. Co. v. Fox (1900) 60 a charge implying that he could not Neb. 531, 83 N. W. 744. Error in recover if he did not run in a safe dicharging that the care required of an rection. Postal Teleg. Cable Co. v. Hulemployee in the use of implements and sey (1896) 115 Ala. 193, 22 So. 854.

side of the car, and still have performed his duty, but that he did not so avoid the spout. Greenleaf v. Dubuque & S. C. R. Co. (1871) 33 Iowa, 57.

See further as to this class of cases, § 350 infra.

An instruction that "it is the duty of every person to use his senses to learn what is going on about him, and that, the more dangerous a position in which he is placed, the more care should he use to protect himself from injury," is properly refused as misleading, since, fer that a higher degree of care than ordinary care would be required. ternational & G. N. R. Co. v. Stephen-

\*Central R. & Bkg. Co. v. Lanier S. W. 1086. An instruction that if the (1889) 83 Ga. 587, 10 S. E. 279. jury believe that the servant knew of Wilson v. Williams (1900) 22 Ky. L. the existence of the dangerous conditions which caused his death in time to Georgia Cotton Oil Co. v. Jackson have escaped from the place where they existed, and failed to do so, they must <sup>7</sup> A jury is properly charged that, al- find for defendant, is properly refused though it is the duty of a railroad com- as exacting too high a degree of dilipany to use the highest degree of care gence. Bessemer Land & Improv. Co. to insure the safety of its passengers, v. Campbell (1898) 121 Ala. 50, 25 So. the engineer of a passenger train is not 793. An instruction that, in determinrequired, as between himself and the ing decedent's contributory negligence, In an action for injuries caused by the lieve that decedent did not exercise the failure of the master's representative greatest care and caution that an ordito give instructions to an employee re-narily prudent man would exercise ungarding the direction in which he was to der like circumstances, then they should run when a tree which he was cutting find for defendant,—is properly refused. the operation of machinery is such as An instruction is erroneous by which, "a man of his experience and his situin a case where a railway servant was ation would ordinarily use," instead of knocked off a car by the spout of a such care as an ordinarily prudent man water-tank, the jury are told, without of his experience and in his situation qualification, that their verdict should would ordinarily use, is not cured by a be for the defendant, if they found that subsequent paragraph correctly defining, plaintiff could have avoided the col- in general terms, negligence and ordilision by stooping or moving to either nary care. Hillsboro Oil Co. v. White (1897; Tex. Civ. App.) 41 S. W. 874. An instruction requiring the servant to use "such ordinary care as a person of ordinary prudence would have used under similar circumstances" is not misleading, as causing the jury to believe that plaintiff was not required to use as high a degree of care as a person of ordinary prudence "would reasonably have been expected to exercise" under similar circumstances. Galveston, H. & S. A. R. Co. v. Williams (1901; Tex. Civ. App.) 62 S. W. 808.

The use of the word "expected" in an without explanation, the jury might in- instruction in an action for the death of an employee, that, even though the jury find that defendant was negligent, if they further find that the emson (1897) 22 Tex. Civ. App. 220, 54 ployee did not exercise that ordinary

There is some authority for the theory that certain classes of employees are to be judged by more lenient standards than others.<sup>8</sup> But this conception seems to be inconsistent with the central idea which governs cases of this class, viz., that the one constant standard is the hypothetical behavior of a prudent person under the given circum-

The acceptance of that standard also renders it necessary to reject the notion that it may be material to inquire whether the injured servant himself believed that he was acting prudently at the time of the accident.9

what the plaintiff did, the verdict must in which a man could omit to perform

sider what degree of care the serv-formance of a duty imposed on him ant's "intelligence and understanding" might exercise the greatest care, and should have enabled him to exercise under the given circumstances. Georgia in the performance of the duty, might, Cotton Oil Co. v. Jackson (1900) 112 without fault on his part, be injured. Ga. 620, 37 S. E. 873. Nor is it proper *Port Royal & W. C. R. Co. v. Davis* to charge that the question to be an- (1894) 95 Ga. 292, 22 S. E. 833. swered is whether a man of ordinary intelligence would regard the work as Macq. H. L. Cas. 748, 28 Eng. L. & Eq. hazardous. A man of ordinary intelli- 48 (a mining accident) Lord Cranworth gence may be very rash. Ft. Wayne v. remarked that rashness is a relative Christie (1901) 156 lnd. 172, 59 N. E. term. That which would reasonably be

was the duty of deceased to take reapreventing a recovery, rashness in a sonable care of his own safety, "even workman, if the master knew that the sonable care of his own safety, "even though to do so required his whole time," the last clause is properly stricken out. Pittsburgh, C. & St. L. R. Co. hibited. v. McGrath (1885) 115 Ill. 172, 3 N. E. It is

fense was that a brakeman ought to uncoupling cars did not believe it was have observed that the bumper on one imprudent to uncouple them in the manof two cars which he was about to couple was higher than that on the other,
and that the link which he was using
lieving that he could uncouple them
was too short, it was held proper to refuse to charge the jury in substance him from the charge of contributory

care and diligence to prevent injury that, if a particular duty was imposed which would be "expected" of an ordiupon the plaintiff, and he failed to pernarily prudent person in similar circumstances the jury should find for defendant,—is proper. Galveston, H. & S. so imposed committed an error of judg-A. R. Co. v. Bonnet (1896; Tex. Civ. ment which resulted in injury, he could App.) 38 S. W. 813.

A requested instruction that the rest faulty in that it ignores the question A requested instruction that the masses of the duty, or in the forming of his going machine wathout knowing what judgment, which turned out to be erhe would meet is properly supplemented by the additional statement that, if a gence. The court remarked that, while prudent person would not have done it might be difficult to suppose a case be for the defendant. Bennett v. War- an imposed duty, and yet be entirely ren (1901) 70 N. H. 564, 49 Atl. 105. free from fault, it was possible, and The jury should not be told to con- even probable, that a man in the permight exercise the greatest care, and still, because of an error of judgment

<sup>8</sup> In Paterson v. Wallace (1854) 1 treated as rashness in the case of some Where an instruction states that it persons may not be, for the purposes of rashness was of a kind which workmen of that particular class ordinarily ex-

It is error to give an instruction from which the jury may infer that the fact In a case where the theory of the de- that a brakeman who was killed while

329. Care proportionate to the danger must be exercised.— The obligatory care which is designated as "ordinary" varies according to circumstances.1

But this variation does not imply that the standards by which the quality of the servant's conduct is to be tested is different in different employments. Whatever may be the nature of the work, the standard to be considered remains intrinsically the same, and the servant is never required to exercise any greater care and diligence than a prudent person would, under like circumstances, usually exercise for his own safety.2

The instructions should be so worded as to make this principle quite clear to the jury.3

330. Respective provinces of court and jury in determining the serv-

R. Co. (1891) 82 Iowa, 148, 47 N. W. (1981) 83 Iowa, 380, 49 N. W. 990. See

"What would be ordinary care in

own protection that degree of care which Missouri P. R. Co. v. Gibson (1896) is commensurate with the character of 56 Kan. 661, 44 Pac. 612. his occupation, and which a reasonably An instruction to the effect that a prudent person would use under like brakeman, part of whose duties consist-

to use a degree of care proportioned to the degree of danger in the ordinary discharge of his duties. Trihay v. Brooklyn Lead Min. Co. (1886) 4 Utah, 468,

the rules to run very cautiously during to use the care which a person of ordi-heavy storms is required to exercise nary prudence would use in the same only that high degree of care which is situation, considering all the risks reasonable under the circumstances, thereof, is proper. Texas & N. O. R.

negligence. Pieart v. Chicago, R. I. & P. Scagel v. Chicago, M. & St. P. R. Co. also next note, and § 328, note 8.

\*It is proper to refuse an instruction handling building sand would be gross that a man engaged in such dangerous negligence in handling gunpowder. So, work as that of a railway switchman is the care to be exercised in running a bound to exercise the highest diligence locomotive through a crowded city is and caution. Lake Shore & M. S. R. something very different from that re- Co. v. O'Conner (1885) 115 Ill. 254, 3 quired in driving the same kind of N. E. 501. An instruction which imvehicle through the open country. Nev-plies a gradation of the care to be exertheless, in both cases the care re-ercised by employees, in different capacquired is that only which a man of ordi-ities, of railway companies, to absolve nary prudence would exercise under like them from the charge of contributory circumstances." *Philadelphia & R. R.* negligence, in an action against the com-Co. v. Boyer (1881) 97 Pa. 101. pany for negligently causing the death A servant is bound to exercise for his of one of its brakemen, is erroneous.

Co. v. Wallace (1897) 101 Ky. 626, 42 in the yards, is bound to exercise "more S. W. 744, Rehearing Denied in (1897) than ordinary care and vigilance to protect himself" in moving a car marked It is the duty of a miner to be vigi- as damaged, requires too high a degree lant and careful in his own behalf, and of care, and should be refused. Taylor v. Missouri P. R. Co. (1891; Mo.) 16 S. W. 206.

It is proper to give an instruction that a night watchman on a railroad 11 Pac. 612 (instruction to this effect track is not required to use a greater approved). If the employment is a degree of care for his own personal safehazardous one, the servant is required ty than is usually exercised by careful to use very great precaution to avoid and prudent persons under similar circumstances. Union P. R. Co. v. Estes (1887) cumstances. Baltimore & O. S. W. R. 37 Kan. 715, 16 Pac. 131. Co. v. Alsop (1897) 71 Ill. App. 54.

2Thus a railroad engineer required by An instruction that a servant is bound ant's negligence.—Whether the action of an injured servant is barred on the ground that he was negligent is a mixed question of law and fact. What duty is to be implied as incident to the relation which he holds to his employer is always a matter for the determination of the court.1 What constitutes a dereliction of that duty is a matter primarily for the jury.<sup>2</sup> It was recently laid down in the English court of appeal that a verdict negativing fault on the servant's part is usually conclusive; 3 and in a theoretic point of view this statement would doubtless be accepted as correct in the United States, also. But it seems safe to say that the principle which it embodies has not always been observed in practice. The American courts, more especially, as is strikingly indicated by many of the decisions cited in the ensuing sections have gone to such extreme lengths in controlling and setting aside verdicts, that it seems to be often difficult, if not impossible, to acquit them of ignoring altogether the true boundary line between their own functions and those of juries.

In employers' liability cases the judges frequently have occasion to enunciate the applicability of the ordinary doctrines which determine whether, under the given circumstances, the negligence of the plaintiff is a question for the jury or for the court,—viz., that a servant ought not to be declared, as a matter of law, to have been in fault where there is a reasonable doubt, either as to the facts themselves,4

some cases a higher degree of care than due care is necessary. Bodie v. Charles-ton & W. C. R. Co. (1901) 61 S. C. 468, 39 S. E. 715.

(1856) 5 Ohio St. 541, 67 Am. Dec. 312, eral discussion of the English decisions holding it error to instruct the jury regarding the respective provinces of that what constituted "the various duthe court and jury in negligence cases.

Co. v. Bingle (1895) 9 Tex. Civ. App. taining a special clause which binds 322, 29 S. W. 674. him to use care, the stipulation applies An instruction that negligence is a to everything he may undertake to do; relative term when applied to different but it is for the jury to decide whether sets of circumstances, and that the cau- he has violated it. Jones v. Lake Shore tion required in one case may be greater & M. S. R. Co. (1883) 49 Mich. 574, 14 than that required in another; but that N. W. 551. A charge in an action for in any case the law imposed the duty the wrongful killing of a servant that of observing the care due under such cirthere was no sufficient evidence that the cumstances, which was the amount of negligence of deceased did not contribcare which would be exercised by a man ute to his injury was properly refused, . of ordinary intelligence and prudence,— as assuming that deceased was negli-is not erroneous as charging that in gent. Knight v. Overman Wheel Co. (1899) 174 Mass. 455, 54 N. E. 890.

\*Williams v. Birmingham Battery & Metal Co. [1899] 2 Q. B. 338, 68 L. J. Q. B. N. S. 918. The reader may consult <sup>1</sup>Mad River & L. E. R. Co. v. Barber 1 Beven, Neg. pp. 148 et seq., for a gen-1856) 5 Ohio St. 541, 67 Am. Dec. 312, eral discussion of the English decisions

that what constituted the various duties of a conductor of a train of cars,"
incident to his position, was a question (1899) 34 C. C. A. 233, 92 Fed. 108; of fact to be found by the jury from the evidence.

2 Mad River & L. E. R. Co. v. Barber (1856) 5 Ohio St. 541, 67 Am. Dec. 312. (1901) 23 Ky. L. Rep. 290, 62 S. W. Where a servant signs a contract con-

or as to the inferences of fact to be drawn from the testimony; 5 and that if, upon the whole evidence, there is uncertainty as to the existence of negligence on the servant's part, the case is for the jury, whether the uncertainty arises from a conflict of the evidence, or because, although the facts are undisputed, fair-minded men may honestly draw different conclusions from them.<sup>6</sup> The latter doctrine obviously involves, as its complement, the corollary that the servant may be declared by the court to have been wanting in due care, if the evidence is not reasonably susceptible of any other construction.<sup>7</sup>

In determining whether the servant was or was not negligent, it is always competent for the jury to take into consideration the hazardous nature of the work in which brakemen are employed, their means of knowledge, what they are reasonably required to know, in the nature of their calling, of machinery; the thought and reflection demanded or expected of such persons, their just expectation that the company will exercise due care and padence in protecting them

such signal and to act with caution in sections. its presence, although they may not have before the series of the series the standing car, is erroneous, where 19; Central R. Co. v. Freeman (1880) there is evidence tending to show that 66 Ga. 170; Cook v. Western & A. R. such a light under the circumstances Co. (1882) 69 Ga. 619. known to the employees, or which they were bound to know, did not necessarily juries received in doing work which it E. 729.

<sup>5</sup>Gates v. Pennsylvania R. Co. (1893) 154 Pa. 566, 26 Atl. 598; Payne v. Reese (1882) 100 Pa. 301; Bannon v. Lutz (1893) 158 Pa. 166, 27 Atl. 890; Reese (1882) 100 Pa. 301; Bannon v. Elliott v. Chicago, M. & St. P. R. Lutz (1893) 158 Pa. 166, 27 Atl. 890; Co. (1893) 150 U. S. 245, 37 L. ed. Texas & P. R. Co. v. Gentry (1895) 163 1068, 14 Sup. Ct. Rep. 85; Hoth v. Pet-U. S. 353, 41 L. ed. 186, 16 Sup. Ct. ers (1882) 55 Wis. 405, 13 N. W. 219, Rep. 1104; Flaherty v. Norwood Engi- and cases cited passim in the ensuing Rep. 1104; Flaherty v. Norwood Engineering Co. (1898) 172 Mass. 134, 51 N. E. 463; Kann v. Meyer (1898) 88 Md. 541, 41 Atl. 1065; Jones v. Flint & Market Co. (1991) 197 Mich. 108 P. M. R. Co. (1901) 127 Mich. 198, 86 tablished by undisputed evidence, it is, N. W. 838; Redding v. East Tennessee, of course, the duty of the court to de-V. & G. R. Co. (1884) 74 Ga. 385; Ben-clare the law applicable thereto." nett v. Northern P. R. Co. (1892) 3 N. Gates v. Pennsylvania R. Co. (1893) D. 91, 54 N. W. 314; Reese v. Morgan 154 Pa. 566, 26 Atl. 598.

 K. & T. R. Co. v. Young (1896) 4 Kan. Silver Min. Co. (1897) 15 Utah, 453,
 App. 219, 45 Pac. 963 (verdict based on 49 Pac. 824; Phillips v. Chicago, M. & conflicting evidence, held conclusive). St. P. R. Co. (1885) 64 Wis. 475, 25 An instruction that if a red light by N. W. 544; Illinois C. R. Co. v. Cozby night displayed on a train is a danger (1898) 174 Ill. 109, 50 N. E. 1011 (insignal, and known to be such generally struction to find for defendant properly by railroad employees, it was incumbent refused where ordinary care on part of upon employees engaged in switching plaintiff was a possible inference). cars on a track upon which a car dismany other cases to the same effect will playing such light was standing to heed be found in the notes to the ensuing

indicate danger, but merely that the car was not necessarily negligent to under-on which it was displayed was the end take, the jury are not bound to find that of the train. Abbitt v. Lake Erie & the plaintiff was careless because sev-W. R. Co. (1898) 150 Ind. 498, 50 N. eral witnesses testified that he said the accident was his own fault. Martineau v. National Blank Book Co. (1896) 166 Mass. 4, 43 N. E. 513.

sections.

"When facts constituting negligence are either admitted or conclusively esagainst injury, and to give due weight to those instincts which naturally lead men to avoid injury and preserve their lives.8

Contributory negligence being, as we have seen (§§ 319, 320, supra), predicable only where the servant understood the conditions and the resulting dangers, the case is always for the jury if it is not a necessary deduction from the evidence that he did understand those conditions and those dangers.9

Considered with relation to the sufficiency of the declaration, the above principles involve the corollary that a court cannot say, as a matter of law, from the allegations in which the servant states his cause of action, that he was guilty of contributory negligence, unless his statement so clearly indicates such negligence that, giving him the benefit of all possible evidence which would be admissible under his allegations, there is no reasonable ground upon which a difference of opinion could be entertained with regard to the quality of his conduct.16

331. Failure to use appropriate precautions in dangerous situations.— (Compare, generally, the cases cited in §§ 338, 339, and § 348, subd. a, infra).—A doctrine which may not improperly be regarded as a direct deduction from the principle stated in § 329, supra, is that a servant who, as the result either of his own voluntary acts, or of events over which he has no control, finds himself placed in a position in which he will be exposed to some specific hazard, unless he pursues a certain course of action, must, at his peril, pursue that course, if a person possessing the intelligence and knowledge which are imputed to him ought to have seen that by doing this he would be able to minimize the risk of injury. This principle prevents recovery, irrespective of whether the act or predicament, when considered apart from the fact that proper precautions were not exercised, was or was not one which betokened culpability on the servant's part. The cases illustrating this type of negligence may be conveniently tabulated under the headings specified in the subjoined note.1

29 Iowa, 14, 4 Am. Rep. 181.

generally, cheapter xxi., post.

<sup>8</sup>Greenleaf v. Illinois C. R. Co. (1870) headlight on his engine, the absence of air brakes, and the incompetency of his \*\*Novalus of the incompetency of his officers of the darkes, and the incompetency of his officers of the incompetency of his officers, and the inc ty of contributory negligence in running <sup>10</sup>Rolesteth v. Smith (1887) 38 Minn. a train on a foggy morning at the rate 14, 35 N. W. 565; Wilson v. Williams of 30 miles an hour into an open switch (1900) 22 Ky. L. Rep. 567, 58 S. W. at which no light was displayed. Illi-444. nois C. R. Co. v. Guess (1897) 74 Miss.

1 (a) Operation of railway trains and 170, 21 So. 50. An engineer who, immecars.—A freight engineer who in start-diately after a storm which he knew had ing knows of the insufficiency of the caused many washouts, and with the

A precaution predicable with regard to dangerous situations of every kind is indicated by the decision that negligence is inferable

knowledge that his train had been pre- so foggy that he cannot see a distance of ceded by no sectionmen, maintains such more than 15 or 20 feet, at such speed a speed that he cannot stop within 130 feet, the distance he can see ahead on going around a curve, and so runs into a washout, is, as a matter of law, negligent. Sweeney v. Minneapolis & St. L. R. Co. (1885) 33 Minn. 153, 22 N. W. 289. The widow of an engineer killed in a collision cannot recover where he was warned by a signal of danger ahead, and immediately thereafter another signal was given indicating that he might proceed with safety, but both signals were continuously displayed together so as to leave it in doubt which should be regarded, and he went on, disregarding the danger signal, with the result that the collision ensued. Devine v. Savannah, F. & W. R. Co. (1892) 89 Ga. 541, 15 S. E. 781.

Where an operator hands a wrong order respecting the movements of a train to a conductor, and the terms of the order show that it is not directed to him, he is negligent if he takes it without inquiry. East Tennessee, V. & G. R. Co. v. De Armond (1887) 86 Tenn. 73, 5 S. W. 600.

Whether a brakeman was guilty of negligence in not taking hold of the brake rod to steady himself in anticipation of a jerk was held to be a question 589, 19 So. 699. for the jury, in *Sloan* v. *Central Iowa* R. Co. (1883) 62 Iowa, 728, 16 N. W. 331. But it has been held that a brakeman employed to run a car loaded with stone from a quarry to a railroad is not, as matter of law, negligent in letting the brake off a little from the car at the very beginning, although the car moves gradually before he does so. Spaulding v. W. N. Flynt Granite Co. (1893) 159 Mass. 587, 34 N. E. 1134.

The motorman of an electric car is guilty of such contributory negligence as will prevent recovery for an injury by collision with a vehicle going in the same direction as his car, where the car was going at such a rate of speed on a foggy morning that he could not stop it in time to prevent the collision after the vehicle became visible. La Pontney v. Shedden Cartage Co. (1898) 116 Mich. 514, 74 N. W. 712 (action against stranger).

A motorman who takes an east-bound car on the west-bound track, although out excuse and with notice that a wild by order of the dispatcher, on a morning train may come along at any time, go

that he cannot stop in time to prevent a collision with an approaching car, is guilty of negligence which is the proximate cause of an injury received by him in such collision. Savage v. Nassau Electric R. Co. (1899) 42 App. Div. 241, 59 N. Y. Supp. 225.

The fact that a conductor of a street car had been over the road before he was thrown off by a jolt at a place where the track was dangerously out of alignment was held not to be a sufficient ground for taking the question of his contributory negligence from the jury. Coughlin v. Brooklyn Heights R. Co. (1901) 59 App. Div. 126, 68 N. Y. Supp. 1105.

The driver of a street car is negligent in allowing the car to acquire such a momentum when near a railway crossing, that he could not stop it in time to prevent a collision with a train. Mantel v. Chicago, M. & St. P. R. Co. (1885) 33 Minn. 62, 21 N. W. 853.

A brakeman on a railroad is not, as matter of law, guilty of negligence contributing to his death, in attempting to light a cigarette while sitting on the rear bolster of a skeleton car from which he fell under the train and was killed. Davis v. Miller (1896) 109 Ala.

(b) Operation of hand cars.-An experienced section hand who is thrown from a hand car by a sudden stoppage of the car cannot recover where the employee who put on the brake gave the usual signal, and the injured servant, although he knew the car would stop, made no effort to save himself by holding on to the lever. Gulf, C. & S. F. R. Co. v. Hubert (1900; Tex Civ. App.) 54 S. W. 1074.

A section hand is not, as matter of law, negligent in having hold of the handle of the hand car with only one hand. Alabama Mineral R. Co. v. Jones (1897)

114 Ala. 519, 21 So. 507. A section boss is guilty of grossest negligence in running a hand car into a deep cut, without preparations to watch for and warn a train known to be due. Goodlett v. Louisville & N. R. Co. (1887) 122 U. S. 391, 30 L. ed. 1230, 7 Sup. Ct. Rep. 1254.

Sectionmen on a hand car who, with-

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down grade around a curve wholly cut- jury to say whether he was negligent in ting off the view, at a rate faster than not sending on a flagman before enterthat of the train which meets it, are guilty of negligence which will prevent flicting as to the distance between the recovery for injuries from collision with incoming train and the hand car at the a wild train properly sent out and which whistles in accordance with the rules. Shepard v. Boston & M. R. Co. (1893) 158 Mass. 174, 33 N. E. 508. "The moment" said Mr. Justice Holmes, "a man right of way after the passage of the has notice that a train may come along a track without warning at any hour, if he is run down by such a train when he is traveling on the track the other way, it is impossible for him to escape the imputaton of negligence merely by showing that such trains were few, and the chance of their coming small."

Trackmen running a hand car around a curve on a down grade are guilty of negligence in failing to send a flagman around the curve to flag an approaching train, if such precaution would be taken by a man of ordinary prudence under similar circumstances, although a printed rule requires flagmen to be sent

not, as matter of law, guilty of contributory negligence in going at a high rate of speed on the track where it is obscured by dense smoke, without stopping to ascertain whether a train is coming from the opposite direction, where he follows so closely behind a train which has passed that he will be through the smoke before such train can reach a side track beyond the smoke and allow another train coming down the main track at the usual rate of speed to enter the smoke; but otherwise if he does not know how far the former train is ahead of his hand car. Woodward Iron Co. v. Herndon (1897) 114 Ala. 191, 21 So. 430. On the second appeal of this case the switch engine, at and before the collision, was running at its customary speed, they should find for defendant; where the smoke was at any time of day, and did not see and could not know how far the incoming train was ahead of the hand car when he entered the smoke, he infra. was negligent in not stopping before entering the smoke, and sending a flagman ing stock.—Negligence was held to be a fo, ward. It was also held to be for the necessary inference where an experienced

ing the smoke, the evidence being contime the former disappeared in the smoke; and it might therefore have been justifiable to act on the assumption that the switch engine would not secure the train in time to get as far as the smoke.

A road master who enters a cut on a velocipede hand car knowing that a train was nearly due from the opposite direction is guilty of negligence which will prevent his recovering for injuries caused by a collision with the train. International & G. N. R. Co. v. McCarthy

(1885) 64 Tex. 632.

A railroad employee in charge of a hand car, who wrongfully and for his own pleasure delays his return with the car until it is too dark to see freight cars left standing on the track, is bound to proceed with such caution as may be necessary to secure his safety. If, around curves in going "up" grade only. through running the car too rapidly, he Southern P. Co. v. Ryan (1895; Tex. fails to observe cars standing on the Civ. App.) 29 S. W. 527. A section foreman on a hand car is fact that the cars have been left without signal lights will not render the company liable for injuries caused by the collision. Sliney v. Duluth & W. R. Co. (1891) 46 Minn. 384, 49 N. W. 187.

Where a track repairer was killed at night by the collision of a backing train of cars with a hand car in which he, with others, was approaching the station at which the train was standing, it is error to instruct the jury that, if deceased knew that the train was at the station, he was not guilty of negligence in aproaching it in a hand car, unless he knew the train was in motion. Catawissa R. Co. v. Armstrong (1865) 49

Pa. 186.

An inexperienced section hand on a (1901) 130 Ala. 364, 30 So. 370, it was hand car cannot be held, as matter of held to be proper to instruct that if the law, guilty of contributory negligence in jury believed, from the evidence, that not trying to stop the speed of the car on which he is riding, on seeing another closely following at a high rate of speed, -especially where there is nothing to and also that, if the plaintiff's intestate show that the slackening of the speed was informed that the switch engine was would have prevented the collision by liable to be passing along the track which he was injured. Christianson v. Chicago, St. P. M. & O. R. Co. (1896) 67 Minn. 94, 69 N. W. 640.

See also cases cited in § 343, note 1,

(c) Inspecting and repairing of roll-

flag at both ends of the siding where he were 6 feet apart at the time and mov-was at work, although at the end where ing very slowly and the brakeman saw the flag was not set engines used to enthe signal given. Jackson v. Norfolk & ter only two or three times a week. W. R. Co. (1897) 43 W. Va. 380, 46 L. Chicago, B. & Q. R. Co. v. McGraw R. A. 337, 27 S. E. 278, 31 S. E. 258. (1896) 22 Colo. 363, 45 Pac. 383. A A servant who has to handle crippled railway employee cannot recover for cars is bound to exercise active vigipersonal injuries caused by a shifting lance to avoid danger, to at least the engine bumping the car on which he was same degree that is demanded of persons engaged in making repairs, where he using highway crossings. Albert v. New knew that if he put up a red flag which York C. & H. R. R. Co. (1894) 80 Hun, was at hand, the car would not be 152, 29 N. Y. Supp. 1126.

struck, and also knew of the danger of A brakeman who, at the direction of struck, and also knew of the danger of A brakeman who, at the direction of failing to put it up, and yet neglected to the conductor, attempts to couple a flat do so. Cypher v. Huntington & B. T. car with steel rails projecting from the M. R. & toal Co. (1892) 149 Pa. 359, end of the car, and raised 4 feet 1 inch 24 Atl. 225. A fireman who has occasion to go underneath an engine which as matter of law, guilty of contributory has a labor raising his head, after has a leaky valve and is therefore liable negligence in raising his head, after to begin moving is negligent if he omits completing the coupling, just before he to scotch the wheels. Vicksburg & M. is out of reach of the rails, so that it is R. Co. v. Wilkins (1872) 47 Miss. 404. caught between the end of a rail and the

tempting to couple cars having couplers R. Co. (1896) 64 Minn. 185, 66 N. W. which he knows are dangerous, without 271. the exercise of great care, is bound to exercise a higher than ordinary degree of A servant who steps off the pilot of a care in his attempt to couple the cars. moving engine at an unusual place, with Southern R. Co. v. Arnold (1897) 114 which he is unacquainted and at which Ala. 183, 21 So. 954. No action can be he is under no necessity to alight, in the maintained for the death of brakeman dark, without using his lantern, as he killed while coupling a car having an could, when, had he used it, he would old-fashioned drawbar to a car having a have discovered an embankment so patent one, owing to the fact that he close to the track as to render his athad not a link ready, so as to prevent tempt to alight dangerous, cannot rethe platforms passing. Toledo, W. & cover for injuries sustained. Burgin v. W. R. Co. v. Asbury (1877) 84 III. 429. Louisville & N. R. Co. (1893) 97 Ala. A brakeman who is chargeable with 274, 12 So. 395. knowledge that the coupling appliances A brakeman who hurriedly stepped on foreign cars are dissimilar is bound from a train without looking to see in to exercise, in coupling them, a degree which direction it was going, which he of care proportionate to the increased could have readily discovered by looking,

washed by being caught between dead-falling upon the station platform and woods, testified that there was nothing rolling under the cars. Magee v. Chito prevent his seeing that both the cars cago & N. W. R. Co. (1891) 82 Iowa, coupled had deadwoods, and that he 249, 48 N. W. 92. could have seen the deadwoods perfectly if he had looked, the unavoidable inference is that his injury might have been —The delay of a brakeman whose duty avoided by the exercise of due care, it is to put caps on the rails as signals Whiteomb v. Standard Oil Co. (1899) to a following train, to place such caps, 153 Ind. 513, 55 N. E. 440. A brakefor the purpose of fixing his fires, is negman is guilty of such contributory ligence which will prevent recovery for negligence as will prevent a recovery for his death from a collision between the trushing of his hand between the two trains during the time of such debumpers of cars which he was attemptable. However v. Beech Creek R. Co. ing to couple, notwithstanding the negli- (1893) 154 Pa. 362, 26 Atl. 315. gence of the conductor in signalling the A train hand who, being sent out to engineer to back the train when the set stop signals, goes to sleep on the

car repairer failed to set out a signal brakeman was not ready, where the cars

(d) Coupling cars.—A switchman at- other car. Corbin v. Winona & St. P.

(e) Dismounting from moving cars.-

danger. Kelly v. Abbot (1885) 63 Wis. although the night was dark, is guilty 312, 53 Am. Rep. 292, 23 N. W. 890. of such contributory negligence as will of such contributory negligence as will Where a brakeman, whose hand was bar a recovery, where he was injured by

See also § 338, subd. f, infra.

(f) Setting stop signals on railways.

track, cannot recover if he is struck by mentum of which kept power on the v. Rush (1885) 15 Lea, 145. Under loose pulley, does not prove, as matter of such circumstances the fact that the en-law, that the plaintiff was careless in athim no such duty. Newport News & M. (1896) 166 Mass. 4, 43 N. E. 513 Valley Co. v. Horre (1892) 3 C. C. A. An employee who works near a revolv-121, 6 U. S. App. 172, 52 Fed. 362; ing shaft, without first removing his Stewart v. Southern R. Co. (1901) 128 N. C. 517, 39 S. E. 51 (servant seated himself on the end of a tie while acting folk Beet-Sugar Co. v. Preuner (1898) as flagman, and fell asleep). See also 55 Neb. 656, 75 N. W. 1097. Price v. Hannibal & St. J. R. Co. (1883)

cage was there).

sustain their weight. Robinson Charles Wright & Co. (1892) 94 Mich. 283, 53 N. W. 938.

note 16 of next section.

an action for personal injuries occa- gloves provided for him. Junior v. Missioned to the plaintiff, while in the de-souri Electric Light & P. Co. (1895) 127 fendant's employ, by the unexpected Mo. 79, 29 S. W. 988. A night inspectthe belt, evidence tending to show that Dixon v. Louisiana Electric Light & P. owing to defects in the belt and in the Co. (1895) 47 La. Ann. 1147, 17 So. driving pulley over which it ran on the 696. overhead shaft, the belt had a tendency, A to put in motion the fly wheel, the mo- to presume that they were properly and

a train. East Tenuessee, V. & G. R. Co. speed shaft after the belt was on the gineer failed to keep a sharp lookout tempting to repair the machine without upon the track will not enable the plain-first taking the belt entirely off. Martiff to recover, since the former owes tineau v. National Blank Book Co.

> coat or protecting it from coming in contact with the shaft, is negligent. Nor-

A servant who has been at work upon 77 Mo. 508 (plaintiff, while asleep, put an obviously dangerous or defective ma-his foot on a rail, and was run over). chine sufficiently long to understand the (g) Operation of elevators. - A serv- special perils to which it exposes him ant who knows of the condition of the cannot recover where he is injured as a doors opening into an elevator well, and result of his want of care in handling it. the fact that they have no automatic Hamby v. Union Paper-Mills Co. (1899) fastenings, is under the duty of guard- 110 Ga. 1, 35 S. E. 297; Standthe v. ing against any accident that is liable Swits Conde Co. (1900) 53 App. Div. to occur in consequence of the absence of 500, 65 N. Y. Supp. 942 (servant's hand such fastenings. Dieboldt v. United drawn between rollers of drying ma-States Baking Co. (1893) 72 Hun, 403, chine, the space between them having 25 N. Y. Supp. 205 (servant backed in- been enlarged temporarily, to his knowlto well without ascertaining whether the edge). Where an employee was operating a stamp which, after descending and An operator of an elevator, familiar cutting pieces of tin in a certain shape, with its construction and operation and returned to a position of rest above the knowing that the brake must be set ac- block, where it was supposed to remain cording to the weight placed upon it, and until released once more by the lever, that a weight would cause it to descend he is not negligent, as matter of law, in unless the brake was properly set, is using his fingers to remove a piece of guilty of such negligence as will prevent tin, although he knew that the machine a recovery for injuries caused by its sud- was not in good order, and he might den descent, where he rolled two heavy have used a stick for the purpose. Norbarrels upon it without trying the brake ton Bros. v. Sczpurak (1897) 70 Ill. and seeing that it was properly set to App. 686. See also subd. (i) of this v. note.

(i) Dealing with electrical appliances.—A recovery cannot be had for the See also subd. (i) of this note, and death of an experienced lineman by handling uninsulated wires charged (h) Manipulation of machinery.-In with electricity, without using rubber tempting of a machine which he was ator's want of care in the use of an insutempting to repair, and which was run
lating board while he was repairing
by a belt from an overhead shaft, there
lamps will prevent recovery for his
being both a loose and a tight pulley for death caused by contact with a live wire.

A charge in an action for a lineman's when running on the loose pulley, to death, caused by a live wire, that, if detick the tight pulley, and to creep from ceased had no knowledge or information the loose to the tight pulley, to such an that the span wires of a street railroad extent as to communicate the power of company were not properly insulated the overhead shaft to the machine, and and reasonably safe, then he had a right safely insulated, unless the want of in- Anson v. Evans (1893) 19 Colo. 274, 35 sulation or defects therein were plainly Pac. 47. obvious, is erroneous, in that it relieves the employee of the duty to exercise from flying objects.—Where an emactive precaution in a hazardous occupa- ployee engaged in working at an emery tion. Jackson & S. Street R. Co. v. Sim-

-Whether the striking of a match by the plaintiff, a janitor in the employ of defendant, to discover where the smell of gas which he detected came from, was negligence which contributed to the injury resulting from an explosion caused thereby, will depend upon the circumstances of the case, and is a question for the jury. Ruch v. Gas Electric Co. (1900) 65 N. J. L. 399, 47 Atl. 504. Contributive negligence is chargeable to an experienced oil miner who is killed by an explosion occasioned by his lighted lantern, in passing near an oil well from which he could smell and hear gas escap-McClafferty v. Fisher (1885; Pa.) 1 Cent. Rep. 571. See also § 335, subd. (14), infra.

Dealing with explosives. — To leave an open barrel of gunpowder close to the place where a charge is being fired is negligence. Mulligan v. M'Alpine (1888) 15 Sc. Sess. Cas. 4th series, 789. To light a fire for the purpose of repairing tools in a room where powder is employer is not liable for injuries sustained by an employee engaged in clearing and grading the surface of the botcommon for cartridges to remain unex- 366. ploded after the use of an electric batof the necessity of caution in approach-App. Div. 133, 57 N. Y. Supp. 168.

A laborer who, while cleaning a wall, is and killed, is guilty of contributory negprecipitated to the sidewalk by the ligence. Georgia F. R. Co. v. Bradfield breaking of a rope of the platform used (1892; Miss.) 10 So. 577. by him, cannot recover therefor, if his employer instructed him that the acid shoulders of sectionmen to be substitutused for cleaning would eat the ropes, ed for a defective one in the railroad which were of sufficient strength when track, instead of upon a hand car, which he began work, and where the rope broke is the usual method of transporting because of acid which he spattered upon rails, does not constitute contributory

(m) Working where there is danger wheel was provided by his employer mons (1901) 107 Tenn. 392, 64 S. W. with a pair of goggles to protect his 705.

(j) Dealing with inflammable gases. the wheels, and, having occasion to be absent from his wheel a few moments, laid his goggles aside, and on his return and before he had adjusted them to protect himself he was struck in the eye by a piece of brass from an adjacent wheel operated by another employee, he is guilty of negligence. Munn v. L. Wolff Mfg. Co. (1900) 94 Ill. App. 122. See also § 335, subd. g.

(n) Handling heavy objects.-One of two men employed to transfer a box weighing 250 pounds from one railroad car to another, who stands in the doorway of one of the cars while his fellow servant shoves the box part way out of the door of the other, and attempts to hold it by a rope attached by one of them to the handle of such box so carelessly that it gives way and causes the whole weight of the box to fall upon the former and pull him out of the car, is guilty of negligence. Gowen v. Harley (1893) 6 C. C. A. 190, 12 U. S. App. 574, 56 Fed. 973.

An employee engaged in loading heavy lying is negligence. Downey v. Pence lumber on a car standing on a spur or (1895) 98 Ky. 261, 32 S. W. 737. An side track is not, as matter of law, guilty of such negligence as will prevent a recovery for his death by the lumber falling upon him when struck by antom of a canal after blasting, from the other car, without notice to him, by not carelessness and negligence of a coem-keeping the lumber on a level at all ployee in striking an unexploded dynatimes, where it is of different dimensite cartridge with his pick, where the sions. Ragland v. St. Louis, I. M. & S. injured employee knew it was not un- R. Co. (1897) 49 La. Ann. 1166, 22 So.

A brakeman on a construction train tery in their discharge, and was aware who, although cautioned of the danger by a fellow servant, attempts while the ing the unexploded holes. Hutchinson train is in motion to adjust cross-ties on v. Charles F. Parker & Co. (1899) 39 flat cars, which have become misplaced so that their ends jut over the end of (1) Dealing with dangerous fluids.— the car, and is knocked from the train

The carrying of a light rail on the it while he was engaged in the work. negligence on the part of one of those sectionmen. Atchison, T. & S. F. R. Co. attached to the post was too large to v. Vincent (1896) 56 Kan. 344, 43 Pac. safely fit down into the hook fastened failed to get a log down to the depression nearest the foot of the skids, ready hook gave way and the post fell upon n load on the carriage when the latter was back from the saw and in front of the skids, rolled the log down after the Dock Co. (1897) 95 Va. 355, 28 S. E. carriage was beyond the skids, and the carriage, when it came back, threw the log against him, an action for the resulting injuries is barred on the ground of his contributory negligence in rolling the log down after the carriage was beyond the skids. Stadky v. Marinette Lumber Co. (1900) 107 Wis. 250, 83 N. W. 514.

It is negligence to roll a heavy grindstone over a depression in a floor without any necessity and without taking any precautions,—such as laying a plank over the low place. Sullivan v. Nicholson File Co. (1900) 21 R. I. 540, 45 Atl. 549.

An employee is not, as a matter of law, guilty of negligence in holding one end of a plank, while the other end rests on a wagon, for the purpose of unloading a heavy barrel therefrom, where such manner of unloading was not so dangerous as to threaten immediate injury in its use. Beard v. American Car Co. (1895) 63 Mo. App. 382.

One of three men injured while attempting to lift heavy steps, when other employees who might have been called to employer for injury thereby received. Ind. App. 335, 56 N. E. 725. pounds, who, without calling for assistto enable him to work more convenientstick or rung used to hold the cylinder So. 771. in place, and which, had the casting not for the purpose although it was crossgrained. McGoldrick v. Metcalf (1892) Affirmed in a mem. judgment (1894) 144 N. Y. 630, 39 N. E. 494.

of contributory negligence where, under where a miner, knowing that a roof was the foreman's orders, he attempted to in an unsafe condition, tapped it with bear down upon a stern post which was his pick for the purpose of testing it, being unevenly raised by a hydraulic and brought down a large piece upon crane, although he knew that the ring his head. Massie v. Peel Splint Coal Co.

Where a sawmill employee, having to the arm of the crane,—a fact of which the foreman was not notified,-when the the employee's leg, crushing it. White v. Newport News Shipbuilding & Dry 577.

> An adult laborer is presumed to understand the operation of the law of gravitation sufficiently to be chargeable with negligence if he puts his weight on one side of a wagon bed on which a thin slab of marble is set almost upright, and thus causes the slab to topple over on him. Motey v. Pickle Marble & Granite Co. (1896) 20 C. C. A. 366, 36 U. S. App. 682, 74 Fed. 155.

> An employee is negligent in moving heavy timbers which have not been squared, along a narrow runway without blocking them so that they cannot roll from the dolly by means of which they are moved. Agnew v. Supple (1898) 80 Ill. App. 437.

A servant is not entitled to recover on findings that plaintiff was employed to operate machinery in defendant's mill, and was injured while attempting to readjust a heavy shaft hung about 8 feet from the floor; that he was as well acquainted with the danger as defendant was; that the injury was purely accidental, and to have avoided it plaintiff need only have kept in mind the fact assist, and all necessary tools and inthat the shaft would fall if not sup-struments for moving such articles, ported, and to give reasonable attention were near, cannot recover against his to the work. Ervin v. Evans (1900) 24

Dunlap v. Barney Mfg. Co. (1888) 148 A factory girl whose duty it is to Mass. 51, 18 N. E. 599. An employee carry boards to be used in her work directed to remove the rough places from the floor above the one on which from an iron cylinder weighing 1,250 she works is not guilty of negligence in attempting to descend the stairs holdance, which he might have had, attempts ing in her arms four boards about 4 feet alone to move the cylinder up an incline long and 6 to 12 inches wide, there being no other way to obtain them. Ferris v. ly, takes the risk of the breaking of a Hernsheim (1899) 51 La. Ann. 178, 24

(o) Work in mines.-A miner who been moved, was reasonably sufficient lights a match without observing his safety lamp to see that there is no gas in the mine is negligent, so as to be un-44 N. Y. S. R. 476, 18 N. Y. Supp. 169, able to hold the employer liable for injuries caused by a resulting explosion. Sommers v. Carbon Hill Coal Co. (1898) An employee in a dock-yard is guilty 91 Fed. 337. No recovery can be had

switch at a resting place along a line guarded. Taylor v. Carew Mfg. Co. of the shaft of a coal mine was struck (1885) 140 Mass. 150, 3 N. E. 21. Where of the shaft of a coal mine was struck (1885) 140 Mass. 150, 3 N. E. 21. Where by a descending car, his contributory the evidence is that the plaintiff ran an negligence is deemed to be a bar to his elevator to an upper story to secure action, where he neglected to have the some merchandise, and, leaving the bar switch turned by his assistant, although up which closed the shaft, went in he knew that the noise occasioned by search of the goods, and, returning, the steam escaping from a pipe which placed some on the elevator; that he he was engaged in repairing would prethen went for others, still leaving the start him fars the supresselve of the goods. the car. Woodward Iron Co. v. Jones returning hastily without the goods, he, (1885) 80 Ala. 123. See also subd. without examination, stepped into the (j), supra.

likely to prove too weak to support the such event he should have been more weight to which it is subjected, unless careful. *Poindexter* v. *Benedict Paper* it is supported at intervals by blocks, *Co.* (1900) 84 Mo. App. 352. is negligent if he does not adopt this precaution. Jones v. Roach (1876) 9 a furnace company to recover for inju-Jones & S. 248. A servant injured ries sustained by falling over a precip-through failing to use some precaution itous excavation in the dump pile at to save him from falling off a sloping nighttime, a verdict should be directed shelf, slippery with ice, which ran for the defendant where the foreman had round a tank, on which he was ordered a right to and might have taken a torch to do some work, the manner of doing such work being wholly under his control, cannot recover. English v. Chica- Affirming 91 Ill. App. 337. go, M. & St. P. R. Co. (1885) 24 Fed. 909.

ant who has got off a beaten path goes leaving the building where he is emon, knowing that there is an unprotect-ployed takes no notice of where he is ed hole close by, and falls into it. going, and, without looking down to see

A woman has been held unable to recover for injuries caused by a fall consequent upon rushing down a ladder ligence. Swift v. McInerny (1899) 90 with high-heeled shoes on her feet. Ill. App. 294. Ayres v. Bull (1889) 5 Times L. R. 202.

ployee in a mill from recovering for indistance from the passage leading to and 177 Mass. 128, 58 N. E. 182. from the mill, in walking through the

foreman to hurry, in the dark, falls into prevent recovery for an injury caused an unguarded elevator well the existence by falling into one of the vats. Chicago of which he knows and which he might Packing & Provision Co. v. Rohan have avoided, is guilty of contributory (1892) 47 Ill. App. 640. It is neglinegligence precluding his maintaining gence to walk in the dark beside an open

(1896) 41 W. Va. 620, 24 S. E. 644. an action against his master, who negli-Where an employee having charge of a gently permitted the well to be unvent him from hearing the approach of bar up and the shaft open; and that on shaft and was precipitated to the bot-(p) Footways.—A servant who is tom, the elevator having been removed chargeable with knowledge that a bridge by another employee,—he cannot recovextending from a vessel to a wharf is er though the light was bad, since in

In an action by the night foreman of with him. Iroquois Furnace Co. v. Mc-Crea (1901) 191 Ill. 340, 61 N. E. 79,

Where an employee, after dark, with No recovery can be had where a serv- an unlighted lantern in his hands, in M'Shane v. Baxter (1890) 7 Times L. if there is a ladder or other safe means of egress, walks out of a window which he knows is 20 feet or more from the ground, he is guilty of contributory neg-

A spinner who, on the electric lights (q) Inadequate light.—A servant who going out for a minute or two, immedigropes about an unfamiliar part of his ately reached in the dark, with his left master's premises on a dark night is, as hand, to shut off the machinery, though a matter of law, guilty of contributory it does not appear that there was any negligence. This rule prevents an em- emergency or need for haste, and in doing so got his right hand in the gear, juries sustained by falling into a cis- is guilty of contributory negligence. tern maintained in the mill yard at a Kelley v. Calumet Woolen Co. (1900)

An employee who, knowing that a yard in search of a drink of water on a room is dangerous because it contains dark night, while the ground was frozen the opening to vats containing hot and slippery. McCann v. Atlantic Mills liquids, enters it when it is dimly light (1898) 20 R. I. 566, 40 Atl. 500. ed, and goes along in it when he cannot A workman who, told by his master's see, is guilty of such negligence as will

from the failure of a servant to extricate himself from such a situation, whenever it is possible to do so by the exercise of ordinary care.<sup>2</sup>

A jury is properly instructed to the effect that an employer is not liable for an injury received by an employee in a situation the peril of which is apparent to anyone of ordinary intelligence, where he failed to exercise the degree of care required, and such failure contributed to his injury.3

Some of the decisions cited in which the servant failed to recover might evidently, so far as the facts were concerned, have been put upon the ground that he had assumed the risk or was negligent in having remained at work.

It will also be observed that in many of the cases the facts involved are identical with or similar to those commented upon in §§ 334-339, infra. Indeed, it is easy to see that circumstances which are suggestive of a violation of the duty to avoid unnecessarily dangerous positions will usually be suggestive also of a violation of the duty to use precautions appropriate to the environment. The practical inference is that a counsel acting for an employer should

Whether an employee stepping down W. 895. from a ladder in the dark without callby stepping into hot water overflowing of negligence which will preclude a refrom a well, is a question for the jury covery by him from his employer for where he had previously crossed the injuries sustained by the horse becoming place three times within a few minutes, frightened, although he did not see the picking his way carefully each time by engine and had been required to drive the light of his candle. Connelly v. the horse against his objection. Maham

The failure of a servant to use a lan- 556. tern, while walking along in the dark (t) Work on ships.—A seaman who between the decks of a ship which is be- is ordered aloft on a dark, windy night

ter time is not, as matter of law, guilty of contributory negligence because he failed to provide himself with clothing sufficient for severe weather. Schumaker v. St. Paul & D. R. Co. (1891) 46 Minn. 39, 12 L. R. A. 257, 48 N. W. 559.

vat on a plank which, as the servant A section hand who allows his feet to ought to know, is frequently rendered freeze, when this might have been preslippery by the vapors which rise from vented by his keeping in motion or gothe vat and settle upon it. Shippey v. ing to a fire provided, is guilty of con-Grand Rapids Leather Co. (1900) 124 tributory negligence. Farmer v. Central Mich. 533, 83 N. W. 284.

- (s) Unruly horses. An employee ing on others present to relight his can-who, seeing a moving train, drives a dle, or to hold theirs so that he could horse known to him to be fractious see, contributed to his injuries caused within 5 feet of the locomotive, is guilty Faith (1899) 190 Pa. 553, 42 Atl. 1024. v. Clee (1891) 87 Mich. 161, 49 N. W.
- between the decks of a ship which is being loaded, is not negligence, where it appears that he did not know that lanterns had been supplied. Tully v. New up the rigging and out on the crane-York & T. S. S. Co. (1896) 10 App. line, is negligent, if he does this without Div. 463, 42 N. Y. Supp. 29. See also subd. (e), supra.

  (r) Severe weather.—A railway servant sent out on a work train in the winter time is not, as matter of law, guilty of contributory negligence because he failed to provide himself with clothing sufficient for severe weather. Schumaks sufficient for severe weather. Schumaks 3 Jones v. Alabama Mineral R. Co.

<sup>3</sup> Jones v. Alabama Mineral R. Co. (1895) 107 Ala. 400, 18 So. 30.

always be careful to see that, whenever, the state of the evidence admits it, both these issues are distinctly raised.

The inference of negligence which is drawn when a servant who is about to put himself in a dangerous position fails to warn other persons of his movements is discussed in § 336, post.

332. Failure to give proper attention to surroundings.—(Compare § 348, subd. b, infra.)—A doctrine which is indirectly exemplified by several of the cases cited under the last section, and specifically enumerated in a large number of others, is that a servant is not in the exercise of ordinary care, unless, at each stage in the progress of his work, he makes an effective use of his bodily and mental faculties, and observes as attentively as is reasonably possible under the circumstances the condition of the instrumentalities by which his safety may be affected, and the results of their operation by himself or others, in so far as that operation may tend to subject him to danger.1

In some cases his inability to recover may be viewed as being referable either to the conception that the fact of his having paid no attention to his surroundings shows that he was reckless as to whether there was or was not danger, or to the conception that his incapacity to understand the extent of the danger was culpable.2

For the sake of convenience in classifying the large number of cases in which a breach of the obligation thus indicated has been recognized, they may be divided into the two main categories indicated by the headings of the next two sections.

332a. Duty omitted in respect to stable or persistent conditions .-(Compare § 348, note 12, infra.)—The conditions thus designated

¹An employee must give heed to the his ears alone, without using his eyes. notice and instructions given him, and Lynch v. Boston & A. R. Co. (1893) 159 must employ his senses, his reasoning Mass. 536, 34 N. E. 1072.
faculties, and his attention, alike for his own safety and the welfare of the road. Louisville & N. R. Co. v. Hall obligation to use eyes and ears is also adverted to.

In Claribase N. Kanaga City. Et al.

own skill and judgment so as to protect it was laid down that a servant could himself in the course of his employment, and the master is not regarded as warfailure to "make use of his faculties of ranting generally his safety. He is bound himself to exercise proper care, and cannot claim indemnity from the master for injuries resulting to him which might have been prevented if he is a servant's duty "to exercise his thinkwhich might have been prevented if he ing faculties, and give careful attention had himself been reasonably vigilant." to the business" in which he is engaged.

International & G. N. R. Co. v. Hester (1888) 72 Tex. 44, 11 S. W. 1041.

An employee is not entitled to rely on 28, 57 N. W. 976.

So. 277.

In Claybough v. Kansas City, Ft. S.
A servant "is bound to exercise his & M. R. Co. (1894) 56 Mo. App. 630,
own skill and judgment so as to protect it was laid down that a servant could

are exemplified in cases involving the different predicaments mentioned in the three following paragraphs.

(1) The conditions to be observed were incident to the permanent arrangements of the master's plant, or affected some portion of that plant in such a manner as to threaten the security of the servant, and the servant was chargeable with knowledge of those conditions at some time before the injury was received. It will be observed, that, al-

contributory negligence in descending a the existence of pits in a roundhouse, ladder at the side of a car for his own walks into a pit at night while going to purposes, without looking for a water the place assigned to him for work, is plug standing so near the car as to be guilty of such contributory negligence dangerous, or in not waiting until such as will prevent a recovery whether the plug is passed, where it is open and ob- place was sufficiently lighted or not. vious to all, and he has had numerous McDonnell v. Illinois C. R. Co. (1898) opportunities of seeing it. Pennsylva- 105 Iowa, 459, 75 N. W. 336. In an acnia Co. v. Finney (1896) 145 Ind. 551, tion by a switchman injured by falling

42 N. E. 816.

N. R. Co. v. Banks (1894) 104 Ala. 508, (1900) 59 S. W. 626.
16 So. 547. A railway company is not liable for the death of a brakeman who was struck by the fourth sill of a danknown to be unblocked, when they might gerously low bridge, after he had passed safely under the three first sills by stooping and lowering his head, where (1894) 152 U. S. 145, 38 L. ed. 391, 14 he had full knowledge of the dangerous Sup. Ct. Rep. 530. For a brakeman, character of the bridge, and the accident was due to his negligently raising his blocked, to move over them while couplead too soon. Chesaneake & O. R. Co. ling and uncoupling cars, even in moving them as ordinarily prudent men would Co. (1899) 93 Me. 80, 44 Atl. 361. usually exercise in reference to their own safety, under like circumstances. had complained to the yard master of Louisville & N. R. Co. v. Hall (1888) the defective condition of a footboard 87 Ala. 708, 4 L. R. A. 710, 6 So. 277. on the engine, and a few days afterbe found in §§ 30a, 63, ante.

by a cattle guard in close proximity ply from the fact that in the hurry of thereto three or four times while engaged in switching on a given day is fect or observe whether it had been remguilty of contributory negligence where cdied. Central Trust Co. v. Wabash, he subsequently walks into it while at- St. L. & P. R. Co. (1886) 26 Fed. 897. tempting to uncouple cars on the same Compare cases cited under §§ 350, 355, day. Fuller v. Lake Shore & M. S. R. infra.

Co. (1896) 108 Mich. 690, 66 N. W. 593. An employee in a foundry company

A railroad brakeman is guilty of A railroad employee who, knowing of over a ground switch in the railroad A brakeman is guilty of contributory yard where he worked, evidence that he negligence precluding recovery for his had been warned by his foreman to look death caused by his striking, while out for certain ground switches, but not standing on the top of a car, against an for the one over which he fell, is propoverhead bridge negligently maintained erly admitted, as tending to explain his by the company, where he had passed failure to discover the switch that under such bridge over one hundred caused his injury. Galveston, H. & S. A. times and at the time of the accident R. Co. v. English (1900; Tex. Civ. App.) his view was unobscured. Louisville & 59 S. W. 912, Denying Rehearing in N. R. Co. v. Banks (1894) 104 Ala. 508, (1900) 59 S. W. 626.

head too soon. Chesapeake & O. R. Co. ling and uncoupling cars, even in moving v. Hafner (1894) 90 Va. 621, 19 S. E. trains, without taking any thought of the 166. A railroad brakeman receiving no- frogs and guard rails, or as to where he tice of low highway bridges over the may be stepping, is negligence on his road and of their location must use such part contributing to the catching of his care, watchfulness, and caution to avoid foot in them. Gillin v. Patten & S. R.

Where a foreman of a switching crew Some remarks on cases of this type will wards was injured while riding on the footboard, by reason of the defect, con-A railroad brakeman who has walked tributory negligence is not inferred sim-

though the right of recovery was made to turn, in the cases cited, upon the question whether he exercised a proper amount of vigilance at the time the injury was received, the action might have been declared not maintainable for the reason that the servant's knowledge charged him with an assumption of the risk, or with contributory negligence in continuing in the employment.

(2) The conditions were of the same nature as those designated in

fully looked ahead of him as he was Super. Ct.) 217. A servant who walks walking along, and such pit was one of backward towards a revolving shaft, the usual appurtenances in connection while helping other employees to move with such a foundry as that in which a box, is negligent. Beck v. Firmenich he worked. East Chicago Foundry Co. Mfg. Co. (1891) 82 Iowa, 286, 48 N. W. v. Ankeny (1897) 19 Ind. App. 150, 47 81. A servant who fails to hold a coil of N. E. 936, Rehearing Denied in (1898) rope which he is carrying high enough to 19 Ind. App. 153, 49 N. E. 186. An clear a revolving shaft the position of employer is not liable for an injury to which he knows, and, as a result of his an employee who falls through an opening in the floor of which he knew, where the accident results from his own inat-

Ill. App. 49.

had full opportunity to know the exact situation; that he was provided with a lantern, and it was a bright moonlight night; and that, while the testimony tended to show that such open space had been habitually covered until within a week or ten days before the accident, there was no proof that it had dent, there was no proof that it had dent, there was no proof that it had been covered within such time, or that such servant did not know the exact situation, or that he took any precaution to prevent the accident. Robbins v. Brounville Paper Co. (1900) 53 App. Div. 641, 65 N. Y. Supp. 955. A servant cannot recover for personal injuries due to his own negligence in letting if he knew the position, condition, and his hands slip into cogwheels while not giving attention to his work. D. M. Schler Carriage Co. v. O'Neil (1891) proaching the same from one particular side, (1925) 12 Or 500, 2020 tion, allows his hand to be caught be- tributory negligence. Hurst v. Burntween the rollers of a machine into side (1885) 12 Or. 520, 8 Pac. 888.

cannot recover for injuries received by which he was inserting a piece of paste falling into a molding pit, where he cannot recover damages. Sarault v. could have seen such pit if he had care-App. 153, 49 N. E. 180. An clear a revolving shart the position of is not liable for an injury to which he knows, and, as a result of his oyee who falls through an openie floor of which he knew, where catching in the shaft, cannot recover. It results from his own inattive stone v. Oregon City Mfg. Co. (1870) Clark v. Murton (1896) 63 4 Or. 52. A servant operating a ripseq. 49. Ill. App. 49.

The servant's freedom from contributory negligence is not established, where it appears that he went to clear ice from a flume rack, and fell into an open space that on the same night he had assisted quired, and by consequence to be neghis brother in clearing away the ice, and had assisted in performing such duty as occasion required for three years; that he was familiar with the flume and its dangerous character, knew Eicheler v. Hanggi (1889) 40 Minn. the method of clearing away ice, and had full opportunity to know the exact situation; that he was provided with a working upon the evidence, to be chargeable with knowledge that, as the table through which the saw projected was not stationary, it was necessary to fasten it by some means or other as occasion rethat on the subject, or to observe that the screws by which it had formerly been years; that he was familiar with the secured in place had been removed. Eicheler v. Hanggi (1889) 40 Minn. 263, 41 N. W. 975. Compare also the decision that an independent contractor situation; that he was provided with a working upon a scaffolding within a

the last paragraph, but the servant's knowledge thereof prior to the accident was not a specific element in the case, either because it was not, or could not be, proved at the trial.2 Under such circumstances, since the defenses of the assumption of the risk and of contributory negligence in continuing in the employment are excluded by the character of the evidence submitted for review, the sole question

N. E. 96.

killed by being knocked from a car by and he simply did not notice what he a bridge over the railroad, which was was doing." ncar other bridges, and was approached A servant who, while walking beside in the daytime; that the deceased and a car, pushing it by the hand rail at ance of any duty, but were sitting idly Detroit, G. H. & M. R. Co. (1899) 122 together, in full view of the danger, and Mich. 232, 81 N. W. 103. with nothing to distract their attention, and nothing to do but to avoid the danin allowing his foot to get into an un-(1886; Pa.) 2 Cent. Rep. 604, 4 Atl. 838.

was er it has steps or not. Chicago, B. & O. v. Warner (1884) 108 III. 538. The danger caused by the difference of the existence of the bridge and its in the height of the drawbars of two dangerous character a short time before the accident, and climbed onto the against which are to be coupled is one fore the accident, and climbed onto the against which an experienced brakeman top of the car at a place which would have been between the bridge and the telltale if there had been a telltale N. H. 271, 39 Atl. 978.

It is held, however, that a finding caught in a narrow space 3½ inches wide that a servant who had his hands between the side of a trail car and the drawn between a belt and a pulley could doorway of its power-house through have avoided the danger by giving attention to where he was putting his the danger of attempting to pass behands is not sufficient to overcome a tween the car and pier being obvious. general verdict in his favor. To have and everything about the construction that effect it must also be stated that being open and transparent, and the inthe failure to give such attention was jury occurring because he failed to let negligent. Romona Oolitic Stone Co. v. go of the car when he came to the door-Phillips (1894) 11 Ind. App. 118, 39 way. Jennings v. Tacoma R. & Motor intilips (1894) 11 Ind. App. 118, 39 way. Jennings v. Tacoma R. & Motor Co. (1893) 7 Wash. 275, 34 Pac. 937.

In an action for damages for the Plaintiff testified that "he saw the sitdeath of a brakeman on a railroad uation, that he was directed by no sufreight train, the facts that he was perior in the execution of the work,

another brakeman were seated on top of the front platform, strikes his shoulder one of the cars facing the bridges; that against a coal shed near the track, canthey passed one of the bridges in safety; not recover where it appeared that he that his companion passed all the could see objects as large as a man at a bridges in safety, and the one by which distance of 10 feet and that others ashe was struck was the last; that the sisting him saw men on the track ahead men were not engaged in the perform- of them, and saw the shed. Pahlan v.

ger, -constitute such evidence of con-blocked frog was held to be for the jury tributory negligence as will defeat a re- upon the facts in Jones v. Flint & P. M. covery. Stoneback v. Thomas Iron Co. R. Co. (1901) 127 Mich. 198, 86 N. W.

A conductor who knows that some of Failure of a railway company to the cars that he has to use are without maintain a "telltale" over one of two end ladders is negligent if, before atparallel tracks passing under a low tempting to pass from the side to the bridge does not render it liable for in- end of a car, for the purpose of unjury to a brakeman while riding on the coupling it, he fails to ascertain wheth-

Negligence is inferable, as a matter An electric street railway company is of law, where a brakeman who was not liable to a conductor who was about to couple two cars failed to nowhich can be material is whether the servant's failure to observe the danger was due to a want of proper vigilance at, or just prior to, the time of the accident.

(3) The conditions were produced by or incident to the use of the master's plant by the employees, and, although not permanent in the sense in which that term has been used in the two preceding paragraphs, were such as to affect the safety of the servant's environment for a definite period of more or less considerable length.<sup>3</sup> In most of the cases illustrating this predicament the servant had no opportunity

tice that they were equipped with pro- approached. Oregon Short Line & U. N. jecting sills which came within 14 R. Co. v. Tracy (1895) 14 C. C. A. 199, inches of each other when the cars met. 29 U. S. App. 529, 66 Fed. 931. Beaudin v. Central Vermont R. Co. A brakeman is not guilty of contrib-(1891) 38 N. Y. S. R. 473, 14 N. Y. utory negligence, as a matter of law, Supp. 700.

hand car over rough ground, in failing to though he had a lantern with him, and Rehearing Denied in (1896) 15 Ind. 56 Kan. 222, 42 Pac. 699. The question App. 356, 44 N. E. 59.

ligence is imputable to a servant who, by poles which projected from the end while carrying an armful of wood into of a car he was attempting to couple to a dark cellar, was injured by stepping another in the nighttime, is for the jury. into a hole, of which he had no previous George v. Clark, (1898) 29 C. C. A. 374, knowledge. Eastland v. Clarke (1901) 56 U.S. App. 505, 85 Fed. 608. 165 N. Y. 420, 59 N. E. 202, Reversing Supp. 1140.

him to do, in time to stop the train be- that a coupling pin is stuck fast in the fore injury, cannot recover for injuries drawhead, and having unsuccessfully on account of such obstruction. Nor- tried to remove the pin steps back to folk & W. R. Co. v. Williams (1892) 89 get out and is caught between the car Va. 165, 15 S. E. 522.

A brakeman who jumps off a moving ter of law, to have voluntarily placed train in a yard without looking to see himself in a place of danger without whether he will alight on any of the having used the caution which a perobstructions which may be expected to son of ordinary prudence would have be encountered near the track in railway used. Renninger v. New York C. & H. yards is negligent, as a matter of law. R. R. Co. (1900) 162 N. Y. 595, 57 N. Thompson v. Boston & M. R. Co. (1891) E. 1123, Affirming (1896) 11 App. Div. 153 Mass. 391, 26 N. E. 1070 (struck a 565, 42 N. Y. Supp. 813. pile of rails).

Whether trainmen should have observed an obstruction on a spur track who knows that there are both crippled was held to be a question for the jury, and sound cars in the yard, cannot rewhere it was hidden by a growth of cover for injuries received while hanoverhanging brush which became much dling a crippled car, where the accident more dense as the point of danger was occurred in daylight, and the condition

pp. 700. precluding recovery for his death A section hand is guilty of such concaused by his head being wedged betributory negligence as will prevent a tween a projecting pole on a flat car recovery for an injury caused by falling, and box car while coupling the cars durwhile helping to carry a heavily laden ing a rainy and very dark night, algive any attention to where he is going. a few minutes before had uncoupled the Terry v. Louisville, N. A. & C. R. Co. same cars from the other side. Atchi-(1896) 15 Ind. App. 353, 43 N. E. 273, son, T. & S. F. R. Co. v. Wells (1895) pp. 356, 44 N. E. 59. of the contributory negligence of a It is for the jury to say whether neg-switchman of slight experience, killed

A brakeman who has an opportunity (1898) 28 App. Div. 621, 51 N. Y. of inspecting the coupling apparatus of upp. 1140. a car, but makes no examination thereof An engineer who could have seen an until the engine to which it is to be obstruction on the track if he had kept united is being backed down upon him a vigilant outlook, as his duty required in response to his signal, and then finds a. 165, 15 S. E. 522. and the engine, must be held, as a mat-A brakeman who jumps off a moving ter of law, to have voluntarily placed

A brakeman employed in making and

to ascertain the existence of the conditions until the actual emergency with which he had to deal presented itself; and the degree of attention which he was paying to his surroundings at or just before the accident is the only material issue to be determined.

332b. Omission of duty in respect to transitory and sporadic conditions.—(See also § 348, note 12, and § 358, infra.)—Another type of case in which the servant's failure to give proper attention to his surroundings is the determinative factor is that in which the condi-

of the car was apparent, although it was illuminated by several electric lights, not marked as crippled. Albert v. New and that, according to the testimony of York C. & H. R. & Co. (1894) 80 Hun, several witnesses, he had been warned of 152, 29 N. Y. Supp. 1126. A railway the danger of the work. Robare v. Secompany is not liable for the death of attle Traction Co. (1901) 24 Wash. 577, an employee who was caught between 64 Pac. 784. two cars, one of which was without a A workman engaged in constructing drawhead and had been condemned to a bridge is negligent if he fails to obbetween the cars without examination and regardless of the defective condition of such car. Illinois C. R. Co. v. Bowles (1894) 71 Miss. 1003, 15 So. 138.

A brakeman was guilty of contribu-tory negligence preventing recovery for his death from collision of two parts of a train which had become separated while the train was running, during the nighttime, where he was riding on the top of the car next to the first car of the rear portion, and failed to discover that the train had broken, or, if aware of that fact, failed to take measures for his own safety, although the cars ran 5 miles before the collision occurred. Richmond & D. R. Co. v. Tribble (1896) 97 Va. 495, 24 S. E. 278.

company in the repair of cars cannot recover against the company for injuif he had looked. Day v. Cleveland, C. N. W. 179. C. & St. L. R. Co. (1894) 137 Ind. 206, A workm 36 N. E. 854.

A workman engaged in constructing the repair shops and had reached the serve whether a wedge used in the conyard of the company, when deceased, struction of a track on which heavy dealing with it as a disabled car, called timbers are conveyed is out of place, so for the engine to be backed, and went as to render the track unsafe, before attempting to convey such timber over it, where he knows that the wedge is liable to slip out of place. Bedford Belt R. Co. v. Brown (1895) 142 Ind. 659, 42 N. E. 359.

A verdict cannot be directed for the defendant where the evidence is that, while plaintiff was on a dimly lighted upper floor in a warehouse on a dark winter's afternoon, doing some work which required him to walk backwards towards the elevator shaft, by which he and the other workmen had just ascended, he fell down it, owing to the fact that, without his knowledge, the spring hinge which closed one of the doors had been broken and the door itself left open permanently, and that, without his A carpenter employed by a railroad knowledge, the foreman had sent the cage down to a lower floor. H. Channon Co. v. Hahn (1901) 189 Ill. 28, 59 N. ries resulting from the fall of a board E. 522, Assirming (1900) 90 Ill. App. the ends of which rested upon two cars, 256. The contributory negligence of an while, under orders from the foreman, employee who walks backward with a he was engaged in moving one of the truck down an incline towards an elecars, which caused the fall of the board, vator, not knowing of the removal of the where the foreman was unaware that cage, and falls down the shaft, is a the board had not been removed, and question for the jury. Perras v. Booth the carpenter could have easily seen it (1901) 82 Minn. 191, 84 N. W. 739, 85

A workman who, several times during the day, has passed up and down a lad-An employee working at night on a der through an open hatchway, is guilty trestle cannot recover for injuries due of such negligence as will prevent his to his stepping on a tie which had been recovery, where, at midnight, without sawed in two, where it appears that he looking to see whether the hatchway is knew that at intervals there were ties covered, and while a candle was burnin that condition, that the trestle was ing within 6 feet of the hatch, he steps tions involved were of an essentially transitory nature, and created a conjuncture which merely affected the safety of the servant's environment for a few moments.

By far the largest part of the cases under this head relate to injuries caused by moving railway cars.

It has been expressly held that the rule of law which excuses passengers from the obligation to observe a strict lookout for trains and locomotives when alighting from or getting upon trains over the tracks of a railway company does not apply to employees whose duties may require them to cross the tracks in the yards or at the

prevent a recovery. The Sin Wolscley (1890) 41 Fed. 896.

out waiting to ascertain whether the on the furnace,—especially where he winch was temporarily stopped because could have seen the hole if he had been it had discharged its load, or was paying attention. Hurley v. Lukens stopped in pursuance of a practice well Iron & Steet Co. (1898) 186 Pa. 187, 40 known to the employee, of holding the Atl. 321. Where a person employed as load suspended until the men in the hold mate by one placed in charge of a vessel

where a workman employed in a colliery deliberately walked into a cloud knew that they had hatchways, and liery deliberately walked into a cloud knew they were liable to be open when of steam which he saw issuing from the the vessel was in port, and in passing surface of a footpath where he was accustomed to walk, the steam in fact proceeding from a defective blow pipe, commission, fell into an open hatchway, which his employer should have kept in repair, his contributory negligence is Nav. Co. (1887) 66 Mich. 638, 33 N. W. for the jury. Payne v. Reese (1882)

The negligence of a reilread commission of the part of the part

ployee who fell into a hole filled with day morning, through a trap door in the hot water, produced by a break in engine room, which he made his head-the sewer leading from a roundhouse, is quarters, and the floor of which he had knowledge of the hole, that it was dark been continuously open, negligence was and he had no light, and that there was inferable, though he testified that he nothing to indicate the hole except a did not know the door was there. Mulantern which was placed in the vicin-tual Wheel Co. v. Mosher (1899) 85 Ill. ity of the hole; and that he took the App. 240. This decision, viewed as a usual course in going from the round- conclusion of law, seems to rest largely house to the turntable where the em- upon the fact of the servant's having ployees whom he was directed to assist had previous opportunities of observing

into it without looking, while reaching for a ladder 5 feet away. The Jersey P. R. Co. (1897) 101 Iowa, 74, 70 N. W. City (1891) 46 Fed. 134. Where a 90. An employee in a blast furnace, night-watchman on a steamer undertook who leaves the building at night for his to sit down on a bunker hatch upon the wholeaves, without looking to see for his own convenience, in front of a whether the cover was on or not, and furnace which he knows is undergoing fell backward into the hold because the repairs, cannot recover for an injury cover was off, his own negligence will caused by falling into a hole in the floor prevent a recovery. The Sir Garnet in front of such furnace, where he knows Wolseley (1890) 41 Fed 896 that in making repairs it is necessary A stevedore's employee is guilty of to remove part of the floor, and that the contributory negligence where he steps floor is not replaced until all the repairs upon a steam winch to reach a ladder, have been finished, although he does not in order to descend into the hold, withwere ready to receive it. Anderson v. laid up during the winter season was The Ashebrooke (1890) 44 Fed. 124. familiar with vessels of this class, Where a workman employed in a col-knew that they had hatchways, and

The negligence of a railroad em- where a night watchman fell, on a Monfor the jury upon evidence that he did swept on the preceding Saturday and not know and was not chargeable with Sunday mornings, while the door had

station houses.1 The obligations of an employee under these circumstances have sometimes been considered to be virtually the same as those incumbent upon travelers who are about to use a highway crossing, viz., to look and listen before going on the track.2

the danger, as well as those which were the passing of a train, and in front of offered at the time when he was injured. In another case, decided by the so that he was struck and injured by same court, it was declared that the question whether an employee, injured by falling through an open hatchway in a shop, was chargeable with negligence repairers employed by one of the railin failing to look where he walked, is a question for the jury in view of all the circumstances of the case. Pullman Palace Car Co. v. Connell (1897) 74 Ill. App. 447.

As it is obvious that a dead tree which is on fire may fall at any moment, a servant who passes close to it is bound to be on the watch for such a contingency. Maltbie v. Belden (1901) 167 N. Y. 307, 54 L. R. A. 52, 60 N. E. 645, Reversing (1899) 45 App. Div. 384, 60

N. Y. Supp. 824.

A seaman engaged in unloading lumber from a vessel cannot recover for personal injuries from the fall of a pile of planks caused by the mate's removal of a cleat holding them in position, where such removal was necessary to their unloading, and the mate gave ample and repeated warning heard and obeyed by the other workmen, but disregarded by such seaman because he believed himself in a safe position. (1892) 49 Fed. 163.

A servant assisting the operator of a drill, who proceeds to work the drill without taking steps to find out whether ment to confuse him. Stacklie v. St. there was a "missed shot" or not, when Paul & D. R. Co. (1898) 73 Minn. 37, he and the operator had full knowledge 75 N. W. 734. The doctrine that a secthat shots had been fired; that a "missed tion man who is about to cross a track shot" might be reasonably anticipated, must look and listen was laid down in and that, if found by the use of the drill, broad terms in Lorin v. Kansas City, danger and injury would result to both, -cannot recover. Browne v. King (1900) 40 C. C. A. 545, 100 Fed. 561.

and close to a backing switch engine, the engine, he was guilty of contrib-

utory negligence.

In an action by a foreman of track way companies using a yard against another of the companies, evidence that he stepped upon a track for the purpose of crossing it, without looking to see if an engine was upon it, shows that he was guilty of negligence barring his re-covery for injuries caused by a collision with an engine, if engines were constantly in operation and he had seen an engine go along another track a short time before, which, according to a custom known to him, must return upon the track upon which he stepped, although subsequently he had examined the switch leading to the track and found it closed, and had heard no signal of the return of the engine. Grand Trunk R. Co. v. Baird (1899) 36 C. C. A. 574, 94 Fed. 946. An employee of a contractor to handle freight for a railroad company is, as a matter of law, guilty of contributory negligence in attempting to cross a track upon which The Aspotogan he knew trains and engines were frequently passing, without looking for engines or trains, in the absence of any sudden emergency, fright, or bewilder-Ft. S. & M. R. Co. (1895) 128 Mo. 349, 31 S. W. 6.

a railroad Where  $_{
m the}$ view of See also Kennedy v. Lake Superior track was unobstructed, a section Terminal & Transfer R. Co. (1896) 93 foreman who, in attempting to cross the Wis. 32, 66 N. W. 1137, § 334, note 15, main track diagonally while the rear <sup>2</sup> Wabash R. Co. v. Skiles (1901) 64 ing behind him, was struck and killed, Ohio St. 458, 60 N. E. 576. There it was guilty of negligence. Elliot v. Chi-Ohio St. 458, 60 N. E. 576. There it was guilty of negligence. Elliot v. Chiwas held that where an employee whose cago, M. & St. P. R. Co. (1889) 5 Dak. duty required him to cross the tracks in 523, 3 L. R. A. 363, 41 N. W. 758, Afthe yards stepped on a track from a firmed in (1893) 150 U.S. 245, 37 L. place of safety on a platform without ed. 1068, 14 Sup. Ct. Rep. 85. A conlooking or listening, immediately after ductor of a freight train, who steps out

But decisions are not wanting which are inconsistent with this doctrine.3

In some cases it is laid down that the rule as to travelers is not applicable to servants who are engaged in work which requires them to be on the track.<sup>4</sup> But the reports also contain a considerable

ger track of which a train is approaching train until it reached a point likely to run at a higher speed than at which not more than five seconds usual, is guilty of contributory negliwould be required to bring it to the gence, preventing recovery for his death place of the accident. Nelson v. New by being struck by the train, where he Orleans & N. E. R. Co. (1900) 40 C. C. sees the train or could see it if he A. 673, 100 Fed. 731. In another case looked. Chicago & N. W. R. Co. v. Holit was distinctly laid down that the dom (1896) 66 Ill. App. 201.

cross, in the same position as a stran- 1065. ger. Hence, a complaint is demurrable which alleges that a motorman injured son (1901) 156 Ind. 364, 59 N. E. 1044, in a collision with a railway train was holding that the question whether the assured by the company that the rail- omission of a trackman to look and lisway track was seldom used; that he ten for approaching trains constitutes was accordingly ordered to run across negligence is for the jury. without stopping his car, and without To same effect, see also Ominger v. opportunity for looking for trains; and New York C. & H. R. R. Co. (1875) 4 that, relying on the representations, he Hun, 159; followed in Crowley v. Burdid as directed, and received the injury lington, C. R. & N. R. Co. (1885) 65 Goodrich v. Chippewa Valley Electric Iowa, 658, 20 N. W. 467, 22 N. W. 918;

to stop, look, and listen is not applito shift iron from place to place in the ern C. R. Co. (1878) 15 Hun, 496. yard and buildings, whose duties require A teamster hired under a special them to cross and recross the tracks, agreement that he should be notified of Weiss v. Bethlehem Iron Co. (1898) 31 the approach of passing trains is not C. C. A. 363, 59 U. S. App. 627, 88 Fed. under any duty to look and listen for 23. So, also, where a laborer engaged in trains. Bradley v. New York C. R. Co. mixing and carrying mortar for a new (1875) 62 N. Y. 99. station under construction was killed being made at the time by the escaping that it is negligence, as matter of law, steam of a locomotive near the mortar for a railroad employee or other person box; that the main track leading to the to be inattentive to his dangerous posistation was curved; and that a siding tion when on a railroad track, whether Vol I. M. & S.—53.

of a telegraph office where he has gone which ran out upon the curve was filled for orders, and starts across a passen- with cars standing in such a position ger track on which a train is approach- that they obstructed the view of the apm (1896) 66 Ill. App. 201. rule requiring persons who go on to a In one case it was held that an engi-railway track to look and listen is not In one case it was held that an engineer who started to cross a track with applicable, where a conductor of a train out looking in both directions, and was consequently injured by an engine tion jointly with another company steps which he had seen, shortly before, taking coal at a chute, could not recover. pany for the purpose of signaling his McCadden v. Abbot (1896) 92 Wis. 551, engineer, and is run down by a train operated by the employees of such company McMagaball v. Chicago. R. L. & Departs of the such as the contract of t A servant operating a street car is, pany. McMarshall v. Chicago, R. I. & as regards a railway which he has to P. R. Co. (1890) 80 Iowa, 757, 45 N. W.

Baltimore & O. S. W. R. Co. v. Peter-

R. Co. (1900) 108 Wis. 329, 84 N. W. Noonan v. New York C. & H. R. R. Co. (1891) 42 N. Y. S. R. 41, 16 N. Y. 3It has been held that the rule requires Supp. 678. It is proper to refuse a ing one about to cross a railroad track charge that the same degree of care is required from an employee engaged in cable to employees of an iron mill which his duty upon the track as from a peruses locomotives at slow rates of speed son crossing the track. Roll v. North-

What the precise effect of the New by a rapidly running train, the case was York decisions just cited may be is held to be for the jury upon evidence rendered somewhat obscure by the fact showing that a considerable noise was that the supreme court has also declared number of decisions which are apparently based upon the theory that such servants are bound to keep a constant lookout for moving cars and engines, and that a breach of this duty is usually a sufficient reason for denying recovery, as a matter of law.<sup>5</sup> A similar doctrine

charge of his duties, is guilty of condiscovered that he is not going to get tributory negligence. Clark v. New out of the way. Lynch v. Boston & A. York, L. E. & W. R. Co. (1894) 80 Hun, R. Co. (1893) 159 Mass. 536, 34 N. E. 320, 30 N. Y. Supp. 126.

ordinary diligence due from every intru- C. R. & N. R. Co. (1891) 83 Iowa, 346, der on a railroad track to care for his 49 N. W. 848. own safety in walking and standing up-Ga. 282, 15 S. E. 365).

A railroad employee engaged in clean-

lawfully there or not. Redmond v. not entitled to expect with certainty a Rome, W. & O. R. Co. (1890) 31 N. Y. warning from every car that may be S. R. 366, 10 N. Y. Supp. 330. And shunted or kicked upon the track where that an employee of a railroad, who he is working, or, if so, can expect only stands upon a track upon which, to his a shout as the car draws near, and is knowledge, trains are frequently pass- not entitled to rely upon his ears alone ing, without paying any attention to his without using his eyes, or to rely upon surroundings, while engaged in the dis- the car being stopped in time after it is 1072. Contributory negligence is infer-Where a servant engaged in loading able where the evidence is that, in actimbers on a flat car next to several box cordance with the usual custom of the cars was killed by a train backing rap- yard, a car was started in charge of a idly against the box cars without any brakeman towards others to which it warning, it was held that the dececased was to be coupled; that, as it approached was under no obligation to look and a switch where a laborer was at work, listen for the approach of the train en- the brakeman shouted to him to get out tering the switch. Freeman v. Illinois of the way; that the brakeman, seeing C. R. Co. (1901) 107 Tenn. 340, 64 S. that his warning was not heeded, applied the brake, but could not stop the No recovery can be had for the death car before it struck the laborer; and of a railroad employee whose duties re- that there was nothing to obstruct the quired him to be upon the track in such laborer's view of the approaching car or a place and manner as to make it nec-essary to look out very carefully for York C. & H. R. R. Co. (1899) 46 App. approaching trains, in the absence of Div. 58, 61 N. Y. Supp. 338. An emevidence that he took the precautions re- ployee of a railroad company engaged in quired by due care and diligence. Shea placing switch lights in position, and for v. Boston & M. R. Co. (1891) 154 Mass. that purpose required to go upon the 31, 27 N. E. 672. A railroad employee track, is guilty of such negligence as at work where engines and cars are constantly passing must be diligent to observe and keep out of the way of moving engines and cars, and cannot rely knew switching was being done and wholly upon persons in charge to prevent accidents. Keefe v. Chicago & N. witchmer approaching him was on, and turning his back to see whether A watchman employed to examine a team was on the other track, although cars and take and report initials and it was usual to switch such car upon numbering thereon must exercise the the other track. Collins v. Burlington,

A railroad employee engaged in cleanon unoccupied tracks, including the ing the tracks at a highway crossing main lines, in performing such duties, was guilty of contributory negligence, in the absence of any custom or acqui where, with knowledge that an engine escence on the part of the superintend- might come his way, he failed to obing officers permitting the watchman to serve its movements, and was injured stand upon such tracks. Richmond & D. when it backed down the track on R. Co. v. Watts (1893) 92 Ga. 88, 17 which he was at work. Carlson v. Cin-S. E. 983 (Former Appeal [1892] 89 cinnati, S. & M. R. Co. (1899) 120 Mich. 481, 79 N. W. 688.

A repairer of tracks employed in a ing under a switch bar in the yard is railroad yard, which were used for the making up of trains, and who was faquently followed by a switch engine, miliar with the manner in which the stepped back upon the track after the work was done, and who, knowing that gravel train passed, without looking,

An employee in a railroad yard, acquainted with a custom of kicking trains backward without a brakeman or looking backward without a brakeman or looking out, is guilty of such contributory negligence in turning his back to moving cars and not keeping an outlook as will prevent recovery for injuries occasioned by a train backing upon him while he was company is not liable for the death of engaged in his work and not looking out for it. Schaible v. Lake Shore & M. S. R. Co. (1893) 97 Mich. 318, 21 L. E. A. 660, 56 N. W. 565. A track hand is guilty of contributory negligence precluding recovery for personal injuries, in remaining on the track while a train was approaching in plain sight for a carroll v. Minnesota Valley R. Co. quarter of a mile, where its whistle was (1868) 13 Minn. 30, Cil. 18, 97 Am. audible, and he was called to by his fellow workmen, although the engineer failed to give the signal required by the rules to persons on the track. St. Jean work men, lathough the engineer failed to give the signal required by the rules to persons on the track. St. Jean move a staging off of the track, was denied recovery. A section foreman who knows that a train is sometimes cut in two at a certain point, and that the train death, where, upon the approach of a train, he stepped upon an adjoining track upon which he was struck by at tain coming from a direction towards passenger car, without looking for the ing track upon which he was struck by part of the train, having no caboose or a train coming from a direction towards passenger car, without looking for the which he was not looking, when nothing occurred to distract his attention, Sioux City & P. R. Co. (1891) 99 Iowa, and he might have stood between the 735, 48 N. W. 733. tracks in safety. Roskoyek v. St. Paul It is negligence to uncouple a car & D. R. Co. (1899) 76 Minn. 28, 78 N. from a train to which an engine is at-

work was done, and who, knowing that gravel train passed, without looking, the switch engine was busy moving cars and making up trains, placed himself guilty of negligence proximately causwith his face away from the direction from which cars were to be expected, and continued his work without ever (1898) 56 Neb. 439, 76 N. W. 901. A looking back, although there was no obstruction to his vision and by ordinary track without necessity therefor, stooped attention he could have observed the approaching cars, and while so employed was struck by the switch engine moving slowly, and was injured,—was guilty contributory negligence. Aerkfetz v. dumphreys (1892) 145 U. S. 418, 36 L. S. R. Co. v. Mitchell (1889) 72 Tex. ed. 758, 12 Sup. Ct. Rep. 835. Compare 609, 10 S. W. 698. A section hand who, Murphy v. New York C. & H. R. R. Co. after getting off the railroad track to (1882) 11 Daly, 122; Chicago & N. W. let a train pass, obeys orders in going R. Co. v. Kane (1892) 50 Ill. App. 100.

An employee in a railroad yard, acquainted with a custom of kicking trains backward without a brakeman or looking trains and was struck by the switch engine, is and was struc

W. 872. Recovery cannot be had under tached, and proceed to push it along the these circumstances merely because the track from a place directly behind the servant was working on an earth embunter, without observing the engine. bankment just wide enough for two Burns v. Boston & L. R. Co. (1869) 101 tracks upon it. Fisk v. Chicago, M. & Mass. 50 (action by the servant of a St. P. R. Co. (1900) 111 Iowa, 392, 82 company using a siding). A brakeman N. W. 931. A section hand who, with was, as a matter of law, guilty of conknowledge that a gravel train was fre- tributory negligence precluding recovis also frequently applied to the disadvantage of servants working in the immediate vicinity of railway tracks.6

the rear end of the tender, where he was to divert his attention or create confurunning with his back to the engine, sion in his mind, he was injured by a and, knowing that it was following him train backing in full view of the switch, closely, stopped for an instant, and then and which, by the observance of care, without looking behind him, stepped he might have avoided. Cincinnati, I. upon the track immediately in front of St. L. & C. R. Co. v. Long (1887) 112 the tender. Guthrie v. Great Northern Ind. 166, 13 N. E. 659. R. Co. (1899) 76 Minn. 277, 79 N. W. 107.

for a car for a short time while engaged 214, 61 S. W. 829. at his work, as will prevent recovery for A section hand who is doing work an injury caused by switching a car on near the track while his foreman is abthe track without any person upon it sent, and no one else is watching for

Where a switchman signaled a tower Rutherford v. Chicago, M. & St. P. R. man, who had manual control of Ye Co. (1894) 57 Minn. 237, 59 N. W. 302. switches in a railroad yard, to throw a that place. N. E. 668.

tracks, and expressly charged to look out ing. Wilber v. Wisconsin Central Co. for himself, is guilty of such contribu- (1893) 86 Wis. 535, 57 N. W. 356. tory negligence as will prevent a recovery for his death, where he works with Croll (1896) 3 Kan. App. 242, 45 Pag. his back toward the track and so near 112, it was in evidence that a lump of the same as to be struck by an approach- coal which fell from an engine tender are passing such platform every few and then bounded and struck a section minutes. Brady v. New York, N. H. & hand; that he was not looking at the H. R. Co. (1898) 20 R. I. 338, 39 Atl. train, but was stooping over, shoveling; 186. An experienced switchman proceedand that, if he had been looking at the ing with his usual and customary dutrain, it was more than likely that he ties between two tracks is chargeable would have seen the lump of coal, and the contributer recligators where the could have dedded it. The court hald

ery for his death from being struck by the absence of any emergency calculated

There can be no recovery where an employee, familiar with the method of Contributory negligence is inferable, operating a railway yard, and knowing as matter of law, where a brakeman, that a certain track is frequently used sent back at night to stop an approach for shunting unattached cars, stands ing train by placing a red lantern on near it while waiting to deliver a lanthe track, was struck by that train a tern to a passing train, and is struck few feet behind the lantern, which the by one of those cars owing to his failtrain overran slightly. Buckmaster v. ure to keep a proper lookout. Sours v. Chicago & N. W. R. Co. (1900) 108 Great Northern R. Co. (1901) 84 Minn. Wis. 353, 84 N. W. 845. 230, 87 N. W. 766. More especially is But an employee engaged in picking he debarred from recovery, where he not up links and pins on a railroad track, only failed to keep a proper lookout, but who looks for a train before going on was warned of the approach of the train the track, and sees that it is clear is by a whistle from the engine and a not, as matter of law, guilty of such conshout from his fellow servants. Sharp tributory negligence in failing to look v. Missouri P. R. Co. (1901) 161 Mo.

to give warning. Chicago & N. W. R. approaching trains, is guilty of negli-Co. v. Kane (1897) 70 Ill. App. 676. gence if he fails to keep a lookout.

A railroad fireman fully acquainted certain switch, and the tower man threw with a switching yard through which a wrong switch, causing the train to he is walking, and knowing that switchrun against the switchman, it was com- ing is actively in progress upon the petent to show, as bearing upon his exer-tracks behind him, is, as a matter of cise of due care, that the train was run- law, guilty of contributory negligence ning faster than was usual for trainsat in walking on or immediately at the side Welch v. New York, N. H. of the main track where a passing car & H. R. Co. (1900) 176 Mass. 393, 57 can str ke him, for a distance of 178 feet, without looking around, and with A railroad employee directed to shovel his cap pulled down over his ears so as snow from a platform between two wholly or partially to cut off his hear-

ing engine, where he knows that trains first struck the rock ballast or ground, with contributory negligence, where, in could have dodged it. The court held

There is apparently no difference of opinion as to the doctrine that a servant who walks or stands upon a track for his own convenience must, at his peril, protect himself from passing trains.7

The failure to observe approaching trains is, of course, more especially culpable in the case of a flagman whose distinctive function is to look out for them, and warn others when they are coming.8

Other illustrations of the duty to watch the movements of trains are furnished by the cases in which a neglect of that duty was held to be a bar to an action for an injury received by a servant who was himself operating or riding on a train,9 or upon a hand car,10 or who was engaged in coupling cars.11

that he was very careless in not watching the train. This doctrine, it is submitted, is simply preposterous. Such an accident is so rare that it may be fairly doubted whether, even if the serving the mails to and from a station, who an accident is so rare that it may be fairly doubted whether, even if the servant had been found by a jury to be negligent in not regulating his conduct with reference to the possibility of its occurring, the verdict should not have been set aside. But whether this be so or not, there seems to be absolutely no justification for the position that the plaintiff was negligent, as matter of law, in continuing to work, without considering the possibility of a contingency which was, to the last degree, improbable. See, however, Illinois C. R. Co. V. Stassen (1893) 56 Ill. App. 221, cited in § 334, note 2, infra.

Contributory negligence is not inferable, as matter of law, where a section foreman, on the approach of a train, Ruane v. Lake Shore & M. S. R. Co. (1879) Contributory negligence is not inferable, as matter of law, where a section of 5 feet, which was the distance usually taken in such instances by workmen similarly employed, was struck by a door of a freight car, which was hanging from one corner at the top, and swing-fairly doubted whether, even if the service of the mails to and from a station, who chooses to stand on the track for his own convenience, must guard himself against the danger of passing trains; occurring, the werdict should not have and a failure to keep a lookout will be imputed as negligence. The mere fact of taking such a position being the same in kind as that incurred by a person standing upon is immaterial, the danger of taking such a position being the only different in degree. Dell v. Philips Glass Co. (1895) 169 Pa. 549, 36 W. N. C. 467, 32 Atl. 601.

Sclark v. Boston & A. R. Co. (1879) 128 Mass. 1; Louisville & N. R. Co. v. Lake Shore & M. S. R. Co. (1896) 64 Ill. App. 359 (action held not maintainable, although bell was not ringing on the engine, as was required by a statute).

Where the foreman and the train master on a railroad had warned the man applied thereon not to ride on the

door of a freight car, which was hanging

'Where the foreman and the train
from one corner at the top, and swinging outward with the motion of the men employed thereon not to ride on the

train was likely to pass at any time. injured by the backing down of the train Baker v. Chicago, R. I. & P. R. Co. at too great a speed. St. Louis & S. F.

train, and which he failed to observe as flat cars, and had provided a caboose in train, and which he failed to observe as that cars, and had provided a carbose in he was standing with his back to it. which plaintiff, a laborer on a gravel Chicago & A. R. Co. v. Cullen (1900) train, was told it was safer to ride, and 187 Ill. 523, 58 N. E. 455, Affirming he selected a place he knew to be danger-(1899) 87 Ill. App. 374.

"Barstow v. Old Colony R. Co. (1887) with his legs hanging over the side of 143 Mass. 535, 10 N. E. 255 (servant a flat car in a position in which he could be could was using track as a footpath). be easily jostled off, and paid so little A section hand killed by a train is attention to what he knew was going on guilty of such contributory negligence that he not only did not watch or see as will prevent a recovery for his death the other cars coming down, but failed in walking to his home on a railway to hear a warning shout heard by others track, where he could have heard the in the vicinity, at least one of whom was train 400 feet away, and have seen the more remote than he,—he cannot recover headlight 1,300 feet away, and knew the of the company for being thrown off and

The obligation to keep a proper lookout is also incumbent upon servants who are exposed to danger from the movements of other heavy machinery. 12

engineer and switchman, and that it was Compare § 331, note 1, subd. (a), supra. the duty of the latter to keep a lookout "Whether a brakeman was guilty of Instructed that, if they believe the evitonotice the slow backward movement dence, "it was the duty of the plaintiff, of one of them was held to be a quesin riding on the car, to have kept a tion for the jury, in Baldwin v. Chicago, lookout for any and all signals that G. W. R. Co. (1899) 109 Iowa, 752, 81 might have been given by the employee of the defendant." Louisville & N. R. 12 Anniston Pipe Works v. Dickey Co. v. Smith (1901) 129 Ala. 553, 30 (1891) 93 Ala. 418, 9 So. 720 (servant So. 571. There can be no recovery for struck by moving crane); Stubbs v. Atabrakeman's death caused by a collision lanta Cotton Seed, Oil Mills (1893) 92 to the first car of the rear portion, and he kept his faculties on the alert while failed to discover that the train had manipulating it).

broken, or, if aware of that fact, failed A coal miner who steps directly into to take measures for his own safety, al- the bottom of a shaft, knowing that the though the cars ran 5 miles before the cages with which coal is carried are collision occurred. Richmond & D. R. above him, and being familiar with their Co. v. Tribble (1896) 97 Va. 495, 24 S. operation, without looking up to see E. 278. An experienced motorman who, whether one of them is descending, or while running his car back to meet antaking the slightest precaution for his other car on the same track, did not safety, is guilty of negligence, as a matrun slowly and watch constantly, cannot ter of law, which will prevent any recovrecover for injuries caused by a colli- ery for resulting injury when struck by sion between the two cars. Hudson v. a descending cage. McDonald v. Rock-People's Street R. Co. (1899) 175 Mass. hill Iron & Coal Co. (1890) 135 Pa. 1, 23, 55 N. E. 464.

killed by its collision with another at building, walked along a narrow beam the intersection of two roads, it is for close to the elevator shaft for the purthe jury to say whether the decedent pose of reaching some plank, and was did or could have seen the red flag when struck by the elevator, so that he fell to displayed, and whether he was not de- the ground below, was not free from conceived by the subsequent waving of a tributory negligence, where he was fawhite flag as a signal to another train. miliar with structures of the kind, and

R. Co. v. Schumacher (1894) 152 U.S. car on which he was riding, with a train 77, 38 L. ed. 361, 14 Sup. Ct. Rep. 479. approaching at the rate of only 3 or 4 In an action for an injury received by miles per hour, in plain view for 11/2 a switchman who was thrown from a car miles. Cooney v. Great Northern R. Co. by a sudden jerk caused by the engi- (1894) 9 Wash. 292, 37 Pac. 438. A secneer's responding to a signal of the fore- tion foreman who, while traveling on a man of the switching crew, where the hand car, fails to keep a lookout for exevidence shows that the control of the tra trains, though he is familiar with acts of the switchman and of the move- the company's rule that no notice shall ments of the train was by means of sig- be given of the passage of such trains, nals given by the foreman of the switch- is negligent. Jolly v. Detroit, L. & N. R. ing crew in charge of the train to the Co. (1892) 93 Mich. 370, 53 N. W. 526.

for all signals given by the foreman, the negligence in placing his hand between defendant is entitled to have the jury the drawheads of two cars, and failing instructed that, if they believe the evitonotice the slow backward movement

be between two parts of a train, which had Ga. 495, 17 S. E. 746 (servant, while become separated while the train was cleaning machinery, carelessly exposed running during the nighttime, where he himself to an unseen danger which he was riding on the top of the car next had had opportunities of observing had

19 Atl. 797. An employee who, while at Where an engineer on one train was work on the upper floors of an unfinished Wood v. New York C. & H. R. R. Co. knew that there were elevators in the (1877) 70 N. Y. 195. building. Clancy v. Guaranty Constr. (1877) 70 N. Y. 195.

building. Clancy v. Guaranty Constr.

10 A section hand is, as a matter of Co. (1898) 25 App. Div. 355, 50 N. Y.

law, guilty of such contributory negligence as will prevent a recovery for an the surroundings was, as matter of law, injury caused by collision of the hand guilty of contributory negligence pre-

There is, of course, an especially strong obligation on the servant's part to look out for a certain danger, where circumstances which have previously occurred have shown the possibility of his being subjected to it.13 Compare § 413a, post.

The extent to which the duty to keep a lookout is qualified by the servant's right to rely on the exercise of proper care by his coemployees is discussed in §§ 355, 356, infra.

333. Selection of the more dangerous of two available courses of action; generally.—The following passage contains a succinct statement of the principle which prevents recovery in a very numerous class of cases:

"The general rule of law is that, when the danger is obvious, and is of such a nature that it can be appreciated and understood by the servant as well as by the master or by anyone else, and when the servant has as good an opportunity as the master or as anyone else of seeing what the danger is, and is permitted to do his work in his own way, and can avoid the danger by the exercise of reasonable

tor man, contrary to his usual custom, contributory negligence as to preclude had not closed, without paying any at- a recovery therefor. Meister v. Alber tention to his surroundings, where he (1897) 85 Md. 72, 36 Atl. 360. should, under the circumstances, have known that the elevator had ascended, that a box was descending or about to although he was not in fact aware of it. descend, and that he was entitled to no although he was not in fact aware of it. descend, and that he was entitled to no Maxwell v. Thomas (1898) 31 App. Div. notice of its descent, is guilty of const46, 52 N. Y. Supp. 30. Where the plaintributory negligence if he goes on about tiff had been working for several months his work without looking out for the in an establishment in which the employees, instead of ringing for the elevation, were accustomed to pull it up and down themselves, and this custom was down themselves, and this custom was contributory negligence is inferable well known to him, he cannot recover for where the evidence is that in order for injuries due to the fact that after any plaintiff to reach that nortion of descent, and that he was entitled to no Maxwell v. Thomas (1898) 31 App. Div. ondice of its descent, is guilty of constant.

to different floors of one portion thereof the saw for cutting slabs, which was is across the floor of an elevator from raised through a slot in a plank when rethe corresponding floor of the other part, quired for use, and allowed to drop who, in attempting to go from one part back under the action of a counterto the other while the elevator is at an- weight when the work was finished,

cluding recovery for injuries sustained other floor, which fact he could have by falling down an elevator well just seen had he stopped long enough to look after the elevator had ascended, in back-carefully, walks into the elevator well ing through the door which the eleva- and is injured, is so clearly guilty of

injuries due to the fact that, after an-plaintiff to reach that portion of de-other employee had called out that he fendant's factory where he had been or-wanted the elevator and was told by the dered to go to work, it was necessary plaintiff that he could not have it, the that he should pass under or over an plaintiff that he could not have it, the that he should pass under or over an plaintiff proceeded, without looking behind him, to back towards the elevator, ated; that he saw the boy operating the pulling the truck, and fell down the lever about to put it down, and called by the other employee in spite of his prohibition. Danuser v. M. Seller & Co. (1901) 24 Wash. 565, 64 Pac. 783.

An employee of several months' standing in an establishment in which access to different floors of one portion thereof the saw for cutting slabs. which was

care, the servant cannot recover against the master for injuries received in consequence of the condition of things which constituted the danger. If the servant is injured, it is from his own want of This rule is especially applicable when the danger care. . . . does not arise from the defective condition of the permanent ways, works, or machinery of the master, but from the manner in which these are used, and when the existence of the danger could not well be anticipated, but must be ascertained by observation at the time." 1

This principle is deemed to involve the corollary that, in the absence of one or other of the differentiating factors to be discussed in the following subtitle, a servant will ordinarily be pronounced negligent, as a matter of law, whenever it is clear from the evidence that there was a safe, and a dangerous, method available for the performance of the work in hand, and that he selected the latter method, with knowledge, actual or constructive, of the fact that it was dangerous.2

sometimes failed to sink below the surface of the plank, was held to be neglient or obvious, is guilty of contributory gent in omitting to look and see if it negligence. Walker v. Atlanta & W. P. was in a safe position, when he was R. Co. (1898) 103 Ga. 820, 30 S. E. 503. An employee who has the choice of

<sup>2</sup> Dandie v. Southern P. R. Co. (1890) 42 La. Ann. 686, 7 So. 792; Highland Ave. & Belt R. Co. v. Walters (1890) 91 Ala. 436, 8 So. 357; Mobile & B. P. R. sections.

performing his service, is guilty of contributory negligence." Brewer, J., in tributory negligence which will prevent English v. Chicago, M. & St. P. R. Co. recovery for injuries sustained. Gowen v. Harley (1893) 6 C. C. A. 190, 12 U. If the servant "was directed to perform certain work, without directions as

A servant who voluntarily and under or prudence, and he ought not to reno emergency selects a dangerous way cover." St. Louis Bolt & Iron Co. v. to perform a duty when there is a safe Burke (1883) 12 Ill. App. 372. way, knowing the way thus selected to

In any case where the evidence ren-

with his fingers on the lower side. John- two ways of doing a given piece of work, son v. Hovey (1894) 98 Mich. 343, 57 N. the one safe and the other dangerous, is W. 172. under a duty to his employer to select the former. Central R. Co. v. Mosely 150 Mass. 423, 424, 23 N. E. 227. (1900) 112 Ga. 914, 38 S. E. 350.

"Where a servant has equal means of knowing the danger, so that the master and servant stand equal in that respect, and the servant is not specifical-Co. v. Holborn (1887) 84 Ala. 137, 4 So. ly commanded as to the time and man-146; Louisville & N. R. Co. v. Orr (1890) ner in which the work may be done, but 91 Ala. 548, 8 So. 360; and the cases is told to do a particular thing, and has cited passim in this and the ensuing such discretion that he can have some control over the means, time, and man-A servant who carelessly pursues a ner of doing the work, then, unless he method obviously more dangerous, where does it in a way and with the means there is a natural and safe method of which will be safest, he is guilty of con-

v. Harley (1893) 6 C. C. A. 190, 12 U.
S. App. 574, 56 Fed. 973.

Where there is a comparatively safe, and a more dangerous, way known to a servant, by means of which he may discharge his duty, it is negligence for him to select the more dangerous method.

Morris v. Duluth, S. S. & A. R. Co. (1901) 47 C. C. A. 661, 108 Fed. 747.

A servant who voluntarily and under or produce.

The mere fact that the safer method is one which involves considerably more trouble than the more dangerous one is no excuse for adopting the latter.<sup>3</sup>

The rule thus laid down is evidently intended to be applied only when the method adopted was essentially unsafe, and the other was apparently safe. It will be observed that this conception emerges more or less distinctly in the statements of the rule already given. That it determines, whether expressly adverted to or not, the actual extent and scope of the rule is apparent from the consideration that a doctrine which should predicate negligence, as a matter of law, in cases where the servant is merely chargeable with having adopted the less safe of two courses which were both reasonably safe, would contravene the fundamental principle by which the standard of due care is declared to be the hypothetical conduct of a prudent person under the given circumstances.4 To let in the defense of contribu-

the absence of alarm sufficient to con- couched in the same phraseology as that fuse the mind, an employee who finds condemned in the case just cited; but select the least dangerous means of es- not betoken any departure from views cape, where two or more are open to generally accepted, as there was evidence him. Austin & N. W. Co. v. Beatty that the method in question was one un-(1894) 6 Tex. Civ. App. 650, 24 S. W. iversally adopted by railways. See note 934, where is was held that the jury 4, infra. should have been instructed that, if a spencell v. Harvey (1898) 78 Ill. person is in a perilous situation, and App. 278. selects that avenue of escape which he should have seen, under the circumstances, to be the more dangerous, he is

guilty of negligence.

In Gibson v. Burlington, C. R. & N. where there was a safer mode. Houston R. Co. (1899) 107 Iowa, 596, 78 N. W. & T. C. R. Co. v. Smith (1897; Tex. Civ. 190, it was held erroneous to instruct a App.) 39 S. W. 582. Nor where there jury that a servant is negligent in adopting a dangerous way of accomplishing a or cautious person might have adopted task, when a safe way is open to him. The court took the position that the question is one of fact, to be determined according to the circumstances of the Where neither of the only two ways case,—the reasons for doing what was by which a servant injured in crossing done, and the care used to avoid danger. But it is submitted that this the- it was absolutely safe, a finding of the ory errs as much on the side of lenien- jury that the choice of one of those ways cy to the servant as the one embodied in was not negligent will not be set aside. the instruction disapproved errs in se- Rodgers v. Hamilton Cotton Co. (1893) verity. Unless the court intended to stand 23 Ont. Rep. 425, where it was also held sponsor for a doctrine different from that, in view of the fact that the evithat applied in other jurisdictions, the dence clearly showed that there was no proviso stated in the text seems to represent the full extent of the allowable jury could not be asked to find whether mitigation of the naked principle that the plaintiff could not have availed himnegligence is inferable whenever a serv-self of some other way of crossing which ant chooses an unsafe method of work. would have rendered the accident impos-In Florida C. & P. R. Co. v. Mooney sible.

ders it appropriate, an instruction (1898) 40 Fla. 17, 24 So. 148, it was should be given to the effect that, in held proper to refuse an instruction himself in a dangerous position should this ruling, as applied to the facts, does

\*In one case we find it expressly laid down that an employee is not necessarily guilty of contributory negligence in selecting a certain mode of doing his work, was another method which a very timid as safer. Taylor v. Felsing (1896) 164 III. 331, 45 N. E. 161, Affirming (1895) 63 Ill. App. 624.

an uncovered gearing could have crossed

tory negligence, however, it is not necessary to show that his conduct in selecting the dangerous way amounted to actual rashness.<sup>5</sup>

It obviously results from the broad principle referred to in § 320, supra, that the inability of a servant to recover on the ground that he adopted the less safe method of doing work can be predicated only in cases where he not only had actual or constructive knowledge, not merely of the material conditions with which he had to deal, but also comprehended or ought to have comprehended the comparative safety of the various courses open to him.6 The cases illustrating the principle that the selection of an unsafe course of action by a servant to whom a safe one was open will usually be imputed to him as contributory negligence may be said, on the whole, to be divisible into two main categories. In one of these the essential conception is that the servant put himself into a dangerous position; in the other the essential conception is that he did the work in a dangerous manner. In arranging the immense mass of authorities which bear upon this description of contributory negligence, it will be convenient to recognize, as far as possible, the existence of these two categories. the line of demarcation between the two classes of cases controlled by each of the two conceptions just mentioned is often difficult, if not impossible, to lay down with precision may be conceded. But, so far as the rights of the parties are concerned, this circumstance is of no material importance, the servant's delinquency being logically one of the same character, to whichever of those conceptions the quality of his conduct is referred.

The fact that an employee was injured because of the manner selected of cross tie on the outside of the rail, instead of putting his foot on the ground of contributory negligence."

An instruction to the effect that the on the roadbed, will not preclude a recovery, if he did not have time to see employer has a right to expect that the and comprehend that the other way servant will adopt the less hazardous would be the safer. Alabama G. S. R. course is misleading and erroneous,

<sup>6</sup> Central R. Co. v. Mosely (1900) 112 Co. v. Richie (1892) 99 Ala. 346, 12 So. Ga. 914, 38 S. E. 350. 612.

In a case where a brakeman was injured by the breaking of a handhold doing his work, when if he had selected when he was mounting a moving car, it another way the injury would have been was held that the mere fact that it avoided, does not of itself fix upon him would have been safer for him to have contributory negligence, since the result is not the true test; but the test is of at the front did not necessarily point whether he knew the way selected to be to the conclusion that he was negligent dangerous, or the danger was apparent in having selected the more dangerous of and obvious. Tennessee Coal, I. & R. the two courses open to him. Louisville Co. v. Herndon (1893) 100 Ala. 451, 14 & N. R. Co. v. Pearson (1893) 97 Ala. So. 287. The fact that a brakeman who 211, 12 So. 176. The court remarked had his arm caught and crushed while that, if the servant "selected a danger-uncoupling cars, by the alleged neglious way to perform the duty, knowing gence of the engineer in moving the cars that it was dangerous, when there was with too much force, could have raised a safer way apparent to him, and the himself higher by placing his foot on the injury was the result of having selected

334. Taking or remaining in an unnecessarily dangerous position; cases relating to work on railways.—(Compare § 348, subd. c, infra.) -The general effect of the authorities upon this subject is that, where the evidence shows that the injury complained of was due to the fact that, at the time of the accident, the servant was occupying a position which was obviously more dangerous than another which was available, a prima facie presumption of contributory negligence arises, which will warrant a court in declaring, as a matter of law, that the action cannot be maintained; but that this presumption is subject to rebuttal by testimony which introduces into the case one or more of the qualifying elements discussed in the next subtitle.

The application of this doctrine to railway employees is observable in the various predicaments stated in the following paragraphs:

(1) Taking a position where there is a risk of being struck by moving trains or cars.1

where the evidence is that the servant did not know there was any hazard in as matter of law, where an experienced the course he actually took. *Hawkins* v. sectionman, who is working a hand car *Johnson* (1886) 105 Ind. 29, 55 Am. on a descending grade, lets go of the Rep. 169, 4 N. E. 172 (revolving shaft handle, which he knows to be necessary der it without injury).

as to the ordinary mode of doing so is justified in using any reasonable mode, 422, 53 Fed. 61. and acts within his instructions in us-Hamilton Bridge Co. v. O'Connor (1895)

24 Can. S. C. 598.

the cases cited in note 2, supra.

A servant having the choice of two positions for doing his work, each appearance. parently safe, is not guilty of contrib-utory negligence in selecting that which proves to be unsafe. McElligott v. Randolph (1891) 61 Conn. 157, 22 Atl. 1094.

A track laborer who, to avoid a passing train, steps from one track to another, receiving an injury from the I. M. & S. R. Co. v. Ross (1892) 56 Ark. trains on the latter, when he might have got off from all the tracks, cannot recover. Shea v. Pennsylvania R. Co. (1888; an employee whose duty required him to Pa.) 11 Cent. Rep. 769, 13 Atl. 193. Recovery cannot be had by such an employee whose duty required him to passed, and walking toward it, was run ployee under these circumstances, alpassed, and, walking toward it, was run though he had no knowledge of a custom existing at that part of the road to train, was not guilty of contributory run trains in the same direction on both negligence. Farley v. Chicago, R. I. & tracks. Tomko v. Central R. Co. (1896)

P. R. Co. (1881) 56 Iowa, 337, 9 N. W. 1 App. Div. 289, 37 N. Y. Supp. 144.

Contributory negligence is inferable, had been repaired without the plaintiff's to enable him to keep his balance, steps knowledge so that he could not drive un- down on the track and stands still until he is struck by a heavily loaded dump-An employee directed to perform an car which is running by its own momenact in regard to machinery by a fore- tum some little distance behind the hand man knowing that he has no experience car. Chicago & N. W. R. Co. v. Davis as to the ordinary mode of doing so is (1892) 3 C. C. A. 429, 10 U. S. App.

In one case stepping on a railroad track ing the only efficient means that he can. just after the passage of an engine engaged in making a flying switch has been held to be contributory negligence in one Compare also the phraseology used in who is struck by the engine on its return, though done for the purpose of throwing something, as directed by the brakeman, under the car being switched, to prevent it from running into another car standing in front of a shed owned by him, and though the engineer did not, as is customary, ring the bell on returning, where the injured person is familiar 230. Compare the similar decision by

which a track repairer who stepped be-preme court seem to have assumed that hind a "dead car" in attempting to avoid a switch tender may, without negligence, a train coming along the main track was walk on the track in going to the place allowed to recover for injuries received where his duties are to be performed. by a switch engine driving a train Two judges dissented, holding that to against the dead car and injuring him. walk on the track unnecessarily is just Chicago & E. I. R. Co. v. Shannon (1891) 43 Ill. App. 540. Nor is a car inspector a stranger. who, for the purpose of discharging his duties more efficiently, went upon the track adjoining that on which the car was standing, instead of standing between the two tracks, deemed to have been negligent, as matter of law, though he knew that an engine might pass upon the track on which he stepped. Taylor v. Louisville & N. R. Co. (1893) 93 Tenn. 305, 27 S. W. 663 (stumbled and fell as he was getting out of the way).

Several cases embody the theory that a railroad employee who walks on the track, unnecessarily and not in the line of his duty, is in no better position than a stranger who did the same thing would be, and is guilty of contributory negligence, as a matter of law. Mulherrin v. Delaware, L. & W. R. Co. (1876) 81 Pa. 366; Dyer v. Fitchburg R. Co. (1898) 170 Mass. 148, 48 N. E. 1087; Kenna v. Central P. R. Co. (1894) 101 Cal. 26, 35 Pac. 332; Tumalty v. New York, N. H. & H. R. Co. (1898) 170 Mass. 164, 49 N. E. 85; Pennsylvania Co. v. O'Shaughnessy (1889) 122 Ind. 588, 23 N. E. 675 (employee engaged in starting loaded cars from a turntable and accompanying them to a point where they could be unloaded into barges, unnecessarily walking in front of a car after starting it, instead of taking a safe path by the side); Cawley v. Winifrede R. Co. (1888) 31 W. Va. 116, 5 S. E. 318; Illinois C. R. Co. v. Curran (1901) 94 III. App. 182.

On the other hand it has been held that a switch tender who, while walking upon the ends of the ties towards the place where he had to turn a switch, was struck by an engine that came up behind him and knocked him down while it was negligently run at unlawful speed, without ringing any bell, was not, as matter of law, guilty of contributory

as culpable for a railway servant as for

The Illinois court of appeals also has held that an instruction which tells the jury that if there were several ways over which the plaintiff, a section hand, could have traveled in safety, and he chose to travel upon the track, they should find the defendant not guilty, is erroneous. The question as to whether the plaintiff was guilty of negligence in walking upon the track was for the jury. Kingma v. Chicago & N. W. R. Co. (1899) 85 III. App. 138.

In one case the court refused to say that negligence was predicable, as a matter of law, where a yard foreman who, when walking between two tracks, stepped on to one of them in order to pass a switchstand more conveniently, and, having continued to walk between the rails for about 40 or 50 feet, was struck by an extra train. The differentiating elements relied upon were that, when he had looked round a few minutes before, no train was in sight, and that in the ordinary course of events no train was due for some hours. Hayes v. Northern P. R. Co. (1896) 20 C. C. A. 52, 46 U. S. App. 41, 74 Fed. 279.

Where a section hand who was obliged to pass over a high trestle on defendant's track to reach his work, and knew before going on the trestle that a hand car was about to start for the place of work when he left, looked back before going on the trestle, but could not see the car, which, however, overtook him, and knocked him off the trestle, the question of his contributory negligence in attempting to pass over the trestle is for the jury. Central R. Co. v. Lamb (1899) 124 Ala. 172, 26 So. 969.

A yard master who in attempting to cross a track in front of a rapidly approaching train catches his foot under wires forming part of an interlocking negligence. Canada Southern R. Co. v. signal system with the existence of which Jackson (1890) 17 Can. S. C. 316. The he is familiar, and falls and is injured, trial judge had told the jury that the when there is no necessity for his crossonly ground on which a charge of con- ing in front of the train, is guilty of tributory negligence could be based was negligence. Horne v. Old Colony R. Co. that the plaintiff had not looked behind (1894) 161 Mass. 180, 36 N. E. 792. An him when starting to walk down the assistant agent at a flag station who attrack. On this point there was a con-tempts to cross the track for the purpose flict of evidence, making the question one of flagging the train, when the engine for the jury. The majority of the su- is so near that it strikes him before he

gets across, is guilty of such contribu- trains are running, and that they have tory negligence as will prevent a re- not stopped running for the night, goes covery, although the engineer failed to give the customary signal of the approach of the train. Helm v. Louisville & N. R. Co. (1895) 17 Ky. L. Rep. 1004, 33 S. W. 396. One whose duty is to take the number of each car coming into a railroad station, who is experienced in the railroad operations in the yard and its dangers, and who knows that a shifting engine is plying back and forth at its work, is chargeable with negligence in going upon the track in front of the engine or in attempting to jump upon the tender. Beuhring v. Chesapeake & O. R. Co. (1892) 37 W. Va. 502, 16 S. E. 437.

A recovery cannot be had for the death of a railroad employee who was injured while using a narrow passageway be-tween the railroad track and a platform, not designed for such use, instead of a safer though longer way provided, un-less there was such need of haste that there was no time to go by the longer way, or the passage is of such a shape as to be a trap for those entering it. Galvin v. Old Colony R. Co. (1895) 162 Mass. 533, 39 N. E. 186. One employed at a mine to assist in pushing and putting in the desired position cars for the receipt of coal cannot recover for injuries from his foot being caught between a platform and a standard on the side of a car in front of which he undertook to run to climb upon the platform to start an engine operating the apparatus for hoisting the coal, where he had more knowledge of the situation practical than the foreman who ordered him to "run ahead and start the engine," and knew the customary method of reaching the engine was to pass to the rear of the moving car, or get upon the end of the mang car and step therefrom to the platform, even though he might have believed that the brakeman on the car would be able to protect him against mishap,—especially where the car was 30 feet away when he went to cross in front of it, and the foreman and brakeman had the right to assume that he had ample time to effect a crossing, and he would have done so in safety had he not slipped upon a projecting plank in the act of springing upon the platform. Kansas & T. Coal Co. v. Reid (1898) 29 C. C. A. 475, 57 U. S. App. 464, 85 Fed. 914.

Where work was being carried on at night only when trains were not running in a tunnel, and an employee who, knowing the dangers to be encountered when 268, 24 S. W. 140.

into the tunnel to work and is struck by a passing train, the engineer of which did not and could not, by the exercise of reasonable care, see him,-the company is not liable, even if the bell on the engine was not rung, where the action is not based on the violation of any ordinance. Loeffler v. Missouri P. R. Co. (1888) 96 Mo. 267, 9 S. W. 580.

The mere fact that it was the duty of

the hostler in charge of an engine to stop it and wait for a signal before taking it on to a turntable will not prevent the inference of negligence as to an employee who goes on the track in front of it when it is near the turntable and still moving with substantially unchecked speed. Cowles v. Chicago, R. I. & P. R. Co. (1897) 102 Iowa, 507, 71 N. W. 580.

An employee engaged in turning up a ladle used for carrying molten iron upon a railroad truck is guilty of contributory negligence which will defeat his recovery for injuries sustained, in placing his foot upon the track near the wheels of such truck, when he knows that at any moment it may be moved by an engine in an attempt to couple to other trucks upon the same track, where there is a safe place in which he can stand while performing his Werk v. Illinois Steel Co. (1895) 154 Ill. 427, 40 N. E. 442, Affirming (1894) 54 Ill. App. 302 (without comment).

A fireman who goes to sleep between two stalls in a badly lighted roundhouse, and is injured by a train running over his foot, cannot recover. Price v. Hannibal & St. J. R. Co. (1883) 77 Mo. 508.

An employee, fully informed of the danger, who places himself between two tracks, where his duty did not call him and where a train moving upon either or both tracks might injure him, is chargeable with gross negligence which is the proximate cause of his injury when struck by a train which approached while he was looking another way. Ryall v. Central P. R. Co. (1888) 76 Cal. 474, 18 Pac. 430.

The mere fact that a trackman knew that the track at a place where he stepped off it to let a train pass was defective is a circumstance tending to show that he was negligent in standing close to the rails, but it does not establish such negligence, as matter of law, nor preclude recovery for injuries caused by the derailment of the train. Swadley v. Missouri P. R. Co. (1893) 118 Mo.

(2) Taking a position where there is a risk of being struck by heavy objects falling from moving or stationary cars.<sup>2</sup>

a ditch several feet from the railway track and a girder between the pillars track, and required to remove stones ly- of an elevated railroad structure, preing in close proximity to the edge of cluding recovery for his death from bethe ditch, is negligent if he goes so near ing crushed between a passing car and the track as to be hit by a passing train, the girder, where there was nothing to where he knows the rate at which the prevent his stepping to the other side trains run, and is not required by his work to go upon the track. Rutherford v. Chicago, M. & St. P. R. Co. (1894) 57 Minn. 237, 59 N. W. 302.

An employee of a railroad company, engaged in unloading cars, is guilty of contributory negligence in attempting to pass an engine on a narrow trestle, where it was going so slowly that he could have walked back ahead of it, or by going back a short distance could have stepped aside on a cap sill and let it pass. St. Louis & S. F. R. Co. v. Bloyd (1895) 60 guilty of contributory negligence in Ark. 637, 31 S. W. 457 (employee was standing in the space between a switch struck by the engine steps and thrown track and the main line while turning off the trestle).

that a brakeman who was running along of peril, although he might with safety the platform made by the top of a boxing which covered the rods operating the switches was negligent in stepping on the edge of the platform, although only a few inches intervened between him and See also § 331, note 1, subd. (a), § the moving cars. Sweet v. Boston & A. 332b, notes 1-3, supra; subd. (i) of the R. Co. (1892) 156 Mass. 284, 31 N. E.

A car inspector who stepped onto a pile of cinders between two tracks to allow an engine to pass, and was injured essarily negligent in taking such a position. Beaver v. Atchison, T. & S. F. R. Co. (1896) 56 Kan. 514, 43 Pac. 113.

The question of contributory negligence of a workman who remained in an 521, 48 N. Y. Supp. 523.

A workman employed on a temporary street-car track was guilty of contribu- about 4 feet from a track while a train

An employee engaged in cleaning out tory negligence in stepping between such of the track upon the approach of the car. Sullivan v. Third Ave. R. Co. (1897) 19 App. Div. 195, 45 N. Y. Supp. 1083. A street-car employee who, knowing that the track is so close to a wall that it is unsafe for a man to stand next the wall while a car is passing, allows himself to be caught in that position by a car, is negligent. Jennings v. Tacoma R. & Motor Co. (1893) 7 Wash. 275, 34 Pac. 937.

The conductor of an electric car is not the switch point, where such position is It cannot be said, as a matter of law, the usual one, and not in itself a place have stood in another place and turned the switch. Gier v. Los Angeles Consol. Electric R. Co. (1895) 108 Cal. 129, 41

Pac. 22.

present section; and § 364, infra.

<sup>2</sup>It has been held that, where a section hand, who was standing a reasonable distance from the track while a train by the cinders giving way under his a piece of coal, he could not be said to weight and thus throwing him under the have been guilty of contributory negliwheels, was held not to have been needed. Gulf, C. & S. F. R. Co. v. Wood (1901; Tex Civ. App.) 63 S. W. 164. passed, was injured by being struck by a piece of coal, he could not be said to sonable doctrine than another decision to the effect that a section hand who voluntarily stands in a ditch at the side of excavation between two street-car tracks the track, in close proximity to a train while the car from which the horses had passing at the rate of 30 to 40 miles an been detached was passing over the ex-hour, is, as matter of law, guilty of negcavation precluding recovery for injuries ligence which will prevent recovery for sustained by coming in contact with the his death from being struck by coal fallcar as he jumped back to avoid one of ing from the engine, where he could with the horses which was drawn too near the ordinary care have reached a place of end of the excavation and slipped in, is safety. Illinois C. R. Co. v. Stassen for the jury upon evidence that there was (1893) 56 Ill. App. 221. Compare the ample room to draw the horses around criticism in note 6 to § 332b, supra, on and avoid the excavation. Burns v. Secthe similar decision in Croll v. Atchi-ond Ave. R. Co. (1897) 21 App. Div. son, T. & S. F. R. Co. (1896) 57 Kan. 548, 46 Pac. 972.

The fact that a section foreman stands

(3) Going under or between stationary railway cars which may be set in motion at any moment.<sup>3</sup> Compare cases cited in § 335, notes 2, 6, § 336, note 2, infra.

is passing, and watches a fireman there-rakes were provided and he had been on as he prepares to throw a message to instructed to use them for removing the him, does not establish his contributory ore, voluntarily subjects himself to an negligence, as a matter of law, so as to unnecessary risk; and he cannot recover prevent his recovering for an injury from his employer for injuries received, caused by a blow by a lump of coal to where a loaded car in charge of fellow which the message was attached. Card workmen, from which the blocks holding v. Eddy (1893; Mo.) 24 S. W. 746.

approaching a car from either end or moved it upon him. Morgan v. Hudson the opposite side, where he could have River Ore & Iron Co. (1892) 133 N. Y. done so safely, approached from the side 666, 31 N. E. 234. where a stone was suspended by a chain the unsafe condition of which he under- who, knowing that other employees are stood, and passed under it, when a link switching cars, and that there is no

is guilty of negligence in attempting to own convenience, and is injured, he is

59 Ill. App. 680.

Incre can be no recovery for the death tween standing cars when he sees an of an employee who went under an engine and train stalled at an upgrade, gine to clean out the ash pan, with only about 20 feet from the cars, is guilknowledge that a train standing upon ty of contributory negligence barring a another track would soon enter upon recovery for injuries received by a colhis track for the purpose of removing lision. The fact that the engineer gave therefrom cars standing about 120 feet no warning by bell or whistle is immafrom his engine on an up grade, and terial, if the noise of the engine's extens the purpose of the purpose of the engine and train stalled at an upgrade, another track would soon enter upon recovery for injuries received by a colhist track for the purpose of removing lision. The fact that the engineer gave therefrom his engine on an up grade, and train stalled at an upgrade, only about 20 feet from the cars, is guilknowledge that a train standing upon ty of contributory negligence barring a recovery for injuries received by a colhist track for the purpose of removing lision. The fact that the engineer gave therefrom his engine on an up grade, and train stalled at an upgrade, only about 20 feet from the cars, is guilknowledge. tion by the train in an attempt to couple apeake & O. R. Co. v. Lee (1888) 84 Va. them, and running down against his en- 642, 5 S. E. 579. gine. Seldomridge v. Chesapeake & O. It may be remarked that it has been R. Co. (1899) 46 W. Va. 569, 33 S. E. laid down, as regards persons not in the 293. A servant who, when directed to employ of railway companies, that the remove coal which had fallen on the risk of passing between cars in a train track while it was being loaded on cars, which is likely to get under way at any goes under or between the cars when he moment is such as no one can incur might have done the work by pulling without being held, as a matter of law, down the coal through a chute under guilty of negligence. Lake Shore & M. the track, is negligent. St. Louis Bolt S. R. Co. v. Pinchin (1887) 112 Ind. & Iron Co. v. Burke (1883) 12 Ill. App. 592, 13 N. E. 677. 372. A workman who, in order to remove ore from a car track, gets under a freezing morning, knowing that trains

it had in some unknown way been re-A railroad employee who, instead of moved, struck the car he was under and

A servant, familiar with the premises, in the chain broke and the stone fell definite or certain passageway left open, and injured him, is guilty of contributory negligence. Kinney v. Corbin inches apart, loaded with tools, and out (1890) 132 Pa. 341, 19 Atl. 141. <sup>2</sup> A car cleaner who knows that the of law, guilty of contributory negli-<sup>2</sup> A car cleaner who knows that the of law, guilty of contributory neglitrainmen are in the habit of recklessly gence which will prevent any recovery bumping moving cars against stationfor his death by being caught between ary stock cars on side tracks without the cars. Lord v. Pueblo Smelting & any warning is negligent in attempting Ref. Co. (1888) 12 Colo. 390, 21 Pac. to cross the track by crawling under 148. Where a servant, having the right those cars. Beal v. Atchison, T. & S. F. to cross the tracks at a designated place R. Co. (1900) 62 Kan. 250, 62 Pac. 321. in order to reach a closet provided by A night clerk in a railroad yard, fahis employer for its servants, goes bemiliar with the conditions and dangers, tween the cars at another place for his is guilty of negligence in attempting to own convenience, and is injured he is cross a track upon which a train was guilty of contributory negligence. Louis-standing, by going under the cars. Chiville & N. R. Co. v. Hocker (1901) 23 cago, B. & Q. R. Co. v. Eggman (1895) Ky. L. Rep. 982, 64 S. W. 638, 65 S. W. Ill. App. 680.

119. A railroad employee going in be-There can be no recovery for the death tween standing cars when he sees an

A car inspector who, on a snowy and car standing upon a slight incline, where are made up at the place where he is in-

- (4) Doing work on railway cars at an improper time or place.4
- (5) Taking a position on a railway car which is dangerous with relation to objects above the track.<sup>5</sup> Some of the cases under this

specting, by kicking cars against others was held to be for the jury, in Closson which are standing, voluntarily goes be- v. Oakes (1897) 69 Minn. 67, 71 N. W. tween a car and an engine only 3 feet 915. See also § 336, note 1, infra. apart, while the train is being made up. There can be no recovery for injuis guilty of contributory negligence, or ries received by a brakeman who was is guilty of contributory negligence, or assumes the risk of the cars being driven unnecessarily walking on the top of a against the engine by failure of the car when he was struck by a low overbrake on the moving cars to work because of snow and ice. Haurahan v. v. Sentmeyer (1879) 92 Pa. 276, 37 Brooklyn Elev. R. Co. (1897) 17 App. Am. Rep. 684. Nor for injuries redived by a brakeman by reason of the ployee is not guilty of contributory negligence in undertaking repairs on a car, towards the rear of the train, on a car with cars on the track on each side of it, which to his knowledge did not leave but at such a distance that if switching room for him to pass a trestle safely were done in the ordinary manner he would be able to get out of the way.

Jin. Co. (1891) 40 N. Y. S. R. 556, 15 Texas & N. O. R. Co. v. Wynne (1893; N. Y. Supp. 872; Goff v. Norfolk & W. Tex. Civ. App.) 22 S. W. 1064 (switch R. Co. (1888) 36 Fed. 299. A railroad engine, which was defective and unman-brakeman familiar with a bridge so low engine, which was defective and unman- brakeman familiar with a bridge so low ageable, struck a car violently and at its sides that it is dangerous for a forced it against the car under which person standing or sitting on the edge the plaintiff was working).

the air reservoir of an air brake on a ing over the side for his own comfort train which is stationary on a bridge so and convenience, and not in the disnarrow that the sides of the cars are charge of any duty, while his proper only 2 feet from the ends of the ties is position is at the center near the brakes. negligent, and cannot recover if he falls off. Norfolk & W. R. Co. v. Mann 100 Ala. 377, 14 So. 105. An employer (1901) 99 Va. 180, 37 S. E. 849. An is not liable for the death of an emengineer who alights on a trestle to oil ployee caused by his head coming in his engine is negligent. Chicago, B. & contact with a low place in a tunnel Q. R. Co. v. Abend (1880) 7 Ill. App. through which he was driving a car, 130. A locomotive fireman, who for his while riding on the top of the load, inown convenience attempts to discharge stead of on a seat provided for him his duties of cleaning the engine at the end of his trip without waiting for it to be inspected and repaired, though knowing that he will have plenty of time to not hold the company responsible for a understood the conditions. Accordingly, defect on account of which he is in- where the attention of a brakeman had Co. (1900) 179 U. S. 658, 45 L. ed. 361, whether he was guilty of contributory 21 Sup. Ct. Rep. 275, Affirming (1899) negligence in being on the top of such 37 C. C. A. 56, 95 Fed. 244.

negligence contributing to the accident, 1153, 54 S. W. 741; (1900) 22 Ky. L.

of a car as it passes under the bridge See also § 331, note 1, subd. (c), su- is guilty of negligence which will pre-A conductor who undertakes to bleed the edge of the car with his feet hangvent recovery for his death, in sitting at Schlaff v. Louisville & N. R. Co. (1893) stead of on a seat provided for him where he could have ridden safely. Foster v. Onderdonk (1894) 54 Ill. App. 254. See also § 331, note 1, subd. (a).

The above decisions presuppose that do his work after such inspection, can- the servant understood or ought to have jured, which would undoubtedly have not been called to the danger of standbeen disclosed by the inspection and ing on a car higher than the rest of the then repaired. Patton v. Texas & P. R. train, it was a question for the jury a car when it passed under a bridge, as But the question whether a railway he had just been on the top of some of employee who was injured by falling the cars to adjust brakes, and had a from a high trestle in attempting to right to pass over the car in question open the door of a car standing thereon, in going to the cab or engine. Southern which door was defective, was guilty of R. Co. v. Duvall (1899) 21 Ky. L. Rep.

head, it will be noticed, are decided with reference to the consideration that there either was or was not a necessity for the employee to be in the place where he was at the time of the accident; and others with reference to the consideration that he did or did not understand the danger to which the position taken exposed him, and was, therefore, capable or not capable of protecting himself.

(6) Taking a position on a railway car which is dangerous with relation to objects beside the track. See also § 358, infra. It will

535, was withdrawn.

something had gone wrong during the at that point, but not otherwise. Wilnighttime, put his head outside a car son v. Louisville & N. R. Co. (1887) 85 window and was struck by a water tank, Ala. 269, 4 So. 701 (effect of decision so his action cannot be barred on the the- stated in Kansas City, M. & B. R. Co. ory that the rule applicable to passen- v. Burton [1892] 97 Ala. 240, 12 So. gers-that it is negligence, as a matter of law, to allow any part of the body to protrude beyond the side of a riding at the bottom of a ladder on the car—is applicable to employees also. side of a box freight car, by striking Walsh v. Oregon R. & Nav. Co. (1881) the switch stand, when his duties do not 10 Or. 250. Nor does that rule apply require him to so ride, is guilty of such to a brakeman on a freight train, who contributory negligence as will prevent a is frequently under the necessity of ex-recovery. Haggerty v. Chicago, St. P. tending his person beyond the surface & K. C. R. Co. (1894) 90 Iowa, 405, of moving cars in order to give and re- 57 N. W. 896.

a brakeman to place himself, without platform of a car and leaning outward necessity, on the side of a train which and looking backward underneath the is about to pass some stationary cars car, is guilty of contributory negligence, on the adjacent rails, or other objects where he is under no necessity or duty to dangerous to a person in that position. be in that position. Sundy v. Savannah Callender v. Carlton Iron Co. (1893) 9 Street R. Co. (1895) 96 Ga. 819, 23 S. E.

railway company).

moving freight car by a side ladder when side of the car, while needlessly hanghe has an opportunity to board it by an ing down to observe whether the wheels end ladder, while it is standing, is guilty were sliding after the brakes had been end ladder, while it is standing, is guilty were sliding after the brakes had been of contributory negligence preventing a set. Walker v. Redington Lumber Co. recovery for injuries caused by his body coming in contact with a car on another track. McDugan v. New York C. A locomotive fireman is chargeable other track. McDugan v. New York C. with contributory negligence, precluding & H. R. R. Co. (1894) 10 Misc. 336, 31 recovery for injuries sustained by fall-N. Y. Supp. 135. A car cleaner who, ing from the engine as cars attached to without any call of duty, takes his stand it came in contact with standing cars, when the oil how over the wheel of a in attempting to pass from the steem without any call of duty, takes his stand it came in contact with standing cars, upon the oil box over the wheel of a in attempting to pass from the steam freight car while it is being run along a siding, cannot recover for injuries the ground, instead of passing along the caused by his striking against a running footboard to the cab, as he ning board projecting from a platform.

Martensen v. Chicago, R. I. & P. R. Co. that the engine had started to back for (1883) 60 Iowa, 705, 15 N. W. 569. A the purpose of coupling standing cars. brakeman who descends over the side of Kelsey v. Chicago & N. W. R. Co. Vol I. M. & S.—54.

Rep. 56, 56 S. W. 988. Former opinion a car for the purpose of eating his in (1899) 20 Ky L. Rep. 1915, 50 S. W. lunch, and not in the line of his duty, is deemed to be negligent where he knows Where a train hand, thinking that that there is a dangerous obstruction

ceive signals, and for other purposes, An employee of a street railway com-Kansas City, M. & B. R. Co. v. Burton pany who is killed by coming in con-(1892) 97 Ala. 240, 12 So. 88. tact with a post close to the track, 892) 97 Ala. 240, 12 So. 88. tact with a post close to the track, On the other hand it is negligence for while standing on the step of the front Times L. R. 646 (action against another 841. No action can be maintained for injuries received by a servant who was An employee who attempts to board a struck by a skidway 29 inches from the

be observed that the same remark that was made in regard to the cases cited under the last paragraph is also applicable to the cases cited under the present one.

(7) Taking a position on a railway car or engine, which is danger-

(1898) 106 Iowa, 253, 76 N. W. 670. the track to admit of a person's swing-An experienced engineer who, while en- ing out with safety from the bottom of gaged in instructing another engineer a passing car is negligent if he puts as to all the physical peculiarities of himself in that position. McKee v. Chithe road, allows himself to be struck by cago, R. I. & P. R. Co. (1891) 83 Iowa, the side of a bridge to which the engine 616, 13 L. R. A. 817, 50 N. W. 209. A happens to have been brought nearer brakeman who, in attempting to get on than usual by the swaying movement top of a car, is caught between the car caused by the passage of the train round and a stone wall 2 feet from the track, a curve by which the bridge was ap- of which he had previously been warned, proached, cannot recover. Such an ac-but which he mistook for a snow bank, cident implies that he failed to use the distance between the ladder and the care which it was his duty to warn this obstruction being from 2 to 4 inches, his pupil to use in entering the bridge. —is guilty of contributory negligence. Bellows v. Pennsylvania & N. Y. Canal Hitchcock v. Railway Transfer & R. Co. (1893) 157 Pa. 51, 27 Atl. No action can be maintained 4th Series, 499.

the extreme outer edge of a brake beam nal to the engineer to stop, cannot rein front of an engine with no cars at-cover for injuries caused by the engintached, to ride through a narrow and eer's being unable to see the signals bedark tunnel on his way to the office for cause of the steam, and failing to stop his pay, on a day when he is not at the train. Pennington v. Detroit, G. H. work, cannot recover for an injury to d. M. R. Co. (1892) 90 Mich. 505, 51 N. his knee from a projecting rock. Richwork, Carbon Hill Coal Co. (1893) guilty of contributory negligence in at6 Wash. 52, 20 L. R. A. 338, 32 Pac. tempting to mount the front platform of his car as it was gripe out of the barn.

der the tender, which he could have suf-ficiently seen without leaving his place. App. Div. 23, 48 N. Y. Supp. 868. East Tennessee, V. & G. R. Co. v. Head Whether an employee, injured by East Tennessee, V. & G. R. Co. v. Head under the wheels, cannot recover, ger in mind, and ought to have avoided Brown v. Chicago, R. I. & P. R. Co. it, is primarily a question for the jury (1886) 69 Iowa, 161, 28 N. W. 487. A under proper instructions. Keist v. brakeman who is chargeable with knowledge that all the wing fences at the 32, 81 N. W. 181. cattle guards along the line are too near A brakeman engaged in moving over

(1900) 81 Minn. 352, 84 N. W. 42,

A switchman engaged in switching where an engineer, knowing that the side cars, familiar with the surroundings, of a bridge was close to the track, put who chooses to descend from a moving his head so far out as to be struck. car knowing that he must strike a post M'Ghie v. Northwestern R. Co. (1886) near the track if the train does not stop, 24 Scot. L. Rep. 370, 14 Sc. Sess. Cas. and knowing the engine to be defective in permitting the escape of clouds of An employee in a mine who gets upon steam which he must see in giving a sighis car as it was going out of the barn, A railway company is not liable for within such a short distance from a the death of an engineer caused by his post at the side of the track that he was coming in contact with a danger signal caught between it and the body of the post which was too near the track, where car, where he was familiar with the surhe knew of its proximity, and unneces- roundings, and knew that he was likely sarily left his place on the locomotive to be squeezed if he got between the car and exposed himself to danger for the and the post, although he did not know purpose of looking at a hot journal un- how close it was to the track. Reiser

(1893) 92 Ga. 723, 18 S. E. 976. A striking a structure while on the side trainman who goes outside the engine of a car in the discharge of his duty, cab, and, while leaning his body out for knew of the danger incident to the structhe purpose of looking under the engine, ture, or, if he did know of it, whether, was struck by a snowbank and thrown under the circumstances, he had the dan-

ous with relation to the movements or condition of such engine or car.<sup>7</sup> For cases of this type in which the negligence of the servant was held to be for the jury, see more especially §§ 353, 354, 357, infra.

a running freight train is not required parties inside the car were unhurt, is to make a nice calculation of inches, so not entitled to recover. Martin v. Baltithat the protrusion of his body shall more & O. R. Co. (1889) 41 Fed. 125. not strike a cattle chute near the track to which his attention was not specific the front platform of the last freight ally called. Wood v. Louisville & N. R. car in a train. Coyle v. Pittsburgh, C. Co. (1898) 88 Fed. 44. It is not con- C. & St. L. R. Co. (1900) 155 Ind. 429, tributory negligence for a street-car con- 58 N. E. 545 (complaint showing such ductor to attempt to collect fares from a position held demurrable in a case the side of a car rendered dangerous by where the servant was thrown off by an overhead wire pole being placed sev-reason of a defective piece of track). eral inches closer to the track than the An employee traveling in the caboose of other poles, of which fact he was igno- a freight train is negligent if he goes rant, where he was a new man, with- out and stands on the platform at a out instructions as to which side he station while switching is being done. should collect fares from, and could not *Posey* v. *Texas & P. R. Co.* (1900) 42 by reasonable diligence have protected C. C. A. 293, 102 Fed. 236. A section himself from the danger. *Pikesville*, R. hand is not, as matter of law, guilty of & E. G. R. Co. v. State (1898) 88 Md. contributory negligence precluding re-563, 42 Atl. 214. A brakeman is not, covery for injuries from being thrown as matter of law, guilty of contributory from the platform of a caboose of a work negligence in attempting to climb the train by the sudden stopping of the side ladder of a car while the train is train, in remaining upon the platform, in motion, without looking to see to which he had just stepped from a flat whether he is in danger from a pole car after hearing the direction of the which is too close to the track, where the foreman to the engineer to move the danger is not so obvious as to be distrain a car's length, where the train coverable by observation, and he has no moved slowly. He is not bound to take actual knowledge of the danger. Whip-precautions in view of such an unexple v. New York, N. H. & H. R. Co. pected contingency. Union P. R. Co. v. (1896) 19 R. I. 587, 35 Atl. 305.

Doyle (1897) 50 Neb. 555, 70 N. W. 43.

side track and a car as he was attempt- his feet inside, and holding on with both ing to board his train after it had hands while the car is in motion, canstarted was negligent in not looking for not be said to occupy a position so manobstacles that might strike him, or in ifestly dangerous that he cannot recover not boarding the train before giving the if thrown off by a sudden jerk. Coughsignal to start,—is a question for the lan v. Cambridge (1896) 166 Mass. 268, jury upon evidence that he had never 44 N. E. 218. before been on the side track, and did not know of the location of the pole, and of a car to be attached to a train is, as that his attention had been directed to matter of law, not guilty of contributory seeing that none of his passengers should negligence precluding recovery for inget in front of a train approaching on juries from being thrown from the car the main track. Crandall v. New York, by the negligence of the engineer, in N. H. & H. R. Co. (1896) 19 R. I. 594, standing upon the top of the car, rather

maintainable, as a matter of law, where position the better to observe the cars there cannot be any reasonable doubt and the signals of the engineer when octhat the servant was aware of the loca- casion requires it. tion of the structure. Blackstone v. S. & M. R. Co. v. Murray (1895) 55 Central R. Co. (1901) 112 Ga. 762, 38 Kan. 336, 40 Pac. 646. S. E. 79, and cases cited above.

who is injured by a collision in which bar a recovery for injuries sustained.

It is negligence to take a position on

Whether a conductor injured by being A city employee who sits on the edge caught between a telegraph pole near a of a gravel car used by the city, with

A brakeman directing the movements than on the narrow platform at the But the action may be declared not front end thereof, where he assumes that Kansas City, Ft.

A railroad employee engaged in shift-A brakeman sitting on a brake wheel ing and handling cars was held guilty on the platform of a car upon a switch. of such contributory negligence as would

where, to save the labor of walking a boiler head of a locomotive which is few feet, he attempted to climb upon pushing a box car towards others to the pilot of a passing engine from which which it is to be coupled is not neglihe fell and was run over. Young v. gence, as matter of law, where the enBoston & M. R. Co. (1898) 69 N. H. gine used was an ordinary freight en356, 41 Atl. 268. Special elements emgine, and not a switch engine with the
phasized were that there was no sudden usual appurtenances of footboards and exigency, nor any opportunity to see hand rails, and the position thus taken whether the pilot afforded a safe foot-corresponded as nearly as the structure ing; and that the employee made no of the freight engine would permit to attempt to discover whether there was that which would have been the proper anything which he might grasp in case position on a switch engine for an emof a misstep.

A servant who rides on the pilot of an engine without any necessity is negin the cars will not justify him in sit-crushed between the box car and the ting on the pilot of the engine; and if engine). he does improperly do so, it is his duty to leave the pilot and go into the cars don a dangerous position, like the footat his first opportunity. Downey v. board of an engine, if it is the under-Chesapeake & O. R. Co. (1886) 28 W. standing that, while engaged in super-Va. 732. To ride on a pilot is deemed vising the switching of trains, he is that might have been said by those in that he cannot perform his duties with charge of the train to encourage the efficiency and promptness if he occuservant to do so. Baltimore & P. R. Co. pies any other position. Highland Ave. v. Jones (1877) 95 U. S. 439, 24 L. ed. & Belt R. Co. v. Walters (1890) 91 Ala. 506.

For a brakeman to sit on the crosswhile the train is running between stations on the main line and it is in no hour and without danger signals, by sense necessary for him to be there, is negligence which will prevent a recovery for injuries sustained as the result of a collision with the rail of a bisecting road. Warden v. Louisville & N. R. Co. (1891) 94 Ala. 277, 14 L. R. A. 552, 10 A similar decision has been So. 276. rendered with regard to an employee who was being transported to his place of work. Kresanowski v. Northern P. R. Co. (1883) 5 McCrary, 528, 18 Fed. 229.

wagon with which an engine came into collision at a crossing, it has been held that the fact that switchmen upon switch engines ride standing upon the ride on the brake beam of an engine, inplatform provided for them has no tendency to prove that a switchman is cannot alight except on an open trestle. pilot with his legs hanging down. Glover v. Scotten (1890) 82 Mich. 369, 62 N. W. 1029. 46 N. W. 936. On the other hand it has been held that for a brakeman to combination car with a railing, got upon stand upon the platform in front of the a flat car next to it, instead of remain-

ployee having duties to perform which required him to be on the engine, but which did not entitle him to be in the ligent. Atchison, T. & S. F. R. Co. v. cab. Missouri P. R. Co. v. McCally Tindall (1897) 57 Kan. 719, 48 Pac. (1889) 41 Kan. 639, 21 Pac. 574 (box The fact that a shopman who is car was driven so violently against the carried to and from his work as a mat- other cars that the force of the impact ter of accommodation cannot get a seat bent the pilot, and the brakeman was

A yard master is not bound to abanto be culpable, irrespective of anything to use the footboard, and it appears 435, 8 So. 357. A switchman, who, while riding on the front footboard of a beam in front of the engine with his switching engine en route to his work, legs hanging over in front of the rilot, was killed by a collision with loaded cars placed on the track at an unusual another company which interchanged cars at that point, is not chargeable, in an action against such company, with contributory negligence because he did not ride on the rear footboard. Lockhart v. Little Rock & M. R. Co. (1889) 40 Fed. 631.

Nor can negligence be predicated from the fact that a brakeman injured by a derailment was riding on the rear, instead of the front, footboard of a switch engine. There is no more reason to an-In an action against the owner of a ticipate danger on one footboard than on the other. James v. Northern P. R. Co. (1891) 46 Minn. 168, 48 N. W. 783.

It is negligence for a brakeman to stead of in the cab, at a place where he justified in sitting on the beam of the Benage v. Lake Shore & M. S. R. Co. (1894) 102 Mich. 72, 60 N. W. 286,

A brakeman who, in uncoupling a

(8) Taking a position on a railway car which is dangerous with relation to the nature of the load upon it.8

ing within the railing, and was jerked (1877) 84 Ill. 570.

the bumper of each car, with his lantern tion for the jury. Murdock v. Oakland in his left hand, and leaning forward S. L. & H. Electric R. Co. (1900) 128 and reaching with his right hand to Cal. 22, 60 Pac. 469. withdraw a coupling pin which with- A charge that if an employee, knowing out his knowledge had been withdrawn that there was a safer way to ride on Va. 112, 24 S. E. 615. A switchman *Powers* v. Boston & M. R. Co. (1900) who was injured by being caught be- 175 Mass. 466, 56 N. E. 710. tween a flat car and engine while standand setting the pin and then stepping timber by the shock resulting from the outside of the track before the engine collision of the car with another. and the car came together. Bennett v. Larkin v. New York C. & H. R. R. Co. Northern P. R. Co. (1892) 3 N. (1896) 166 Mass. 110, 44 N. E. 122. D. 91, 54 N. W. 314. A brakeman who uncouples the caboose from ligence which will prevent his recovery a moving freight train while there for injuries sustained by his foot being the caboose to come caught against the and of an open car. & N. R. Co. v. Fox (1897) 20 Ky. L. mond & D. R. Co. v. De Butts (1894) Rep. 81, 42 S. W. 922. 90 Va. 405, 18 S. E. 837.

Negligence is an inference, in point of law, where an engineer, for the pur-tempts to climb upon or pass over a pose of making some necessary repairs, lumber car in a train, which is a danwent out on the running board of an gerous car to pass over, is guilty of engine which was apt to rock a great such negligence as will prevent a redeal. Southern P. Co. v. Johnson covery for his death caused by the break-(1894) 12 C. C. A. 479, 29 U. S. App. ing of improvised steps leading to the 201, 64 Fed. 951.

A railroad company is not liable for an injury to an employee, where he voluntarily leaves the coach in which he is the engine to the tender on a dark night riding as a passenger, and takes a more to fill the tender with coal, without any dangerous place upon the engine to sub- other light than a torch, is negligent in serve his own purposes, with a view of attempting to get back to the engine gaining information to secure his promo- after his torch goes out, by walking on tion. Texas & P. R. Co. v. Boyd (1894) a tank which he knows to be a very 6 Tex. Civ. App. 205, 24 S. W. 1086. dangerous one, when a safer way is, to

Whether the conductor of a "lunging" off and run over, is not entitled to re- electric car, who was injured by the sud-Chicago & A. R. Co. v. Rush den starting of the car, was negligent in leaning backward over the dashboard A brakeman is guilty of contributory with both hands upraised, attempting to negligence in standing with one foot on keep the trolley on the wire, is a ques-

by a fellow brakeman, precluding re- an engine, placed himself, without ne-covery for injuries resulting from the cessity, in a more dangerous position, separation of the cars. Young v. West and thereby contributed to the injury, Virginia C. & P. R. Co. (1896) 42 W. he was not entitled to recover, is proper.

<sup>8</sup> No action can be maintained by a ing on the footboard of the engine on brakeman who, when getting off a car the inside of a curve in the track as he on which there was a tank of oil known was assisting in making a coupling was by him not to have been secured against not guilty of contributory negligence, as sliding, places his hand on a timber near matter of law, because he remained on the end of the tank, and has it crushed the footboard, instead of going ahead when the tank is thrown against the

is no one on the caboose to concaught against the end of an open car trol its movements is guilty of such by the sliding of iron rails therein, in contributory negligence as will prevent putting his foot inside the car in front a recovery for his death from being run of the rails, when he knows the car is over by the caboose, after being thrown about to be struck by the train for the from the train by a sudden jerk, where purpose of moving it, and sees that the he remained on his knees in a dangerous train is moving fast enough to strike position at the rear end of the train af- hard, where there is a platform outside ter uncoupling the caboose. Louisville the car upon which he can stand. Rich-

A brakeman who unnecessarily attop of such car. Harris v. Chesapeake & O. R. Co. (1895; Va.) 23 S. E. 219.

A railroad employee who is sent from

(9) Taking a position on a railway car which is dangerous by reason of some specific defect therein.9

(10) Dangerous positions taken by employees engaged in coupling or uncoupling cars. Abstracted from the element introduced by the fact that both the cars to be connected were in motion, the question whether the servant's position imported negligence may be considered with reference to dangers arising from the movements of other cars, 10 or from the location of the track, 11 or from the construction of the coupling apparatus, 12 or as to the manner in which the cars were loaded, 13 or from the attitude which he assumes. 14 In all these predicaments, as is shown by the cases cited, the servant is bound at his

place where he was to make a coupling, whereby he was injured by being crushed between the logs on the cars leaving the coupling cars with deadwoods, unnecestrack, is a question for the jury on conflicting evidence as to the prudence of such course. Balhoff v. Michigan C. R Co. (1895) 106 Mich. 606, 65 N. W.

11 An employee is guilty of negligence 288. in standing to couple cars on the inside

his knowledge, available to him. Chi-arated on the outside of the curve, so cago, R. I. & P. R. Co. v. Cowles (1898) that he would not have been injured if 54 Neb. 269, 74 N. W. 579. he had stood on that side. Tuttle v. De-Whether a brakeman was guilty of troit, G. H. & M. R. Co. (1887) 122 U. contributory negligence in riding on a S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. flat car between two tiers of logs, to the 1166; Texas S. V. & N. W. R. Co. v. Guy (1893; Tex. Civ. App.) 23 S. W. 633.

sarily goes inside those deadwoods, is negligent as a matter of law. Osborne v. Knox & L. R. Co. (1877) 68 Me. 49,

28 Am. Rep. 16.

<sup>13</sup>A brakeman who, in broad daylight, <sup>9</sup>A head brakeman a part of whose has to couple cars loaded with lumber duty consisted in filling the water tank which projects over their ends on one of the locomotive through the manhole, side of the track, is chargeable with a and who had filled it several times dur- knowledge of the risk he has to run, and who had filled it several times durknowledge of the risk he has to run, ing the trip, cannot recover for personal injuries received by stepping on if he attempts to make the coupling the manhole cover, which, being out of on that side of the track on which the repair, slipped and injured him, if he lumber projects, and without stooping. knew that the cover was defective. Mc-Lothrop v. Fitchburg R. Co. (1890) 150 Quigan v. Delaware, L. & W. R. Co. Mass. 423, 23 N. E. 227. It is negli(1890) 122 N. Y. 618, 26 N. E. 13. gence to attempt to make a dangerous and between two attached cars and a cars are leaded in a dangerous manner. gap between two attached cars and a cars are loaded in a dangerous manner. single car to make a coupling, where he Houston & T. C. R. Co. v. Kelley (1896) could not see the conductor's signals 13 Tex. Civ. App. 1, 34 S. W. 809, Renor the movement of the engine and cars hearing denied in (1896) 13 Tex. Civ. approaching him, and remained upon the App. 25, 46 S. W. 863. No action can track while five uncontrolled cars trav- be maintained where a brakeman, with eled down a grade for 50 feet before knowledge of the danger created by a striking the two attached cars, and the projecting load, and without being or-whole 7 traveled between 10 and 50 feet dered to do so by the conductor, went before reaching him, gathering mo-between the two cars to make a coup-mentum as they went down grade, is ling, and, being compelled to stoop in guilty of contributory negligence. Mc-order to avoid the lumber, fell and was Donald v. Alabama Midland R. Co. killed. Brice v. Louisville & N. R. Co. (1899) 123 Ala. 227, 26 So. 165. (1888) 10 Ky. L. Rep. 526, 9 S. W.

14 Negligence is a necessary inference, of a sharp curve, so that he is crushed where a brakeman stood with his left by the contact of the cars, in consequence arm against a stationary car waiting of the slipping and passing of the draw- for a moving car to come, and while bars, when the cars are sufficiently sep- feeling for a coupling pin has his arm peril to select a position which will protect him from unnecessary risks, in so far as they are known or ought to be known to him. is he free from negligence where he goes on the track in front of a stationary car, when he sees that the engineer is not responding to his signals to slow up the cars which are being backed.15

As regards the proper inference to be drawn where the essence of the defendant's plea is that the servant attempted to couple cars in motion, the doctrine which is sustained both by reason and by the weight of authority is that the question of his contributory negligence is for the jury to determine with reference to all the circumstances in evidence, and that a court is not justified in declaring, as a matter of law, that the action is not maintainable, unless something more is shown than that the cars were in motion.<sup>16</sup> Recovery is allowed

able where a brakeman tried to couple the plaintiff was trying to couple when cars running from 3 to 5 miles an hour, he was injured were in motion, does though he saw that the engineer had not not compel the legal conclusion that he responded to his signal to slacken the was negligent. Cleveland, C. C. & St. speed. On the second appeal (1896) 93 L. R. Co. v. Baker (1899) 33 C. C. A. Wis. 32, 66 N. W. 1137, the evidence 468, 63 U. S. App. 553, 91 Fed. 224. must have been presented under a someon a dark, wet winter's morning, in accordance with his duty, no one being practice to indicate the propriety or impropriety of what he was doing. St. between moving cars and a standing one, Louis & S. F. R. Co. v. Keller (1900) when they were 2 or 3 feet apart, to couple them, and was injured by falling pare Spaulding v. Chicago, St. P. & K. over piles of ashes 4 to 8 inches high C. R. Co. (1896) 98 Iowa, 205, 67 N. and covered with snow. The main stress W. 227, where a verdict for the plainty of the fact that his failing to tiff was wheld for the reason that the observe those piles was not culpable.

10 That stepping between cars in mo- the act was negligent or not. tion to uncouple them is not negligence, as a matter of law, was declared in in undertaking to couple cars in motion, as a matter of law, was declared in in undertaking to couple cars in motion, Eastman v. Lake Shore & M. S. R. Co. where there is no evidence going to (1894) 101 Mich. 597, 60 N. W. 309; show that the speed was so great as to Ashman v. Flint & P. M. R. Co. (1892) have deterred an ordinarily couragous 90 Mich. 567, 51 N. W. 645; Gardner brakeman from making the coupling. V. Michigan C. R. Co. (1886) 58 Mich. Ohio & M. R. Co. v. Wangelin (1892) 43 592, 26 N. W. 301; Rebb v. East Tennes- Ill. App. 324. sec, V. & G. R. Co. (1891) 87 Ga. 631, 13 S. E. 566.

caught between the deadwoods. Mueller ing in front of a moving car on a dark v. Lake Shore & M. S. R. Co. (1895)

105 Mich. 487, 63 N. W. 416.

1087) 83 Va. 512, 3 S. E. 123; this case was followed by Kennedy v. Lake Chicago & W. M. R. Co. (1897)

118 Superior Terminal & Transfer Co. (1894) 87 Wis. 28, 57 N. W. 976, where the complete the coupling link, preparatory to making a coupling, where complete the coupling link, preparatory to making a coupling, where the coupling link preparatory to making a coupling, where the coupling link preparatory to making a coupling, where the coupling link preparatory to making a coupling, where the coupling link preparatory to making a coupling, where the coupling link preparatory to making a coupling, where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where the coupling link preparatory to making a coupling where t

it was held that negligence was infer- complaint showing that the cars which

Where a brakeman, while endeavoring what different aspect, as the effect of the to uncouple moving cars, caught his foot judgment was that the injured servant between a rail and a crossing plank and -a fireman of a switching crew-was was run over, a demurrer to the evidence not negligent, as matter of law, where, should not be sustained, if, according to on a dark, wet winter's morning, in ac- the testimony, there is no unvarying was laid on the fact that his failing to tiff was upheld for the reason that the evidence was conflicting as to whether

A court ought not to infer negligence

It is error to hold, as a matter of law. that a brakeman who, in the course of A brakeman is not, as matter of law, his employment, goes between cars movguilty of contributory negligence in go- ing at the rate of 4 or 5 miles an hour, even in those cases in which the servant finds considerable difficulty in extracting a coupling pin and is thus subjected to danger, for an unusually long time, and under unusually hazardous conditions.<sup>17</sup> The doctrine thus applied appears to be the only fair one, in view of the fact that this method of coupling cars, if not adopted from

about to couple to another. Bird v. 46 Pac. 374. Long Island R. Co. (1896) 11 App. Div. 134, 42 N. Y. Supp. 888.

3 miles an hour for the purpose of putting a link in the drawhead of a car. sult of the second appeal in this case, see note 20, infra).

A special finding that plaintiff was

A special finding that plaintift was killed while uncoupling cars which were is not, as matter of law, free from going at the rate of 4 miles per hour, negligence; and that the question he all the time knowing that the train whether he was entitled to recover was soon to stop, when he could have performed the task safely, which, however, was not unusually hazardous, as ting employees to go in between cars when they are moving at a safe rate of speed which is shown not to have been Chicago, R. I. & P. R. Co. (1883) 61 Iowa, 56, 15 N. W. 597.

was on the point of meeting the car; ditch, and, stumbling, threw his hand on the drawbar, where it was crushed by the other car,—does not necessarily show that he was negligent, where there is nothing to show the rates at which the train and the car were moving, and, the train and the car were moving, and, so far as appears, he did not know of the additional danger created by the ditch. Baird v. Chicago, R. I. & P. R. Co. (1883) 61 Iowa, 359, 13 N. W. 731, 16 N. W. 207, First Appeal (1880) 55 Iowa, 121, 7 N. W. 460.

is guilty of negligence. O'Neill v. Chi- of negligence in attempting to uncouple cayo, R. I. & P. R. Co. (1901) 62 Neb. cars moving at the rate of 2 or 3 niles an hour, in violation of a formal rule A brakeman is not, as matter of law, of the company, which, however, has guilty of negligence in stepping from a been in effect abrogated by habitual vioplatform 2 feet from the railroad track lation with the company's acquiescence, and walking between the rails in front is a question for the jury. Wright v. of a slowly moving car which he is Southern P. Co. (1896) 14 Utah, 383,

In Lake Erie & W. R. Co. v. Craig (1896) 19 C. C. A. 631, 37 U. S. App. A railroad brakeman is not, as matter 654, 73 Fed. 642, it was held that one of law, guilty of negligence in going on who goes between cars running about 5 the track in front of cars moving about miles an hour to uncouple them on a dark night when the ground is frozen, with snow upon it, at a point where the Carrier v. Union P. R. Co. (1897) 58 tracks interlace and the ties project Kan. 816, Appx. 50 Pac. 873 (for the reabove the ground, which is usually moist and likely to be slippery,—especially when he has just given his signal to

exceeded at the time of the accident, a brakeman injured by stepping into a A special finding to the effect that a ditch cannot be held negligent, as mat-brakeman, while walking in front of a ter of law, because he walked between slowly backing train, discovered that the cars, if it appears that he had no the car to which it was to be coupled knowledge of the ditch. Hollenbeck v. was moving towards him; that, upon as-Missouri P. R. Co. (1897) 141 Mo. 97, certaining this fact, he did not step out 38 S. W. 723, Affirmed in Banc in at once from between the rails, but re- (1897) 141 Mo. 113, 41 S. W. 887. The mained in front of the train until it cars in this case were moving at a rate of 3 or 4 miles an hour, which, accordand that, upon his then attempting to ing to the testimony of experienced railget out of the way, he stepped into a road men, was a reasonably safe rate of speed.

17 As, where a switchman went between

cars to uncouple them while in slow motion, and used a stone as he walked along to loosen the pin. Curtis v. Chicago & N. W. R. Co. (1897) 95 Wis. 460, 70 N. W. 665. Or where a switchman attempted to make the coupling as directed, but, owing to the fact that he could not pull out the car pin, or for some other cause, did not succeed, and followed the cars as they moved on, Whether or not a switchman is guilty trying to remove the pin, until his foot

absolute necessity, 18 is at all events naturally suggested and induced by the conditions under which such work is done. It is, of course, qualified to the servant's disadvantage, where the inference is unavoidable, that the speed at which the cars were moving was so great that no prudent man would have attempted to couple or uncouple them; 19 or where the testimony introduces some other special element which points to the same conclusion; 20 or where the servant failed

caught and he was run over. Illinois with the engine would descend the grade C. R. Co. v. Cozby (1898) 174 Ill. 109, more rapidly than the one detached by 50 N. E. 1011, Affirming (1896) 69 Ill. him. Alabama G. S. R. Co. v. Richie App. 256. Or where a switchman walked (1896) 111 Ala. 297, 20 So. 49. App. 256. Or where a switchman walked between slowly moving cars while attempting to withdraw a coupling pin, and caught his foot in a defective frog of a switch. International & G. N. R. uncouple cars while moving at about Co. v. Turner (1897; Tex. Civ. App.) 43 S. W. 560. Or where a switchman walked along ahead of a slowly moving walked along ahead of a slowly moving car to adjust the coupling pin, for the nursose of making a coupling with a unblocked. Towner v. Missouri P. R. purpose of making a coupling with a was negligent in leaving a guard rail standing car. Riftey v. Minneapolis & unblocked. Towner v. Missouri P. R. St. L. R. Co. (1898) 72 Minn. 469, 75 Co. (1893) 52 Mo. App. 648.

N. W. 704 (slipped on ridge of ice).

20 An employee who knew of the location of an unsafe cattle in and condition of an unsafe cattle in a condition of a condition of an unsafe cattle in a condition of a condition of an unsafe cattle in a condition of a condit

act of coupling cars while in motion is not negligence, as it can scarcely be done otherwise. Plank v. New York C. & H. R. R. Co. (1875) 60 N. Y. 607. See, however, § 357, note 2, infra.

in Marsh v. South Carolina R. Co. (1876) 56 Ga. 274; Kroy v. Chicago, versing on Rehearing (1897) 71 N. W. R. I. & P. R. Co. (1871) 32 Iowa, 357 (brakeman attempted to pull out a coupling pin while standing on the deadwood A switchman is, as a matter of law, of core on a train proving about 14 cuilty of contributory, regigning proving a standing on the deadwood and switchman is, as a matter of law, contributory, regigning proving a specific section. of a car on a train moving about 14 miles an hour).

guilty of contributory negligence pre-cluding recovery for injuries to his hand from being caught between the deadwoods of two cars, in attempting to make the coupling with a short stick without observing the speed of the mov-ing car, which he had reason to believe had been kicked on to the switch, and that its speed therefore could not be regulated, where he knew that it was particularly dangerous to make a coupling in that manner, and there was no 534.

emergency to render it necessary. A brakeman who attempts to change Southern R. Co. v. Arnold (1897) 114 the link on an engine while it is in mo-Ala. 183, 21 So. 954.

deadwoods after uncoupling some empty vania Co. v. Hankey (1879) 93 Ill. 580. cars from the end of a train which was moving down a grade in front of an switch or storage track is not ballasted, engine is negligent, as he ought to com- and having full control of the moveprehend that the loaded cars remaining ments of an engine, instead of stopping

guard was, as a matter of law, guilty of contributory negligence where, while attempting to pull a coupling pin, he walked between two moving cars, and fell into the cattle guard and was run

guilty of contributory negligence preiles an hour). cluding recovery for injuries resulting
A switchman is, as a matter of law, from one of his feet being caught betilty of contributory negligence pretween the rails at a switch and his being run over by the cars, where, with knowledge that the cars were approaching the switch and that there was no one present to signal the engineer to stop in case of danger to him, he continued to walk between two cars while attempting to draw the coupling pin, which resisted his efforts. (Speed of train not a factor here.) Crawford v. Houston & T. C. R. Co. (1895) 89 Tex. 89, 33 S. W.

A brakeman who attempts to change tion on a side track known to him to A brakeman who remains between the be unballasted is negligent. Pennsyl-

A brakeman who, knowing that a

to use an apparatus provided by the company for the special purpose of enabling him to couple or uncouple moving cars without going between them.<sup>21</sup>

Whether an employee who, while endeavoring to adjust the link of a moving car, runs backwards in front of it, should ever be allowed to recover, is very questionable. His negligence would, at all events, seem to be indisputable when the car was moving rapidly.<sup>22</sup>

Some courts seem to favor the doctrine that it is for the jury to say whether the dangers of uncoupling cars while they are in motion are greater than those of uncoupling them while they are stationary, and that the inference of negligence is peremptory if it is thus found, as a matter of fact, that the former method is the more hazardous.<sup>23</sup> But if this is really the effect of the cases cited, they are inconsistent with the general principle which declares that the essence of the culpability which is inferred from the selection of the more unsafe of two courses is that the course selected was positively unsafe, and not merely that the other course was the safer. See § 333, supra.

it or having it moved so slowly that no attempting to draw the coupling pin, accident could befall him, jumps from which resisted his efforts. Crawford v. while the engine is backing, to make a 89, 33 S. W. 534, Affirming (1895; Tex. coupling, and attempts to remove the Civ. App.) 32 S. W. 155. link from the drawhead while walking slowly backward, and is injured by having to uncouple cars while in motion, with snow, a few feet in front of an approaching train, for the purpose of inserting a link in the drawhead of the cars was defective, stepped between the cars was defective, stepped between the cars was defective, instead him, is negligent. Carrier v. Union P. R. Co. (1900) 61 Kan. 447, 59 Pac. 1075

A switch nan is, as matter of law, infra. guilty of contributory negligence pre-cluding recovery for injuries resulting (1896; Tex. Civ. App.) 38 S. W. 51, from one of his feet being caught betrom one of his feet being caught between the rails at a switch and his belaware, ing run over by the cars, where, with Delaware, L. & W. R. Co. (1892) 129 knowledge that the cars were approach. N. Y. 669, 29 N. E. 825, note 20, suprating the switch and that there was no one present to signal the engineer to (1891) 42 Ill. App. 642, Second Appeal stop in case of danger to him, he continued to walk between two cars while into cattle guard); Henderson v. Coons

the brake beam at the rear of the tender Houston & T. C. R. Co. (1895) 89 Tex.

ing his foot caught between the ties,— knowing the absence of a hand-hold on is guilty of contributory negligence. the ear, prevents his recovery from the Finnell v. Delaware, L. & W. R. Co. company for an injury caused by a de- (1892) 129 N. Y. 669, 29 N. E. 825. A fective roadbed and the lack of such brakeman who, while engaged in coup- hand-hold. Ohio & M. R. Co. v. Bass

of using the lever on the opposite side, (for the ruling on the first appeal, see he is guilty of negligence which will note 16, supra).

See, however, Lake Erie & W. R. Co. caused by his stumbling while walking v. Craig (1896) 19 C. C. A. 631, 37 U. between the cars. Morris v. Duluth, S. S. App. 654, 73 Fed. 642, note 16, S. & A. R. Co. (1901) 47 C. C. A. 661, supra.

In one case a Federal judge seems to have assumed in his charge that, whatever may be the circumstances involved, the act of attempting to couple or uncouple cars in motion is negligent, as matter of There is also authority for the view that this act may be pronounced culpable by a court, wherever it was done merely for the purpose of saving a little time.25

For other cases as to injuries received in coupling cars, see §§ 338, subd. (3), 353, 357, 442, infra.

- (10a) Traveling on railway cars operated in a dangerous manner.26
  - (11) Taking a dangerous position on a hand car.<sup>27</sup>
  - (12) Riding on a push car down a steep grade.<sup>28</sup>

25 Peoria, D. & E. R. Co. v. Ross (1894) 55 Ill. App. 638 (movement was not furnished a ticket to ride in a passenger car to the switch. (1894) 55 Ill. App. 638 (movement was Butler v. New York & Q. C. R. Co. only at the rate of 2 miles an hour). (1899) 42 App. Div. 280, 58 N. Y. Supp. But there the specially dangerous situation was that a car was to be uncoupled from the drawbar of an engine. Unless this circumstance is assumed to be a jecting over the front edge of the car, controlling and differentiating factor the car. Stewart v. Ohio River R. Co. ise is opposed to Hammer v. Chicago, the car. Stewart v. Ohio River R. Co.

I. & P. R. Co. (1883) 61 Iowa, 56, (1895) 40 W. Va. 188, 20 S. E. 922.

N. W. 597. See note 16, supra.

A railroad employee cannot recover for an injury caused by his falling from case is opposed to *Hammer v. Chicago*, R. I. & P. R. Co. (1883) 61 Iowa, 56, 15 N. W. 597. See note 16, supra.

who goes between the pilot of a moving engine and a car to which it is attached engine and a car to which it is attached ployees in charge thereof, where he was for the purpose of uncoupling them is sitting on the front part of the same negligent, if it is apparent that he can in a careless manner, and his negligence perform the work without putting himins of doing contributed to the injury. self in that position. Mobile & O. R. Galveston, H. & S. A. R. Co. v. Parrish Co. v. George (1891) 94 Ala. 199, 10 (1897; Tex. Civ. App.) 40 S. W. 191.

So. 145, Second Appeal (1895) 109 Ala.

A railway company is not liable for

245, 19 So. 784.

26 A brakeman is not guilty of contributory negligence so as to prevent a recovery for his death in the wreck of a train while he was on one of several flat cars which were being pushed ahead of the engine in accordance with custom, if when he entered the employment he was ignorant of such custom, but in the course of his service ascertained that the cars had to be so pushed, and it seemed reasonably necessary for him to get on them to discharge his duty; and the danger was such that an ordinarily prudent person situated as he was would have deemed it prudent to do so. Fordyce v. Lowman (1893) 57 Ark. 160, 20 S. W. Lowman (1893) 57 Ark. 160, 20 S. W. A section hand who jumps on a "push 1090. An employee is not, as matter of car" without brakes, designed only to law, guilty of contributory negligence in carry material, while going down a steep riding on a flat car which was being grade with the wind unfavorable, after

(1888) 31 Ill. App. 75 (similar acci- pushed by a passenger car a short distance, in order to shunt it upon a switch, 24 Hudson v. Charleston, C. & C. R. where he was required to accompany the

a hand car suddenly stopped by the em-

A railway company is not liable for personal injuries to an employee who, while working the front lever of a hand car under the orders of the section boss, was struck by the lever and knocked off while stooping to move some loose tools placed on the floor of the car by the section boss, although he has worked for the company but a few days. Jones v. Louisville & N. R. Co. (1894) 95 Ky. 576, 26 S. W. 590.

28 A servant who travels down a steep grade on a push car unprovided with any apparatus by which its speed can be controlled by persons riding upon it cannot recover. Miller v. Union P. R. Co. (1880) 2 McCrary, 87, 4 Fed. 768.

- (13) Remaining on a derailed engine which is being dragged on to the track.29
- (14) Mounting or remaining on a car the speed of which cannot be controlled.30
- (15) Taking a position dangerous with reference to a coal chute.<sup>31</sup> 335. — cases not relating to work on railways.—The doctrine stated at the beginning of the last section has also been applied, as shown in the following paragraphs, to actions for injuries received under circumstances mentioned.
  - (1) Taking a dangerous position on vehicles drawn by horses.<sup>1</sup>

being warned that it is dangerous, is will defeat an action to recover for his death caused by jumping from the car to avoid a collision with freight cars on a track for which the target showed the switch was set, but which fact he did not observe. York v. Kansas City, C. & S. R. Co. (1893) 117 Mo. 405, 22 S. W.

<sup>29</sup> Where an engine has been derailed and the servants of another company are endeavoring to pull it on to the track by means of a rope hauled upon by another engine, the question whether the engineer of the derailed engine was guilty of contributory negligence in returnpower was being applied is for the jury. Robertson v. Boston & A. R. Co. (1893) 160 Mass. 191, 35 N. E. 775 (rope broke and hook flew back and struck engineer).

30 When the defense relied on in an action for injuries received by a switchman owing to a collision between a car which he had mounted and tried to stop and a stationary one was that he had mounted the car when it was moving at a dangerous speed (10 to 12 miles an hour), it was held that the proper charge to give was that, if the jury believed that the car, when it reached the plaintiff, had attained such a dangerous rate of speed that a prudent man in his position would not have boarded it, they should find for the defendant. Texas & P. R. Co. v. Reed (1895) 88 Tex. 439, 31 S. W. 1058.

The mere fact that a brakeman ordown a descending grade did not abandon his post and jump from the car at was not acting properly does not show that he was negligent. Spaulding v. W. N. Flynt Granite Co. (1893) 159 Mass. 587, 34 N. E. 1134.

<sup>81</sup> An employee who knows the danger guilty of such contributory negligence as of coal falling down a coal chute cannot recover for an injury caused by a lump of coal striking him while sitting under such chute several minutes before the time he is required to commence work under the same in repairing the track, unless the employer or its agents were guilty of gross negligence in causing the injury. Louisville & N. R. Co. v. Walker (1897) 19 Ky. L. Rep. 369, 40 S. W. 461. As to Kentucky doctrine referred to in the last clause, see § 314. subd. e, supra.

An employee cannot recover for injuries occasioned by the failure of her employer to provide sufficient accommoing to and remaining on it while the dations for conveying her to her place of work, where the lack of such accommodations is obvious and she rides in an unsafe position. McGuirk v. Shattuck (1893) 160 Mass. 45, 35 N. E. 110. Where plaintiff, after a year's service

in driving a coal truck, which was barely low enough to pass under a beam in the coal bin when the driver was on the seat, was injured by attempting to remain on the seat while driving out un-der it with a new truck, which was about 2 feet higher than the old one, he cannot recover for the injury, since the danger was an obvious one. Miller v. Grieme (1900) 53 App. Div. 276, 65 N. Y. Supp. 813.

Whether a teamster engaged in hauling bark over his employer's private roadway is guilty of contributory negligence for injuries sustained from a defect in such roadway, in driving down a dered to run a car loaded with stone hill while sitting on a load, with the soles of his boots even with the front end of the load, and with nothing for the first instant that he saw the brake his feet to brace against, is a question for the jury. Nelson v. Shaw (1899) 102 Wis. 274, 78 N. W. 417.

An employee in a building who, although he notices that a teamster driv-

- (2) Taking a position in which there is danger from the movement of an elevator cage.2
- (3) Going on to an insecure structure.<sup>3</sup> Compare cases cited in § 341, infra.

ing up in front of it with a load of son who has hired his labor, and who seat, and does not hitch the horses, which shaft, it is proper to instruct that plainare spirited and restless, or put any-tiff was not negligent in going under-thing under the wheel, goes with the neath the elevator, if necessary in oper-teamster on a plank leading from the ating it, and he was assigned to that wagon to the building to pass bricks duty and was compelled to obey the asfrom the teamster to other employees in signment, there being also a further in-the building, and is injured by the horses struction that he was negligent if the suddenly starting and throwing down elevator might have been operated from the plank, is guilty of negligence. God- the outside without going under it. Baldard v. McIntosh (1894) 161 Mass. 253, timore Boot & Snoe Mfg. Co. v. Jamar 37 N. E. 169. Judge Knowlton dis- (1901) 93 Md. 404, 49 Atl. 847. See sented in a well-reasoned opinion, on the also note 5, infra, and § 336, note 2, ground that it was for the jury to say whether the plaintiff appreciated the real character of the team, in view of the ries received by a laborer while he was fact that he had been doing the same working voluntarily on a temporary work daily for about two months with- trestle, known to him to be in a dangerout accident, and might have been justi- ous condition, when the remedies to prefied in inferring that the horses were not vent injury were entirely in the hands in any material respect less trustworthy of him and his fellow workmen, and had than those ordinarily used for the same constantly been applied by them in purkind of work.

<sup>2</sup> An employee who has been for some time engaged in the use of an elevator which runs only from the first to the second floor is guilty of contributory negligence where, on pushing up the rod by he put his head into the well to see what Columbus & W. R. Co. v. Bridges (1888) was the matter, knowing the bottom of 86 Ala. 448, 5 So. 864. the car was only 6 feet above, and was could have examined into the matter safely by simply going upstairs. Murphy v. Webster (1890) 151 Mass. 121, 23 N. E. 842 (1892) 156 Mass. 48, 30 N. E.

An employee in a mine who knows that a coemployee has repeatedly started the cage without a signal is guilty of such contributory negligence as will prevent a recovery for his death by placing himself on the cage in a position which would be rendered dangerous by the starting of the cage, when there is no necessity therefor. Acme Coal Min. Co. v. McIver (1894) 5 Colo. App. 267, 38 Pac. 596. Compare cases cited in § 334, note 3, supra, § 336, note 2, infra, and note 7, of the present section.

vator in a building belonging to the per- gency requiring him to expose himself

bricks throws his reins loosely over the was injured while on the inside of the infra.

There can be no recovery for injusuance of general orders from their foreman. Carroll v. Pennsylvania Coal Co. (1888) 1 Monaghan, 234, 15 Atl. 688. A conductor who, without compulsion or necessity, attempts to take his train across a bridge after an extraordinary which the car was lowered, and repeat- flood, which, to his knowledge, was likeing this act, without starting the car, ly to render it insecure, is negligent.

Where the insufficiency of a scaffold struck by the car and injured, when he to support the workmen and the material placed on it is obvious, an employee who is injured by its fall cannot recover. Daniel v. Forsyth (1899) 106 Ga. 568, 32 S. E. 621. An employee cannot be said, as a matter of law, to have done an unnecessarily dangerous act in structing a platform from which to oil a journal 4½ feet above the floor, and in using a stepladder to get on the platform, by the separation of the parts of which he is injured, where there is evidence that the floor about the journal was greasy and unsafe. Standard Oil Co. v. Bowker (1895) 141 Ind. 12, 40 N. E. 128.

A miner cannot recover for injuries received by the breaking of a rotten plank forming part of a walk laid across timbers in a stope of the mine, where In an action by a convict who was as- he knew of the decayed condition of the signed by the warden to operate an elc- planks, and there was no sudden emer-

## (4) Taking a position rendered dangerous by moving machinery.

to the danger of walking over them. he might have kept the box between him v. Bullion-Beck & C. Min. Co. (1895) 12 Utah, 51, 41 Pac. 557.

A servant who, when pushing a car across a trestle, is injured by a fall which is due to his walking on a maniunsound guard rail, when he might have walked on the ties, cannot recover damages. Southern R. Co. v. Harbin (1900) 110 Ga. 808, 36 S. E.

An employee who, while assisting to replace a derailed car on a track running along a trestle, stands at the ends of the cross planks, which he knows to be constructed of poor lumber, instead of remaining between the rails where there is a double layer of planks, which furnishes a perfectly safe footing, is guilty of negligence. Davey v. Hall & M. Co. (1899) 122 Mich. 206, 80 N. W. 1082.

Where a servant, at work on a flat roof replacing a pane of glass in a window, in removing the old putty, exerted sufficient pressure to break the mullion, when he had unnecessarily put himself in a position which prevented him from supporting himself on the roof, his con-

An employee engaged in putting terra cotta ornaments upon a building is guilty of contributory negligence preventing a recovery for an injury caused by the fall of such terra cotta upon his stepping thereon, when it was, to his knowledge, in an unfinished condition. Campbell v. Mullen (1895) 60 Ill. App. 497.

If it appears that a servant, injured by the collapse of a defective scaffolding, had some opportunity to inspect it before going on it, the question whether or not he was guilty of contributory negligence in going on it is for the jury. McLaughlin v. Eidlitz (1900) 50 App. Div. 518, 64 N. Y. Supp. 193.

An employer or his representative, when he orders a servant of average intelligence to do work in the neighborhood of machinery in motion, has a right to assume that the latter will take which, while permitting him to do the work, offers the best chances of safety. ing caught in a revolving shaft, where clothing while he was stepping over it,

and it).

"If the servant puts himself in the way of dangerous machinery, with knowledge of its character, or places himself in the way of bodies moving in their accustomed orbit with irresistible force, and is thereby injured, it will generally be regarded as the result of his own carelessness." McGovern v. Central Vermont R. Co. (1890) 123 N. Y. 280, 25 N. E. 373.

An employee in a sawmill is negligent if he takes a position in the vicinity of a rapidly revolving shaft with a projecting set screw, where he had been employed for a long time about the mill, and, in performing his duties, on at least one occasion should have discovered the set screw, and not more than two or three days before the accident was informed of the danger, and his attention specifically called to the set screw. Middaugh v. Mitchell (1899) 120 Mich. 581, 79 N. W. 806. An employee whose duty requires him to oil a revolving shaft at a point within 3 or 4 inches of a set screw is guilty of such contributory negresult of his negligence. Saunders v. screw, in leaning over the shaft while Eastern Hydraulic Pressed Brick Co. it is in motion, without a light, and (1899) 63 N. J. L. 554, 44 Atl. 630.

An employee engaged in putting the same as will prevent recovery for an injury from being caught by the set result of his new injury from being caught by the set result of his new injury from being caught by the set result of his new injury from being caught by the set result of his new injury from being caught by the set result of his negligence. Saunders v. screw, in leaning over the shaft while the set result of his negligence. Saunders v. screw, in leaning over the shaft while the set result of his negligence. Saunders v. screw, in leaning over the shaft while the set result of his negligence. Saunders v. screw, in leaning over the shaft while the set result of his negligence. Saunders v. screw, in leaning over the shaft while the set result of his negligence. Saunders v. screw, in leaning over the shaft while the set result of his negligence is not set of his negligence. Saunders v. screw, in leaning over the shaft while the set of his negligence is not set of his negligence. Saunders v. screw, in leaning over the shaft while the set of his negligence is negligence. Saunders v. screw, in leaning over the shaft while the set of his negligence is negligence. Saunders v. screw, in leaning over the shaft while the set of his negligence is negligence. Saunders v. screw, in leaning over the shaft while the set of his negligence is negligence. Saunders v. screw, in leaning over the shaft while the set of his negligence is negligence. Saunders v. screw, in leaning over the shaft while the set of his negligence is negligence. Saunders v. screw, in leaning over the shaft with the set of his negligence is negligence. ligence as will prevent recovery for an while wearing loose clothing. Sakol v. Rickel (1897) 113 Mich. 476, 71 N. W. 833. Where an employee who is directed to oil a shafting finds some castings piled upon the floor on the side of the shafting where the oil box is, and, instead of requesting their removal, sets up his ladder on the opposite side, where he is obliged to lean over the shaft to reach the oil box, he cannot recover for injuries caused by his sleeve catching in a set screw. Demers v. Marshall (1901) 178 Mass. 9, 59 N. E. 454.

Placing a ladder where an effort is required to reach from it machinery to be oiled, when it could have been conveniently placed, constitutes contributory negligence which will defeat recovery by an employee falling from such ladder against a set screw unnecessarily projecting from a shaft. Groff v. Duluth Imperial Mill Co. (1894) 58 Minn. 333, 59 N. W. 1049. An employee in a the precaution of selecting the position sawmill acquainted with the machinery and its location, and competent to know the danger, is guilty of negligence con-Russell v. Tillotson (1885) 140 Mass. tributing to his injuries occasioned by 201, 4 N. E. 231 (servant injured by be- a set screw on a shaft catching in his

(5) Taking a dangerous route in passing from one point to another.5

which was not necessary to accomplish which he put his arm through the openhis purpose. Lewis v. Simpson (1892) 3 Wash 641, 29 Pac. 207. A workman *Pankratz Lumber Co.* (1897) 95 Wis. in a room wherethere is a revolving shaft, 622, 70 N. W. 677. An employee in a in a room where there is a revolving shaft, who knows that the shaftisdangerous to one coming in too close proximity therewith, and who, on moving a box, walks backward until his body comes in contact with the shaft and catches his clothing, is guilty of contributory negli-Beck v. Firmenich Mfg. Co. (1891) 82 Iowa, 286, 48 N. W. 81. One employed to do whitewashing in a factory in which there are shafting and set screws suspended near the ceiling, who for his own convenience refuses an ligent. Tooke v. Bergeron (1897) 27 offer of the employer's foreman to stop the machinery, and stands upon a platform, instead of standing on the floor and using a brush with a long handle, is guilty of such contributory negligence as will prevent a recovery for his death by being caught in the machinery. Glassheim v. New York Economical Printing Co. (1895) 13 Misc. 174, 34 N. Y. Supp. 69.

Evidence that a mature and experienced employee in a sawmill, in removing the sawdust which was clogging the sawdust carrier below a saw which was running at a high speed, and which extended in an unguarded condition several inches below a table on which it was placed, and the dangerous condition inspection, placed his hand so that it came in contact with such saw and was so injured, conclusively shows contributory negligence on his part and bars a recovery for the injury. Anderson v. C. N. Nelson Lumber Co. (1896) 67 Minn. 79. 69 N. W. 630. A servant familiar with the operation and construction of N. Y. Supp. 323. the planing machine at which he works cannot recover for injuries caused by unas will prevent a recovery for an injury Mass. 167, 45 N. E. 87. caused by the falling of the sleeve, where knowledge through which one's arm dangerous route might be safely put for the purpose for through and amongst machinery and

ing under the sleeve. Rysdorp v. George sawmill, of ten or twelve years' experience, wno voluntarily puts his hand into a hole in the boxing around a machine, and attempts to pick up the end of a broken chain lying within 2 or 3 inches of a revolving saw, and is injured thereby, is guilty of contributory negligence. Schultz v. C. C. Thompson Lumber Co. (1895) 91 Wis. 626, 65 N. W. 498.

A girl who dresses her hair near moving machinery is, as matter of law, neg-Can. S. C. 567.

An employee cannot recover for injuries received in passing over uncovered cogs, unless there was a reasonable and practical necessity for him to pass over them. British Columbia Mills Co. v. Scott (1895) 24 Can. S. C. 702.

See also cases cited under note 5,

infra.

<sup>6</sup> In an action for the death of an employee who was killed by an iron bar which fell upon him as he was passing through an elevator shaft which formed one of three passageways from one side of a cellar to the other, it is for the jury to say whether he was negligent in using the shaft as a passageway, where the evidence is that, before he entered of which was easily discernible on slight the shaft, he looked up and saw that the cage was stationary, and that the bar which fell on him was dropped by an employee of a company which was supplying machinery to his own master. Hoes v. Edison General Electric Co. (1899) 161 N. Y. 35, 55 N. E. 285, Reversing (1897) 23 App. Div. 433, 48

An employee in a sawmill is not, as a matter of law, guilty of contributory necessarily stooping over an arm and negligence precluding recovery for the reaching under the table to remove shav- loss of his fingers from coming in conings. George v. St. Louis Mfg. Co. tact with a circular saw, in attempting (1900) 159 Mo. 333, 59 S. W. 1097. to pass from one part of the mill to an-Compare § 339, subd. 2, infra. An em- other through a space 2 feet wide beployee in a sawmill who puts his arm tween the saw and another object, where through an opening under a sleeve cov- that was the only accessible way of passering the upper portion of a saw is ing from one part of the mill to the guilty of such contributory negligence other. Dolphin v. Plumley (1896) 167

An employee who, being directed to go other openings had been provided to his to a distant part of a mill, selects a which takes

when there were other routes open to gence of some of the ship's company. him, is negligent. Sauer v. Union Oil The Tammerlane (1891) 47 Fed. 822. Co. (1891) 43 La. Ann. 699, 9 So. 566.

A workman who chooses to take a certain route in leaving a dock, when another one which was safer and usually taken by the employees was open to him, cannot recover if he falls into an unprotected opening. Pritchard v. Lang (1889) 5 Times L. R. 639. The report tected does not show that any evidence was given that the plaintiff knew, or ought to have known, of the alternative route. But presumably this was proved or conceded.

going to his work through a factory, he turned aside unnecessarily, from mere curiosity, and, with an abundance of light to show him the condition of the of making repairs. for the purpose Headford v. McClary Mfg. Co. (1893) 23 Ont. Rep. 335 (1894) 21 Ont. App. Rep. 164 (1894) 24 Can. S. C. 291.

The absence of contributory negligence is not shown where a female employee in a hotel, after being directed to make inquiry of a certain person as to the proper way to reach the place of her ementered upon the roof without the knowledge of anyone, fell through the skylight. Kane v. Whitaker (1898) 33 App. Div. 416, 54 N. Y. Supp. 85.

Negligence is inferable where an employee in a mine follows a hoisting bucket up an incline, and is injured by the breaking of the rope. Patnode v. Harter (1889) 20 Nev. 303, 21 Pac. 679.

A servant who unnecessarily goes through a narrow opening left between a live dynamo and an iron clutch extending from another one which is temporarily standing near it is guilty of negligence which will prevent recovery for his death resulting from the simultaneous contact of his body with the live dynamo and the clutch. Fritz v. Salt Lake & O. Gas & E. L. Co. (1899) 18 Utah, 493, 56 Pac. 90.

A ship is not liable for injuries to a seaman who, when ordered to go between So. 124. decks, does not avail himself or safe and easy means provided therefor, but and is injured by the half cover of the against the stanchions, turning and

over and under running wheels and belts, and was left unfastened by the negli-

The fact that a mill-hand reaches a mill a few minutes early, and goes from another part of the premises to his place of work by a different route from that which he ordinarily takes, in the absence of any rule to the contrary, does not make him guilty of contributory negligence when injured by timbers negligently thrown from the mill. Sayward v. Carlson (1890) 1 Wash. 29, 23 Pac. 830. A complaint by an employee against an employer for personal injuries sustained by falling into an un-A workman cannot recover, where, in guarded well of which he was not aware, in the latter's field, while proceeding in the darkness, at the employer's direction, and in the course of his employment, from a tent in the field to a nearpremises, fell into an open hoistway, the by town, is not insufficient because it bars of which were temporarily down does not expressly aver that the employer directed him to take the route he did, where it avers that there was no road, path, or traveled way from the tent to the town, and that he took the direct route. Indiana Pipe Line & Ref. Co. v. Neusbaum (1899) 21 Ind. App. 361, 52 N. E. 471.

A servant is, of course, not chargeable with negligence precluding recovployment, omitted to do so, and, having ery for injuries due to the unsafe condition of the premises, in departing from the shorter route to a point to which he was obliged to go in the discharge of his duties, where there was no apparent risk in taking the route which he did. Lauter v. Duckworth (1897) 19 Ind. App. 535, 48 N. E. 864.

An employee in a mine is not, as matter of law, guilty of negligence in ascending the mining slope in the course of his employment while tram cars were being drawn up some distance ahead of him, where all ingress and egress to and from the mine was along this slope, and there were points at which a person could leave the track on the approach of descending cars, especially where he was killed by a post which the derailed cars struck and knocked against him while he was on the track. Whatley v. Zenida Coal Co. (1899) 122 Ala. 118, 26

A mining company is not liable to an employee who, on his first day in the swings himself through the main hatch, mine, was told by his "boss" to heed no one but him, but who, on the second day, hatch of the between-decks, which rested not finding his boss at the surface, descended into the mine, undertook to find catching him when he stepped upon it, his place to work by himself, and, on bealthough such cover is usually fastened, ing informed that the boss was on the

- (6) Getting onto a stationary machine which may be put in motion at any moment.6
- (7) Taking a position in which there is a risk of being struck by flying bodies.
- (8) Taking a position in which there is a risk of being struck by falling bodies.8

crossed under the shaft without giving cutting off small blocks from wooden any heed to the danger of the situation, although there was a passageway around saw. Vicksburg Mfg. Co. v. Vaughn the shaft for the employees to use, and was injured by one of the cages. Rush v. Coal Bluff Min. Co. (1892) 131 Ind. guide by a tag rope stones swung into 135, 30 N. E. 904.

See also § 333, note 4, supra; the cased cited as to injuries received by employees walking upon railway tracks in § 334, note 1, *supra*; and § 336, note

infra.

<sup>6</sup>An employee who gets upon a machine which has been stopped temporarily, and which is operated by another employee who cannot see him, for the purpose of opening a valve over the machine, without being ordered to do so, duty to do so, is guilty of contributory ries from the starting of the machine, gence on the part of the employer cominjured if the machine is started. Colorado Fuel & Iron Co. v. Cummings (1896) 8 Colo. App. 541, 46 Pac. 875. three minutes while passing under a traveler or movable derrick is guilty of negligence which will prevent his recovering for injuries on its starting in a if a stone should fall. gust of wind on account of failure to block the wheels,—especially where it was not necessary for him to pass that way to reach the place he had started for. Salem-Bedford Stone Co. v. O'Brien (1895) 12 Ind. App. 217, 40 N. E. 430.

See also § 336, note 2, infra; and compare cases cited in § 334, note 3, supra, and note 2 of the present section.

An action by a servant temporarily in charge of a factory, who was injured by being struck by a block thrown from a rip saw while he was instructing an employee how to operate the same on a machine equally adjustable for a rip or cut saw, is barred by his contributory negligence in standing in front of the Vol I. M. & S.—55.

other side of the mine, carelessly saw, a place of obvious danger, and in strips with the rip saw instead of a cut

(1900; Miss.) 27 So. 599.

8 An employee whose duty it is to place by a hand derrick cannot recover for an injury to his foot by the breaking of the chain by which a stone is suspended, where it is unnecessary for him to have his foot under the stone. Kilroy v. Foss (1894) 161 Mass. 138, 36 N. E. 746, Distinguishing Hackett v. Middlesex Mfg. Co. (1869) 101 Mass. 101, and Spicer v. South Boston Iron Co. (1885) 138 Mass. 426, on the ground (1) that, in those cases, the injury was caused by the fall of a part of a permanent strucand without being under any general ture, which the plaintiff had a right to believe was in no danger of falling, while negligence precluding recovery for inju- in the case at bar the appliances were in their nature temporary, and the danger where he knows that in the absence of that the stone might fall by the breaka sufficient light, which is the negli- ing of the chain was known and understood; and (2) that, in the earlier cases, plained of, he runs great risk of being it was expected that the persons injured might, in the usual course of their employment, place themselves where they would be hurt if the structure above An employee who places one of his feet them gave way, while, in the case at bar, in the cogwheels of a shaft for two or the plaintiff need not have placed himself under the stone, and was furnished with the tag rope to enable him so to work as not to expose himself to injury

A special finding that a servant went, without specific direction, to a machine on which he was adjusting drills, placed his arm beneath a heavy chain to which the drills were suspended, knowing that they were so suspended, and held it there for a minute before the drills dropped upon it; that he selected his own position and mode of work, and placed nothing under the chain to keep it from falling; that it was daylight; and that there was another safe way of doing the work,-shows that plaintiff was guilty of contributory negligence. Consolidated Stone Co. v. Redmon (1899) 23 Ind. App. 319, 55 N. E. 454.

A laborer engaged in taking down a

- (9) Taking a position where there is danger from the action of leverage.9
  - (10) Taking a dangerous position on a ladder.<sup>10</sup>
  - (11) Taking dangerous positions in mines. 11

T. R. Co. (1884) 110 III. 340.

S. R. 294, 19 N. Y. Supp. 900, it was Buttes Gold Min. Co. (1885) 11 Sawy. no evidence either of an express or implied direction from the master to enter it in this condition, or of any express or

end of a plank so balanced that a tim-Stobba v. Fitzsimmons & an injury.

v. Guggenheim Smelting Co. 248, 40 Pac. 248. (1899) 63 N. J. L. 647, 44 Atl. 762. Krulderv.

<sup>11</sup> A miner who, knowing that the roof 152, 772,

bank is negligent if he continues to of a tunnel is shattered and dangerous, work at a point where there is a mani- assists in removing a supporting timber fest risk of the earth's falling upon him and before another is substituted sits at any moment. Simmons v. Chicago & down to rest under the place whence the timber has been removed, is guilty of In Stuber v. McEntee (1892) 47 N. Y. contributory negligence. Bunt v. Sierra held that a servant was negligent in go- 178, 24 Fed. 847, Affirmed in (1891) 138 ing into an unshored trench, there being U. S. 483, 34 L. ed. 1031, 11 Sup. Ct. Rep. 464. A miner who continues to work at a place where he could not help seeing that a fall of the roof might occur implied representation as to its safety. at any moment is negligent, although The judgment was reversed in (1894) the necessary props had been ordered 142 N. Y. 200, 36 N. E. 878, but this and were being brought. Knight v. point was not discussed. See also notes Cooper (1892) 36 W. Va. 232, 14 S. E. 11, 12, infra, and § 336, note 2, infra; 999. A miner who goes to work in a and compare § 334, subd. (2), supra.

On a membrough that a place where he has observed that the roof is in a dangerous condition and of a placific as heldered that a time. cannot recover for injuries caused by a ber falling on the other end is liable to fall of the rock. Evans v. Chessmond throw him into the air, and who knows (1890) 38 Ill. App. 615. An experithat timbers are liable to fall owing to enced miner, extracting coal under a the defective condition of the tongs used contract by which he is to do his own to hold the timber, is guilty of such neg-timbering, and receive pay by the ton, is ligence as will prevent a recovery for guilty of such contributory negligence as will prevent a recovery for an injury, C. Co. (1895) 58 Ill. App. 427. An em- where on a day when work is not being ployee who, while engaged in raising the carried on in the mine he voluntarily framework of a building, unnecessarily and without any sudden emergency sits stands upon one of the iron frames ly-down under a hanging wall which he ing upon the ground, and thus causes it knows is dangerous and liable to fall at to tilt up and slip down upon his foot, any time. Fowler v. Pleasant Valley v. Tate (1894) 12 Ind. App. 57, 37 N. 594. A miner who, in passing through E. 1065, 39 N. E. 529. <sup>10</sup> The question whether it was neglistops at a place under the roof which a gence for an able-bodied workman, in his recent fall has demonstrated to be danforty-fifth year, to step on the second gerous, is guilty of contributory negli-round from the top of a ladder a foot gence precluding recovery for his death shorter than a new brick wall against caused by a subsequent fall,—especially which it rested, and on or over which where he might have gone to the surface the workman had to step over the upper through another entry. Colorado Coal end of the ladder, is for the jury. Flan- & I. Co. v. Carpita (1895) 6 Colo. App.

A miner who, with reason to suspect One who is upset and fatally injured the presence of dangerous gases at a point while at work on a ladder putting up at which he is working, remains for a shades in the course of his employment, considerable time engaged in conversaby a baggage truck wheeled against the tion having no reference to the proseculadder by another person, is not, as a tion of the work of the mine, is guilty matter of law, guilty of contributory of negligence which will prevent recov-Woolverton cry for his death caused by an explosion (1895) 11 Misc. 537, 32 N. Y. Supp. of such gases. Morgan v. Carbon Hill Coal Co. (1893) 6 Wash, 577, 34 Pac.

- (12) Taking a dangerous position on a ship. 12
- (13) Taking a dangerous position with relation to electric appliances.13
- (14) Taking a position which is dangerous with respect to inflammable gases.14

In the section dealing with the servant's duty to keep a proper lookout and take notice of his surroundings many other cases illustrating the extent of the servant's right to recover for injuries received while in a dangerous position are collected.

The extent to which the duty to avoid a dangerous position, as qualified by the servant's right to rely on a fellow servant's proper performance of his duties, is discussed in § 355, infra.

Whether an employee, who was engaged in blasting rock with dynamite in tain the nature and extent of trouble the employer's mine, and was killed by with telephone wires, caused by a charge the explosion of a dynamite cartridge, of electricity transmitted from the wires was guilty of negligence in prematurely of a trolley-car company, ascends a pole entering the mine twenty minutes after belonging to the latter company, and the fuse had been lighted, where car so comes into contact with a charged tridges generally exploded two or three wire, is negligent if he could have done minutes after the fuse was lighted, was the same work and avoided that contact properly submitted to the jury as a by ascending a pole close by, which bequestion of fact. Eureka Co. v. Bass longed to the telephone company. Jack-(1886) 81 Ala. 200, 8 So. 216.

The conductor of a train of cars which is being hauled out of a mine cannot be held negligent, as a matter of law, in gence of an employee of an electric railriding on the front car, where the evi- way company in mounting upon a box dence is conflicting as to what is the on the repair car while attempting to proper position under such circumstan- draw a trolley wire into position by

See also note 5, supra.

fact that he is crowded by the trucks 540. bringing cotton will not excuse such negligence, where the truckmen place the from which an explosive or inflammable trucks where he requires them, and he gas is escaping, carries an unprotected can give directions which would leave light in his hand, is negligent. Bannon him room to move out of danger. Recka v. Lutz (1893) 158 Pa. 166, 27 Atl. 890 v. Ocean S. S. Co. (1893) 3 Misc. 526, (the evidence, however, was held not to 23 N. Y. Supp. 3.

A seaman who unnecessarily stays in a position where he is liable to become entangled in a towing hawser is negligent. The Samuel S. Thorpe (1900) 99 Fed. 108.

show, as matter of law, that the accident was caused by his negligence); Bentially v. Vacuum Oil Co. (1894) 75 Hun, 209, 27 N. Y. Supp. 16.

18 A lineman who, when sent to ascerson & S. Street R. Co. v. Simmons (1901) 107 Tenn. 392, 64 S. W. 705.

The question as to contributory neglices. Crabell v. Wapello Coal Co. means of a block and tackle, precluding (1886) 68 Iowa, 751, 28 N. W. 56. recovery for injuries caused by falling when the wire broke and struck him, is 12A longshoreman engaged in piling for the jury, notwithstanding that the cotton bales upon a dock is guilty of portion of the work at which he was encontributory negligence which will pre- gaged at the time of the accident could vent his recovery for injuries sustained have been performed more safely while by the fall of a bale through the slipping standing on the ground, it appearing of the hooks used in hoisting it, where that the elevated position was necessary he stands under the bale while it as- to enable him to connect the trolley wire cends, when he is not ordered so to do, with the span wire, which was necessary and the bale is not lifted until he him- to the completion of his task. Dixon v. self gives the order therefor; and the Bausman (1897) 17 Wash. 304, 49 Pac.

> <sup>14</sup> A servant who, when near an orifice show, as matter of law, that the accident

336. Going into a dangerous position without notifying persons from whose acts danger may be anticipated.— The fact that a servant, before putting himself in a dangerous position, had communicated his intention to those persons whose acts, performed in the ordinary course of their duties, would be likely to injure him, if they proceeded with those duties on the assumption that he did not occupy that position, is sometimes an element which so far tends to negative the inference of culpability that a court cannot say, as matter of law, that recovery is barred.1

On the other hand, his failure to notify those persons of what he was going to do is an element which will often preclude him from maintaining an action under circumstances which would otherwise be either unquestionably indicative of an absence of culpability, or render it necessary to take the opinion of the jury upon the quality of his conduct.2

track).

Norfolk & W. R. Co. v. Graham (1898) 1075. 96 Va. 430, 31 S. E. 604 (employee went under car forming part of a train); employee in a mine, familiar with the Lumpkin v. Southern R. Co. (1896) 99 movement of the cars, gives no warning

<sup>1</sup> Where a car repairer was injured Ga. 111, 24 S. E. 963 (night watchman while on the side of the roof of a car at-climbed on car). The fact that a car tached to a train standing at its passen- repairer who had put out no signal reger station, through the negligent start- lied on another employee who was standing of the engine, and 15 minutes before ing outside, to give warning and prevent starting time he notified the fireman in other cars from striking the car on charge of the locomotive not to start, which he was working, will not enable because he had to measure a ventilator him to recover. Southern P. Co. v. Pool on the car, the question whether he was (1896) 160 U. S. 438, 40 L. ed. 485, 16 on the car, the question whether he was (1896) 160 U. S. 438, 40 L. ed. 485, 16 guilty of negligence in going on the car Sup. Ct. Rep. 338; Hulien v. Chicago & while standing at the station, instead of N. W. R. Co. (1900) 107 Wis. 122, 82 waiting until it had been placed in the yard, where such repairs were generally gine); Whitcomb v. McNulty (1901) 45 made, is for the jury. Sherman v. Dcta- C. C. A. 90, 105 Fed. 863 (similar ware & H. Canal Co. (1899) 71 Vt. 325, facts); Spencer v. Ohio & M. R. Co. (1892) 130 Ind. 181, 29 N. E. 915 (employee went under engine without notifying engineer).

Thus, a railway employee, when about to put himself in such a position with respect to a stationary car that, if it should be moved unexpectedly, he will livence preventing recovery for him

it should be moved unexpectedly, he will ligence preventing recovery for his in all probability be injured, is bound to death, where he goes between cars in the notify all other employees whose work nighttime without any warning or sigmay, in its progress, produce a movenal to the engineer, and at a time when may, in its progress, produce a movemal to the engineer, and at a time when ment of the car, or to put out a flag or the latter is following the signals of another signal which will show them where other brakeman. Atchison, T. & S. F. he is. Whitmore v. Boston & M. R. Co. R. Co. v. Alsdorf (1892) 47 Ill. App. (1890) 150 Mass. 477, 23 N. E. 220 (car 200 (1894) 56 Ill. App. 578. Or where inspector); Alabama G. S. R. Co. v. he goes between cars at any time with-Roach (1895) 110 Ala. 266, 20 So. 132; out giving any notice to those in charge (1896) 116 Ala. 360, 23 So. 52 (car in- of the engine and train, after he knows spector went under car standing on side that two unsuccessful attempts have been made to couple the cars, and that The same result follows where the in- the attempt to couple them has been susiury is caused by the moving of the car pended. Nihill v. New York, N. H. & upon which the servant is working. H. R. Co. (1896) 167 Mass. 52, 44 N. E.

337. Going into or remaining in an unauthorized position.— In a later chapter (xxxIII.) we shall have occasion to consider the rule that a servant who is injured while in a place where his duties do not require him to be cannot recover for the reason that the obligations of the master do not follow him into such a place or inure to his benefit while he is in it. Under the circumstances presented in some cases of this type, his inability to recover may also be referred to the conception that, in going into the place in question, he was guilty of contributory negligence. An additional ground for declaring his

work on the track, and is struck by a boilers (McLean v. Chemical Paper Co. car while assisting the mining boss to [1895] 165 Mass. 5, 42 N. E. 330). repair a stairway beside the track on In Texas the failure to notify coem-S. R. 866, 10 N. Y. Supp. 484.

S. R. 800, 10 N. Y. Supp. 484.

Similarly, any employee who is about Dewalt v. Houston, E. & W. T. R. Co. to assume such a position with respect (1900) 22 Tex. Civ. App. 403, 55 S. W. to stationary machinery that, if it begins to move, he will be injured, is negligent if he fails to give notice of what Civ. App.) 51 S. W. 864 (car repairer). he is going to do to the person who contains the theterogeneous Compare also cases cited in §§ 334, and 225 texts 2.66 support of the contains he is going to do to the person who controls that movement. Cleary v. Dakota note 3, 335, notes 2, 6, supra.

Packing Co. (1898) 71 Minn. 150, 73 N.

1 An employee who rides on the engine, when he is not engaged in operating the train, but merely conveyed on it Press Brick Co. v. Kenyon (1893) 57 as a passenger, is guilty of contributory III. App. 640. So, a servant whose duncties do not require him to go into an elefor his death by the collapse of a bridge rate well and who has observed that under the engine. Daggett v. Illinois C.

principle are furnished by the decisions guilty of negligence which will prevent that a railway employee who, when or- recovery for an injury received from an dered to hurry from the rear of a train, overhead trolley wire, where the evigoes close to a box car from which he dence shows that he had never been auknows that ties are being rapidly thorized to get into the car for such a thrown, without giving any warning of purpose, and it was unnecessary to do his approach, when a way of safety is so. Leppala v. Cleveland Iron-Min. Co. open to him, cannot recover for an in- (1900) 122 Mich. 633, 81 N. W. 553. jury caused thereby (Thoman v. Chicago & N. W. R. Co. [1894] 92 Iowa, 196, also a competent motorman, cannot be 60 N. W. 612); and that an employee held negligent on the ground that he 60 N. W. 612); and that an employee held negligent on the ground that he who knows that a manhole leading to a temporarily took the place of the regusewer is used to clean out the sewer lar motorman while the latter was eatwhen it becomes clogged during the ing his dinner. Gamble v. Akron, B. & operations of the employer, and also for C. R. Co. (1900) 63 Ohio St. 352, 59 N. blowing off steam from boilers, is guilty E. 99 (collision with another car as a of contributory negligence if he goes inresult of dispatcher's fault).

The contributory negligence is the goes inresult of dispatcher's fault).

A workman employed outside a mill,

to have the cars stopped while he is at notifying the person in charge of the

which the lifting cars ran. Jenkins v. ployees under such circumstances as Mahopac Iron-Ore Co. (1890) 52 N. Y. those presented by the cases cited above is not negligence, as a matter of law.

vator well, and who has observed that under the engine. Doggett v. Illinois C. the cage is standing at a floor above, R. Co. (1872) 34 Iowa, 284. Neglicannot recover damages if, without giving any warning of his intention, he ening any warning of his intention, he ening any article which he happens to need,
night, and on going to get them fell into and is injured by the descent of the a bunker hole. Belford v. Canada Shipcage. O'Donnell v. International Nav. ping Co. (1885) 35 Hun, 347. A serv-Co. (1900) 49 App. Div. 408, 63 N. Y. ant who gets into a car for the purpose of loosening the ore when it has become Other illustrations of the general clogged in the chute discharging it is

A conductor of an electric car, who is

action not to be maintainable is shown where it appears that, while in such a place, he conducted himself in an imprudent manner.2 Evidence to this effect obviously suggests a breach of the duty discussed in § 331, supra.

The boundary line between cases in which the position of the servant was merely one which he was not authorized to occupy, and cases in which that position was one which he had been expressly forbidden to occupy, is not easy to define. But the distinction is seldom, if ever, of any practical importance, the servant having no right of action in either event unless some qualifying factor is introduced by the evidence. The cases which deal with the effect of an express prohibition are reviewed in §§ 363, 364, infra.

338. Doing work in an unnecessarily dangerous manner; cases relating to work on railways.—(Compare § 348, subd. (3), infra.)— The doctrine that negligence may be inferred, as a matter of law, when it is apparent that the act which caused the injury was done in an unnecessarily dangerous manner, has been applied in the predicaments exemplified in the following paragraphs:

(1) Operating cars in a dangerous manner.—Negligence is imputed, as a matter of law, to an employee who allows a car under his management to travel at a rate of speed which is dangerous under the circumstances.<sup>1</sup>

Rep. 29.

clined to adopt in its entirety the doc- 67 III. App. 80, Affirmed in (1897) 169 trine of certain English cases cited, that III. 429, 48 N. E. 822, solely on the no person who is injured in life or limb, ground that she was in a part of the although the latter may be in fault. A railroad employee who, when off But it was held that a workman cannot duty, loiters carelessly about the railrecover where he perseveres in going road tracks, and voluntarily puts himback to a place, after he has become self in a place and posture of obvious aware of the danger to which he will be danger, and neglects to use his senses to

who, after passing through it to get a in groping about in the dark in an undrink of water, unnecessarily goes out familiar part of the building, and cannot of his way to assist a millhand and falls recover for an injury caused by falling through a hole in the floor, not guarded through an unguarded opening to an eleas required by statute, cannot recover. vator shaft, where her employer had no Finley v. Miscampbell (1891) 20 Ont. knowledge that she would go into the pp. 29. room opening into such elevator shaft. In a Scotch case, one of the judges de- Jorgenson v. Johnson Chair Co. (1896) when in a place where he ought not to be, builling where she had no right to be. can have an action against the master, See note 1, supra.

aware of the danger to which he will be exposed. Gray v. Lawson (1860) 22 Sc. Sess. Cas. 2d Series, 710.

2 A servant who gropes along a dark passageway on his master's premises where he has no business, and opens a door and falls down an elevator which has a bar in front of it, has no cause of action against his master. Pfeiffer v. Such a place over a track which both Ringler (1884) 12 Daly, 437.

A servant employed to scrub floors in a factory does not exercise ordinary care

- (2) Participating in the making of a flying switch.—As it is a universal practice to make flying switches, a brakeman is not guilty of contributory negligence, as a matter of law, in participating in this operation, although such method is not the safest which can be used.<sup>2</sup> (See § 353, infra.) But such negligence will be inferred where the making of a flying switch is carried out in a dangerous manner.3
- (3) Adopting a dangerous method of coupling or uncoupling cars. —(Compare § 334, subd. (10), supra.) A servant coupling cars may be found negligent, where he does not make a proper use of coupling pins; 4 or where he does not regulate his movements with due reference to the fact that the cars have double buffers; or where he unites dissimilar couplings in an unsafe manner.6

trol, and he, instead of going 5 miles Co. v. Emmert (1887) 83 Va. 640, 3 S. an hour, which would be safe, goes 30 E. 145; St. Louis, I. M. & S. R. Co. v. miles an hour, which is unsafe. If he Higgins (1884) 44 Ark. 293. is injured on the trip, he cannot say,

guilty of such contributory negligence as time. Moore v. Kansas City, Ft. S. & will prevent recovery for an injury to M. R. Co. (1898) 146 Mo. 572, 48 S. W. his hand, although some experienced 487. brakemen testify that the prudent way

According to several decisions, neglicars to shake the pin in, was held to gence is inferable, as matter of law, be negligent, as a matter of law. Norwhere a brakeman who is reasonably folk & W. R. Co. v. McDonald (1891) well versed in his duties is injured through using a straight, instead of a crooked, link to couple cars having drawheads of unequal height. Welch v. jecting his arm straight in between the New York C. & H. R. R. Co. (1892) 43 buffers, when it is well known to rail-N. Y. S. R. 958, 17 N. Y. Supp. 342; road men that it cannot be done in that Hulett v. St. Louis, K. C. & N. R. Co. manner without injury, and it might be

speed was reasonably within his con- (1878) 67 Mo. 239; Norfolk & W. R.

A switchman who, in attempting to "I was told to make that trip, and al- couple cars the drawheads of which were though I went at that rapid speed I am of unequal height, tried to force the link not guilty of contributory negligence." in the higher drawhead down to the lower one as the cars came together,

2 St. Louis & S. F. R. Co. v. French
(1896) 56 Kan. 584, 44 Pac. 12; Florida link in the lower drawhead, was guilty C. & P. R. Co. v. Mooney (1898) 40 of such contributory negligence as pre-Fla. 17, 24 So. 148. cludes recovery for injuries sustained a. 17, 24 So. 148. cludes recovery for injuries sustained \*As, where an employee intrusted thereby, where it was the custom of with the pulling out of a coupling pin, switchmen in making a coupling of this signaled the engineer to start before it kind to use a straight link placed in had been pulled, the result being that the higher drawhead and prop up the the car was derailed and the employee lower one, and his excuse for not doing killed. Browne v. New York & N. E. so was want of time to prop the lower R. Co. (1893) 158 Mass. 247, 33 N. E. drawhead after the rebound of the car, 650. See also § 334, subd. (10). supra. and before it was "kicked" a second 'A brakeman while uncoupling cars time against the other cars, and no by placing his entire hand on the head of emergency required him to risk his life the bolt before the slack comes is not or limbs in making the coupling at that

A brakeman who, when he was coupis to take hold of the pin with the thumb ling a Miller to a Janney coupler, placed and forefinger just as the slack comes, the pin in the former and the link in but that only experts can employ that the latter, instead of adopting the remethod. Campbell v. McCoy (1893) 3 verse arrangement, which was the only Tex. Civ. App. 298, 23 S. W. 34. safe one, and then remained between the According to several decisions, negli- cars to shake the pin in, was held to

- (4) Passing over the cars of a moving train in an improper manner.—Walking over a train of flat cars when in motion, or stepping from one to the other, is not negligence per se. But an employee cannot recover for injuries caused by doing either of these acts in a dangerous manner.8
- (5) Attempting to mount moving engines or cars.—(See also §§ 439, 440, subd. d, 442, post; and compare § 339, subd. (9), infra.) In some cases the mere fact that a servant attempted to mount a moving train without any necessity seems to have been regarded as sufficient to prevent his recovering damages.9 But the preferable view would seem to be that, in view of the normal requirements of railway work and the universal practice of railway employees, the inference of negligence should not be drawn, as matter of law, unless there is proof of some aggravating circumstance which rendered the action of the servant especially imprudent. (Compare the analogous situation when the injury was received in coupling or uncoupling cars in motion.) Thus, it is reasonable to say that a servant ought not to be allowed to recover where the car or engine was moving so rapidly that no cautious person would have attempted to mount it,10 especially where the conditions under which the attempt was made rendered it unusually dangerous; 11 or where the part of the car

safely done by dropping his arm below 8 So. 360. Compare § 334, note 8, the buffers, is negligent. Illinois C. R. supra. Co. v. Harris (1894) 53 III. App. 592.

Co. v. Harris (1894) 53 Ill. App. 592.

<sup>a</sup> Negligence is inferable where a Co. (1901) 163 Mo. 309, 63 S. W. 695 brakeman couples a common drawhead (brakeman signaled train to go ahead to a Miller drawhead, instead of the other way. Texas, S. V. & N. W. R. Co. v. Guy (1893; Tex. Civ. App.) 23

Tatchison, T. & S. F. R. Co. v. Mc-Candliss (1885) 33 Kan. 366, 6 Pac.

another jumps on the end gate of the point was not affected.

former, and, owing to its not being "A brakeman was held guilty of negfastened and giving way under him, is ligence where he undertook to board an precipitated on to the track. Louisville engine moving from 4 to 6 miles an & N. R. Co. v. Orr (1890) 91 Ala. 548, hour, the step of which was, to his

when it was stopping for him).

<sup>10</sup> Recovery was denied in *Dowell* v. *Vicksburg & M. R. Co.* (1884) 61 Miss.
519 (train running 10 or 12 miles an hour); *Louisville & N. R. Co.* v. *Wallace* (1891) 90 Tenn. 53, 15 S. W. 921 \*A section hand engaged in unloading his master for injuries alleged to be dirt from a train of flat cars, injured by caused by the defective condition of the falling between two cars while running footboard of a locomotive, which the to the rear of the train, where he had servant attempted to board while in mobeen ordered by the conductor, is guilty tion, it is error to refuse to instruct of negligence and cannot recover where that the verdict should be for the dehe had been repeatedly warned by the fendant if the injury was the result of section boss of the danger of running on negligence of the plaintiff in attempting such cars while they were in motion. to board the engine while it was going Saner v. Lake Shore & M. S. R. Co. at a high rate of speed. Houston & T. (1895) 108 Mich. 31, 65 N. W. 624. C. R. Co. v. Milam (1900; Tex. Civ. Negligence is inferable where a brake- App.) 58 S. W. 735, Reversed on reman in passing from one gondola car to hearing (1901) 60 S. W. 591, but this

or engine by which he attempted to mount was one of such a character, or in such a condition, as to make the act unduly hazardous;12 or where he stood in the middle of the track in front of the engine

knowledge, very high, at a time when his ing engine by the step at its side, when Pa. 324, 13 Atl. 205. A brakeman who being rendered especially hazardous by attempts, after dark, and with a lan-reason of the steps being obscured by esattempts, after dark, and with a lan-reason of the steps being obscured by estern in his hand, to board a freight train caping steam, cannot maintain an acrunning 8 miles an hour by catching tion. Union P. R. Co. v. Estes (1887) the ladder on the side of the car, is negligent. Kilpatrick v. Grand Trunk R. A brakeman is chargeable with negro. (1900) 72 Vt. 263, 47 Atl. 827. A ligence where in getting upon a freight brakeman who unpresserily attempts train as it was leaving a station before brakeman who unnecessarily attempts train as it was leaving a station he perto board a train moving 5 miles an hour, mitted several cars fitted with side ladthe night being dark and the ground ders to pass, and climbed over or under muddy, is negligent. Chambers v. West-the bumpers of a car and attempted to ern North Carolina R. Co. (1884) 91 pull himself up by an end ladder, which, being factored to a metal to be set to pass. N. C. 471.

ing 15 pounds in his hands, while the death by falling from such ladder. Patengine is in motion. Wabash, St. L. & terson v. Foster (1896) 18 C. C. A. 467, P. R. Co. v. Kastner (1898) 80 Ill. App. 25 U. S. App. 642, 72 Fed. 121.

572. Compare last note. An employee The contributory negligence of a 572. Compare last note. An employee

The contributory negligence of a who, in endeavoring to couple an enbrakeman and switchman in mounting gine to a car, jumped upon a rim 1½ a flat car coming toward him, by graspinches wide extending around the pilot ing a brake staff which was loose and of the engine, while the engine was movbent when he did not know of its dehaving anything to catch hold of, is ser v. Montana, C. R. Co. (1895) 17 negligent. Mayfield v. Savannah, G. & Mont. 372, 30 L. R. A. 814, 43 Pac. 81. N. A. R. Co. (1891) 87 Ga. 374, 13 S. E. A brakeman's attempt to step on a

An engine hostler who is injured in 342, infra. attempting to get on the cab of a mov-

right hand was encumbered with two there was no duty to perform on the lamps, and his duty did not require him cab and he might have got in the ento get on to the engine. New York, gine more safely by using the footboard L. E. & W. R. Co. v. Lyons (1888) 119 at the rear of the tender, the attempt

being fastened to a rotten timber, gave

N. C. 471.

12 It has been held negligence for a way. Wilson v. Michigan C. R. Co. brakeman to attempt to get on the pilot (1892) 94 Mich. 20, 53 N. W. 797. A of a moving engine. Cornicall v. Charbracheman who, without urgent neceslotte, C. & A. R. Co. (1887) 97 N. C. sity, climbs a ladder upon the side of 11, 2 S. E. 659; Grant v. Union P. R. a car having a grab-iron dangerous to Co. (1891) 45 Fed. 673. A brakeman his own knowledge, and whose condiwho knows that the track is very rough tion it was part of his special duties is guilty of such contributory negligence to examine, knowing that it was dangerous under any circumstances to climb as will prevent a recovery for an injury gerous under any circumstances to climb by attempting to get on the pilot of the such ladder while the train was moving, begine, upon which there are no hand- is guilty of contributory negligence holds, with an iron pin and link weigh- which will prevent recovery for his

ing 4 or 5 miles an hour, and without fects, is a question for the jury. Pros-

N. A. R. Co. (1891) 87 Ga. 374, 13 S. E.

459. Where a brakeman attempts to jaw-strap under a coal car out of sight, mount a moving flat car by stepping on in order to get on over the side, just as the journal box and taking hold of a the train was starting, when ordered standard placed on the car to keep to get on and ride to uncouple cars, freight from falling off, the car not being provided with means for mounting foot was run over and crushed, is not it, and the caboose, provided with steps negligence, as a matter of law, but intended for use in mounting the train, makes a question for the jury, where being only four cars back, he cannot recover for an injury caused by the standard's turning round, so that he lost primary purpose of the jaw strap was to standard's turning round, so that he lost primary purpose of the jaw strap was to his hold of it. Quirouet v. Alabama G. strengthen the car. Coates v. Boston & S. R. Co. (1900) 111 Ga. 315, 36 S. E. M. R. Co. (1891) 153 Mass. 297, 10 L. 8. A. 769, 26 N. E. 864. Compare §

or car which he was about to mount; 13 or where he attempted to mount the car or engine at a point on the track at which the act was attended by some unusual hazard; 14 or, possibly, in some cases, where he was aware of the incompetency of the coservant who was controlling the movements of the car or engine. 15

If any special emergency exists—as, where a railway policeman is trying to arrest a trespasser—the question of contributory negligence will, as a general rule, be for the jury to determine.<sup>16</sup>

(6) Attempting to dismount from railway cars while in motion.— (For other cases bearing upon this subject, see §§ 439, 440, subd. d, 442, post.) So far as the writer's researches extend, no court has adopted the doctrine that a servant who alights from a moving car or engine without necessity is negligent, as a matter of law. 17

Still less is negligence a peremptory conclusion of law where the evidence is substantially to the effect that the servant, either under the direct orders of a superior, 18 or by the implied invitation of the company's agents,19 alighted from a car or engine moving at a moderate rate of speed.

18 Ferguson v. Chicago, M. & St. P. R.

Co. (1897) 100 Iowa, 733, 69 N. W.

nurc (1900) 91 Ill. App. 508, Affirmed 1026 (engine); Cunningham v. Chicago, in (1901) 190 Ill. 1, 60 N. E. 57. See M. & St. P. R. Co. (1883) 17 Fed. 882 § 358, infra.

(engine); Greaser v. Chicago, R. I. & 11 In Texas & P. R. Co. v. Patton P. R. Co. (1901) 93 Ill. App. 476 (1894) 9 C. C. A. 487, 23 U. S. App. (brakeman stepped on brake beam).

11 Applementation of the state of the

14 A brakeman who becomes entangled

supra.

16 It has been held, however, that mere knowledge of an engineer's incompetency does not, as matter of law, charge him with contributory negligence in making an attempt to board the engine while in motion, where he would not be so chargeable in the absence of such knowledge. Francis v. Kansas City, St. J. & C. B. R. Co. (1894) 129 Mo. 658,

11 In Texas & P. R. Co. v. Patton (1894) 9 C. C. A. 487, 23 U. S. App. 319, 61 Fed. 259, where a fireman was injured by the turning of a loose step, while the mandle of a switch while attempting to get upon a car, by which he is thrown under the train and injured, cannot recover where such switch was properly constructed for its purpose, and he had a safer way of getting on the and he had a safer way of getting on the from the engine until after the proper train than at the switch. Richmond & servants of the defendant had had an D. R. Co. v. Bivins (1893) 103 Ala. 142, opportunity to inspect and repair it after its arrival in the yard. The majority of the court did not discuss the question whether the place chosen was a question of contributory negligence, and proper one, the servant's contributory reversed the judgment of the lower court proper one, the servant's continued, negligence is for the jury. Donahue v. on the ground that the record lands of Boston & M. R. Co. (1901) 178 Mass. show any negligence on the part of the 251, 59 N. E. 663. See also note 13, defendant. Toulmin, J., who dissented, expressed the opinion that the facts did not show that contributory negligence was an inference of law under the circumstances.

 See § 439, note 4, post.
 In Louisville & N. R. Co. v. Stacker (1888) 86 Tenn. 343, 6 S. W. 737, contributory negligence was denied to be a bar to the action of an elderly employee, J. & C. B. R. Co. (1894) 129 Mo. 658, fifty-seven years old, who, after receives S. W. 842, Affirmed in 127 Mo. 676, ing his wages on a pay car, undertook to 30 S. W. 129.

Whether a servant is ever justified, however slowly a car may be moving, in getting off in front of it and between the rails, is a matter of doubt under the cases as they stand.20

But it seems safe to say that the limit of allowable speed under such circumstances must be lower than where the servant alights outside the rails, and at such a distance that the cars will clear him unless some unforeseen accident occurs.

As to the duty to look out for obstructions, when dismounting, see § 332a, note 3, supra.

- (7) Running alongside moving cars.<sup>21</sup>
- (8) Blocking cars which are running down a grade.<sup>22</sup>
- (9) Method of doing repair work on railway cars.<sup>23</sup>
- (10) Operating hand cars in a dangerous manner.<sup>24</sup>

struction that, under such circumstances

231, 23 N. W. 644.

the track, while running alongside a the car was overtaken by the train. As moving locomotive, was violating any of regards the latter of these acts, the the company's rules, it cannot be decourt considered that the section man clared, as a matter of law, that he was not negligent himself, even though was guilty of contributory negligence, the foreman may have been at fault, or that he assumed the particular risk Slette v. Great Northern R. Co. (1893) by reason of violating such rules. Flutter v. New York, C. & St. L. R. Co. Whether or not it was negligence as to (1901) 27 Ind. App. 511, 59 N. E. 337. a trackwalker who was obliged to traverse

not be said, as a matter of law, to be one-half hour ahead of the schedule guilty of contributory negligence in choosing a long instead of a short block, more & O. S. W. R. Co. v. Alsop (1898) or in not letting loose of it sooner. Ma
17. Its Visible West Conf. (1898) hood v. Pleasant Valley Coal Co. (1892) (1897) 71 Ill. App. 54. 8 Utah, 85, 30 Pac. 149.

slowly, and was injured. He was regarded as having left the train under the implied order of the company.

23 A truck repairer who fails to place trestles provided for that purpose under the car, but relies upon the air jack In another case, where an employee alone, cannot recover for injuries susjumped from a pay car while it was tained when the air-jack breaks and lets moving at the rate of 4 or 5 miles an the car down upon him. Wabash R. Co. hour, it was held proper to refuse an in- v. Probst (1900) 92 Ill. App. 485.

24 It is negligence to run a hand car he was negligent. New York, P. & N. over a railroad at a time when a train, R. Co. v. Coulbourn (1888) 69 Md. 360, if it is punctual, will be met. Burling 1 L. R. A. 541, 16 Atl. 208.

v. Illinois C. R. Co. (1877) 85 Ill. 18.

<sup>20</sup> In one case negligence was held to In a case where a freight train was be imputable to a brakeman who, in getabout half a mile distant from a station ting off of an engine which was moving where it was likely to stop, it was held at least 6 miles an hour, alighted on the that a section man was not negligent, as track between the rails, instead of jump- a matter of law, in getting on a hand ing to one side of them. Dandie v. car with his foreman to run to a cross-Southern P. R. Co. (1890) 42 La. Ann. ing on the opposite side of the station 686, 7 So. 792. In another, recovery and about half a mile distant, where it was denied where an engine was moving was proposed to take off the car, and more than 4 miles an hour. Gibbons v. that, as he was justified in deferring Chicago, B. & Q. R. Co. (1885) 66 Iowa, somewhat to the judgment of the foreman, he was not necessarily negligent in 21 Where it does not appear that a acquiescing in the running of the train brakeman, injured by tripping over to a crossing further on, which the forewires stretched close to the ground near man thought it possible to reach before man thought it possible to reach before the foreman may have been at fault. 53 Minn. 341, 55 N. W. 137.

<sup>22</sup> A brakeman injured while attempt- the track during the nighttime on a rail-

See also § 331, subd. (b), supra.

- 339. Doing work in an unnecessarily dangerous manner; cases not relating to work on railways.—The headings of the following paragraphs indicate the circumstances under which the doctrine stated at the beginning of the last section has been applied to servants other than those working on railways. Other cases involving situations similar to those reviewed are collected in § 331, supra.
  - (1) Attempting to get on a moving elevator cage.<sup>1</sup>
- (2) Failing to stop machinery when work is to be done which is dangerous while the machinery is in motion.—A servant who, with knowledge of the risk he is incurring, does acts about machinery while it is in motion, is guilty of contributory negligence, if he could have accomplished his purpose safely after stopping the machinery.<sup>2</sup>

14 Atl. 658 (hand of employee caught in operated by machinery, without supposed wheels of machine which he was ping the machinery). Compare also § cleaning); Deering v. Canfield & W. Co. 335, subd. (4), supra. (1901) 126 Mich. 373, 85 N. W. 874

No action can be maintained for an injury caused by the plaintiff's getting stick to push out the chips which accumulated between a circular saw and its wheels of machinery which he was turning with his own hands where the compared to the compared veyer for the purpose of removing dirt stopping the machine. Cameron v. and dust that had accumulated and Walker (1898) 25 Sc. Sess. Cas. 4th stopped the conveyer); Foss v. Bigelow series, 409. stopped the conveyer); Foss v. Bigelow (1899) 102 Wis. 413, 78 N. W. 570

An employee injured in attempting 257. 68 N. W. 674 (servant's hand to get upon an elevator while it is asslipped and came into contact with cogcending, when it is not his duty to do so, wheel while he was using a wrench on a cannot recover for the injury. Block v. nut covered with oil and very slippery); Swift & Co. (1896) 161 Ill. 107, 43 N. Hoffman v. American Foundry Co. E. 591, Affirming (1895) 58 Ill. App. (1897) 18 Wash. 287, 51 Pac. 385 (in-354. Compare § 338, subd. (5), supra. jury received in attempting to replace 2Gaffney v. J. O. Imman Mfg. Co. a belt on a pulley, there being a set (1895) 18 R. I. 781, 31 Atl. 6 (servant's hand was placed in a machine and which the selt was caught); Aiken v. crushed); Cahill v. Hilton (1887) 106 Smith (1893) 4 C. C. A. 654, 2 U. S. N. Y. 512, 13 N. E. 339 (servant took a App. 618, 54 Fed. 896 (one engaged in belt off of a pulley); Ingerman v. Moore paying out the rope of a hoisting apbelt off of a pulley); Ingerman v. Moore paying out the rope of a hoisting ap-(1890; Cal.) 25 Pac. 275 (servant paratus tried to throw the rope off the placed his hand in dangerous proximity drum while it was in motion); Harturig to running saws, while attempting to revenue an obstruction); Atlas Engine 118 N. Y. 664, 23 N. E. 24 (servant at-Works v. Randall (1885) 100 Ind. 293, tempted to adjust a mold while the 50 Am. Rep. 798 (servant allowed waste press was in motion); Moody v. Smith with which he was wiping a machine to (1896) 64 Minn. 524, 67 N. W. 633 (emhang down, and thus had his hand ployee attempted to replace a sash drawn into the machine); Stoll v. which had become insecure, while the Hoopes (1888; Pa.) 12 Cent. Rep. 553, edges were being shaved off by knives 14 Atl. 658 (hand of employee caught in operated by machinery, without stopcogwheels of machine which he was ping the machinery). Compare also § cleaning): Degring v. Canfield & W. Co. 335, subd. (4)

guide); Star Elevator Co. v. Carlson ing with his own hands, where the com-(1896) 69 Ill. App. 212 (one employed plaint shows that the accident had ocabout grain elevating machinery had a curred through his turning round to hand crushed which he put into the con- obey an order of his superior without

The general rule that the servant's ac-(workman attempted to clear away saw- tion is not barred unless he understood dust about a saw while it was in mo- the danger has been applied in a case tion, with a short stick which was where it was held that negligence was thrown upward with such violence as to not necessarily inferable because a servbreak his jaw bone); Gorman v. Des ant tried to put a belt on machinery Moines Brick Mfg. Co. (1896) 99 Iowa, without waiting for it to be slowed

- (3) Adjusting machinery in a dangerous manner.3
- (4) Stopping machinery in a dangerous manner.4
- (5) Operating machinery in an improper manner.<sup>5</sup>

Sup. Ct. Rep. 1044.

That the doing of an act such as those which caused injury in the cases cited supra is not excused by the fact that it was done by the order of the master or his representative, see § 442, note 4,

<sup>8</sup> An employee who attempts to shift a belt upon a running shaft by hand, instead of using the belt shifter, is negligent. Fleming v. Buswell (1900) 48 App. Div. 635, 62 N. Y. Supp. 1137, Affirming (1899) 39 App. Div. 196, 57 N. Y. Supp. 230 (sudden moving of belt caused servant to step on the edge of the platform on which he was standing, and,

being defective, it gave way).

ing to the right, so that the belt might machinery. Bibby v. Wausau Lumber be removed in that direction. Cushman Co. (1891) 80 Wis. 367, 50 N. W. 337. v. Cushman (1901) 179 Mass. 601, 61 N.

shaft, and to know the precaution necesand also fails to stop with his work employee himself. when the substitute for a belt shifter falls, but holds onto the set screw after the shaft begins to turn, in obedience to ery, who knows that the usual way of the friction of a belt, which shifts from starting a circular saw is to press it a slack to a fast pulley, is negligent. lightly with a stick, is guilty of such

hold a running belt in position with his inches long which he wishes to saw. hand is negligent. Willingham v. Rock- Wulff v. Walter A. Wood Harvester Co. dale Oil & Fertilizer Co. (1897) 101 Ga. 713, 29 S. E. 30.

down. McDade v. Washington & G. R. mold instead of the side, is negligent. Co. (1886) 5 Mackey, 144, Affirmed in Hartwig v. Bay State Shore & Leather (1890) 135 U. S. 554, 34 L. ed. 235, 10 Co. (1889) 118 N. Y. 664, 23 N. E. 24.

An experienced servant, familiar with a machine, who uses his hand when he should have used a stick, is negligent. Wetjen v. Southern White Lead Co.

(1878) 5 Mo. App. 598.

<sup>4</sup> A servant who had his hand crushed by keeping hold of a wheel in order to stop certain machinery—the act not being necessary, but safe if he had not kept his hand on longer than was requisite to stop the machine-was guilty of contributory negligence which will prevent his recovering damages, although the owner of the machinery had failed to furnish mechanical appliances to stop it. White v. Sharp (1882) 27 Hun, 94.

A head sawyer in a sawmill who,

Where a belt which a servant is re- while sawing a crooked log requiring unmoving from a fixed pulley on a shaft usual care in sawing, permits the log to catches on the collar and injures him, move at an unusual and excessive speed, he will be regarded as guilty of contrib- so as to render him unable to stop it uputory negligence, where it is in evidence on the breaking of the machinery, and that by standing on a part of the ma- who fails to comply with his duty to chine one could lift the belt from the slacken the motion when the saw is laspace between the fixed pulley and the boring,—is guilty of contributory neglicollar and over the collar, and also that gence which will prevent his recovery there was plenty of room on the shaft- for injuries from the giving way of the

An employer is not liable for an injury to a skilled employee while operat-An employee who has been employed ing an embossing and stamping press, alsufficiently long to know how to adjust though it was working at undue speed, a set screw on the collar of a horizontal where the whole of the employee's hand was under the press at the time of the sary to be taken in returning it to its injury, and only the hand so far as the proper place when it has dropped out, second knuckle needed to be inserted to and chooses to perform this duty with operate the press, and the speed had out applying the clutch or hand lever, been increased at the instance of such Burland v. Lee

(1898) 28 Can. S. C. 348.

One experienced in the use of machin-Carrierre v. McWilliams (1901) 104 La. contributory negligence as will prevent 678, 29 So. 333.

An experienced servant who tries to with unusual force a block from 4 to 6 (1897) 67 Minn. 423, 70 N. W. 156.

An employee engaged in cutting pieces A servant who, while attempting to of plank 18 inches long into slats with adjust a mold while the press was in a circular saw, who knows from his famotion, puts his finger on the top of the miliarity with the work that the gauge

- (6) Using tools in an improper manner.<sup>6</sup>
- (7) Handling electric appliances improperly.<sup>7</sup>
- (8) Improper method of performing work in connection with vessels.8
  - (9) Improper methods of performing work in mines.9
  - (10) Testing appliances in a dangerous manner.<sup>10</sup>
  - 340. Doing acts with undue haste. A nonculpable act may be con-

is name to loosen and cause the wood to struck the rope inside the knot which bind and fly up and back with great fastened it to the tree, which allowed it force, is guilty of contributory negligence preventing a recovery for the loss around, whereby the end struck and of his hand through being thrown broke his leg, cannot recover for the inagainst the saw, where he pushes forward a piece of plank with his hand within 4 or 5 inches of the saw, instead of using another piece of wood.

Wiley and the rope inside the knot which which blowed it to the tree, which allowed it rapidly to unwind as the boat swung around, whereby the end struck and broke his leg, cannot recover for the injury.

Brown v. Wood (1888) 2 Monawithin 4 or 5 inches of the saw, instead of word with the saw of the sa is liable to loosen and cause the wood to struck the rope inside the knot which of using another piece of wood. Wilson v. Steel Edge Stamping & Retinning Co. (1895) 163 Mass. 315, 39 N. E. 1039.

ries received while using a circular saw, on the ground that he should have been furnished a helper, where he could have avoided any danger by going to the other end of the timber he was sawing and pulling it instead of pushing upon it. Weigreffe v. Daw (1891) 40 III. App. 53.

An employee is not, as matter of law, Brown v. Concord & M. R. Co. (1897) 75 III. App. 605. saw." (1896) 68 N. H. 518, 39 Atl. 581.

jury believe that the only tools used by incline of only 36 or 40 feet to 100 feet. plaintiff to perform his work were a Reese v. Morgan Silver Min. Co. (1897) hammer and a mandrel, and that such 15 Utah, 453, 49 Pac. 824. tools were reasonably safe, but that stead of the wire on which he was working, and thereby caused the hammer to chip, which flew in his eye, causing the injury, plaintiff was himself guilty of pergligence and could not recover. could not recover. negligence and Duerst v. St. (1901) 163 Mo. 607, 63 S. W. 827.

(1895) 47 La. Ann. 1147, 17 So. 696.

captain before daylight, to cut ropes E. 124. holding the boat for the night, who

act of mounting a car being slowly drawn by a mule, was thrown forward by reason of his foot catching in some An employee cannot recover for inju-  $d\acute{e}bris$  which had fallen from the roof, so that he was struck by a timber and hurled in front of the car, which passed over him, is not chargeable with contributory negligence. Consolidated Coal Co. v. Bokamp (1897) 75 Ill. App. 605.

The driver of loaded cars in a coal mine, drawn by a mule, cannot be held guilty of negligence, as a matter of law, guilty of contributory negligence in at in attempting to climb on the front of tempting to run through a board on the a moving car, there being no evidence as left side of a saw after discovering that to the speed at which it was moving. it was sawed "badly and crooked when Consolidated Coal Co. v. Bokamp (1899) run through on the right side of the 181 Ill. 9, 54 N. E. 567, Affirming

A miner is not, as matter of law, guil-In an action for injuries caused by a ty of contributory negligence in going flying chip from a defective hammer, it down a ladder leading to the mine with is error to refuse to charge that if the his back to the ladder, where it is on an

A miner who attempts to dislodge a plaintiff used the hammer in so careless hanging piece of coal without placing a manner as to strike the mandrel in- sprags for the purpose of preventing it

10 There can be no recovery for the Louis Stamping Co. death of an employee killed by an explo-1901) 163 Mo. 607, 63 S. W. 827. sion while testing steam radiators by The night inspector of an electric pounding them with a hammer, where light company cannot recover for inju- he had been repeatedly warned that it ries due to the careless manner in which was dangerous to test them in that manhe handled one of the lamps. Dixon v. ner, and had notice that a radiator had Louisiana Electric Light & P. Co. exploded under the jar of turning it over the day before the accident. Moeller v. 8 A deck hand sent on shore by the Brewster (1892) 131 N. Y. 606, 30 N.

verted into a negligent one by proof that it was done with an excessive haste which was not necessary under the circumstances.1

But the existence of an emergency prompting to rapid action will prevent this principle from operating as an absolute bar to the action. See § 358, infra.

341. Negligence inferred from the use of defective or unfit appliances.

-The general principle noticed in § 322, supra, involves the corollary that negligence is not necessarily inferable from the mere fact that an appliance which an employee undertakes to handle is specifically defective.1 But no action is maintainable where the defect was of such a character that the employee knew or ought to have known that, under the given circumstances, the use of the appliance would expose him to imminent peril.2

improper jerk of the engine is not necssarily debarred from recovery, where the footboard has been constantly used without any accidents. Lyttle v. Chicaplace his bare hand in open day upon 60 6 W. M. R. Co. (1890) 84 Mich. 289, the ragged steel splinters of a sliver 6 inches long projecting 1 inch beyond the 47 N. W. 571.

<sup>1</sup> O'Neill v. Wilson (1858) 20 Sc. Sess. S. E. 4 (recovery denied for the death Cas. 2d series, 427 (descending a lad- of an electric light employee, sent to der in a mine). A conductor who, in look for a break in the circuit while the going back to signal a following train, current was on, who selected and took after his own has been stopped by an with him an obviously defective shunt accident, falls on a defective tie, cannot cord, and was killed while attempting to recover where he was hurrying along use it); St. Louis & S. W. R. Co. v. faster than there was any occasion for Threat (1896) 12 Tex. Civ. App. 375, 34 doing, in view of the time at which the S. W. 152 (employee used a crane haveoming train might be expected. East ing, to his knowledge, a defect in the Tennessee, V. & G. R. Co. v. Reynolds pulley attached thereto, which was such (1894) 93 Ga. 570, 20 S. E. 70. Tennessee, V. & G. R. Co. v. Reynolds pulley attached thereto, which was such (1894) 93 Ga. 570, 20 S. E. 70. that no man of ordinary prudence, "Whether a prakeman injured by the moving of the train while he was entake to use the crane to lift heavy deavoring to put into shape a defective weights); Beall v. Pittsburgh, C. & St. bumper was negligent is a question for L. R. Co. (1893) 38 W. Va. 525, 18 S. the jury. Central R. & Bkg. Co. v. E. 729 (brakeman unnecessarily used a Lanier (1889) 83 Ga. 587, 10 S. E. 279. brake, when the nut securing the wheel The fact that an engineer operated a to the standard was missing); Cleary train with an air brake which he knew v. Long Island R. Co. (1900) 54 App. to be out of order is not negligence Div. 284, 66 N. Y. Supp. 568 (recovery which will prevent his recovering for indenied where a brakeman was injured juries caused by a defective track. Unwhile attempting to couple a car with a der such circumstances there was no imdrawhead which had sunk below its der such circumstances there was no imment danger, and the ultimate risk proper level. See, however, last note); arose out of an event which he was not bound to anticipate. Flynn v. Kansas (1885) 98 N. Y. 274, Reversing (1884) City, St. J. & C. B. R. Co. (1883) 78 32 Hun, 415 (laborer, without special Mo. 195, 47 Am. Rep. 99. A brakeman thrown off a defective footboard by an improper jerk of the engine is not necessary when heads to the well-ing head.

inches long projecting ½ inch beyond the <sup>2</sup> Chesapeake & O. R. Co. v. Sparrow tire of the driving wheel of the engine, (1900) 98 Va. 630, 37 S. E. 302 (rope for the purpose of supporting himself in taken to hold ferry boat in high water was obviously too weak to stand the strain); Picdmont Electric Illuminating about him as serviceable for that pur-Co. v. Patteson (1888) 84 Va. 747, 6 pose. McCain v. Chicago, B. & Q. R.

In the case of the smaller appliances which are ordinarily kept in considerable quantities, and are in their nature intended to be transported from place to place as they are required, this doctrine is expressed in the form that, where the master keeps an adequate and accessible stock of such appliances in good condition, contributory negligence is predicable of the act of a servant who selects an appliance which he knows or ought to know to be defective and dangerous.3

of a drain pipe on the tender of an en-

Where the foreman of a switching gang used a road engine without attaching a flat car in front of it, for the purpose of making a flying switch, and the evidence is that the danger would have been diminished by thus attaching a flat car, he may properly be found guilty of contributory negligence which will prevent his recovering for an injury caused by falling from the pilot of the engine while attempting to uncouple the car which was being switched. Thompson v. Montana C. R. Co. (1896) 17 Mont. 426, 43 Pac. 496.

contemplates the cutting of bars of raila heated state, a servant who undertakes to cut one cold and away from the shops, and receives an injury from a sliver which flies off the head of the chisel used for cutting, is guilty of contributory negligence. Houston & T. C. Parento v. Taylor (1898) 26 App. Div. R. Co. v. Conrad (1884) 62 Tex. 627. 518, 50 N. Y. Supp. 518. R. Co. v. Conrad (1884) 62 Tex. 627.

A servant who knew that an engine step was greasy, or would have known it for an injury to an employee from the if he had used ordinary care, cannot refall of redhot "bloom" from tongs used

cannot recover. Toohey v. Equitable were too smooth to be safe. Devlin v. Gas Co. (1897) 179 Pa. 437, 36 Atl. Phænix Iron Co. (1897) 182 Pa. 109, 37

An employee who undertakes to lower a stone weighing 700 pounds into a pit direction of a coemployee to get a crow-5 feet deep, by means of two wooden bar and assist him in springing rails

Co. (1896) 22 C. C. A. 99, 40 U. S. App. skids 6 feet long and 2 inches thick, one 181, 76 Fed. 125. But whether plaintiff of which is smaller and weaker than the acted as a prudent man in taking hold other, with only one man in the pit and of a drain pipe on the tender of an en- two at the top, is not chargeable with gine, which was defective in not having negligence unless he knew that the skid hand-holds, was held to be a question for was unsafe or insufficient, or unless it the jury in Coley v. North Carolina R. was so obviously unsafe and insufficient Co. (1901) 128 N. C. 534, 57 L. R. A. to use for the purpose and in the manner in which it was being used that a man of ordinary prudence would have known it. Dillingham v. Harden (1894) 6 Tex. Civ. App. 474, 26 S. W. 914. An employee who, to make his work more convenient, attempts to move a casting weighing 1,250 pounds up an incline, with a stick, without asking for assistance, cannot recover for injuries caused by the stick breaking. McGold-rick v. Metcalf (1891) 37 N. Y. S. R. 611, 14 N. Y. Supp. 269.

The question whether it was negligence for an able-bodied workman, in his forty-fifth year, to use a ladder a foot Where the usual course of operations shorter than a new brick wall against which it rested, and on or over which road iron in the shops, while they are in the workman had to step over the upper end of the ladder, was for the jury. Flanigan v. Guggenheim Smelting Co. (1899) 63 N. J. L. 647, 44 Atl. 762.

<sup>a</sup> East Tennessee, V. & G. R. Co. v. Perkins (1891) 88 Ga. 1, 13 S. E. 952;

The proprietor of a mill is not liable cover for injuries received by his slipping from such step while climbing on so smooth by use as not to grasp the the engine to clean a headlight. Booktrum v. Galveston, H. & S. A. R. Co. (1900; Tex. Civ. App.) 57 S. W. 919.

Appropriated applicates who soled discontinue the superficient form the sufficient firmness, where a supply of tongs and bitts was furnished, and it was the duty of such employee to the soled of the superficient firmness. An experienced employee, who selects discontinue the use of a bitt when it bea fitting which is too light to bear the came smooth and replace it with a pressure to which he subjects it in shutting in and testing a well of natural gas, bitts in use at the time of the accident Atl. 927.

A skilled mechanic who responds to a

342. Negligence inferred from the use of appliances for a purpose other than that for which they were designed.—In §§ 26, 27, ante, reference was made to the doctrine that, in respect to a servant who perverts an instrumentality from its proper function, a master is under no obligation to see that it is in a safe condition. In any case in which such an unauthorized application of the instrumentality subjects the servant to a specific danger which, if he had refrained from so applying it, would have been avoided, circumstances are presented which raise the question whether his conduct was or was not negligent. If the danger was one which ought to have been understood by any reasonably intelligent person who possessed the same amount of technical knowledge and the same familiarity with the work as the servant himself (see chapter xxx., post), a court is usually deemed to be justified in saying, as a matter of law, that he was in fault and cannot recover.1

apart, gets a bar which he could have apart, gets a bar which he could have the seen at a glance had a broken or worn man to undertake to ride down a steep point, and is injured by its slipping gradient on a push car which has no while he is prying the rails apart, canbrakes. Miller v. Union P. R. Co. not recover. McBride v. Indianapolis (1880) 2 McCrary, 87, 4 Fed. 763; York Frog & Switch Co. (1892) 5 Ind. App. v. Kansas City, C. & S. R. Co. (1893) 482, 32 N. E. 579. A servant is not justification of the servant is not justification. tified in assuming that because a worn

coupling link); Elgin, J. & E. R. Co. v. N. Y. Supp. 717.

Docherty (1895) 66 Ill. App. 17 (brake An employee staff gave way when used as a hand-hold climbing upon a spout which, under his by a servant when mounting the car); weight, gives way and precipitates his Quirouet v. Alabama G. S. R. Co. arm into a set of cogwheels, cannot re-(1900) 111 Ga. 315, 36 S. E. 599 (stand-cover for the injury, where the spouting ard which brakeman grasped in attempt- did not give way because of any defect ing to mount a car by placing his foot in its construction, but only because of on the journal box slipped in its socket its being used by plaintiff for a purpose and caused him to fall); Timmons v. Central Ohio R. Co. (1856) 6 Ohio St. 106 (brakeman, when attempting to spouting had previously given way unmount a moving train, seized the rim of der his weight. Schmidt v. Leistekow the gravel-box, and was injured by its giving way); Fortier v. Lauxier (1898) Where the rope by means of which the Rap. Jud. Quebec, 14 C. S. 359.

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It is negligence for a railway work-

A section foreman cannot recover for implement remains among the stock of a personal injury received by being tools furnished, it is safe to use it, un- struck by an extra train while he was der conditions which render the partic- inspecting the track upon a railroad trithe conditions which render the particles in inspecting the track upon a railroad tri-ular defect which exists in it specially cycle, a conveyance other than that pro-dangerous. Hefferen v. Northern P. R. vided by the railroad company for the Co. (1891) 45 Minn. 471, 48 N. W. 1 inspection. Jolly v. Detroit, L. & N. R. ("side-set," a tool used for cutting iron, Co. (1892) 93 Mich. 370, 53 N. W. 526.

threw off a sliver when struck).

The Hadje (1881) 19 Blatchf. 354 to an employee caused by the latter's (planks spanning a hatchway, which were not laid to walk upon, gave way under a man engaged in stowing cargo); by the employer, although he failed to Houston & T. C. R. Co. v. Myers (1881) provide the safeguards for the elevator 55 Tex. 110 (brakeman tries to substi- shaft required by statute. Guenther v. tute the end of a switch chain for a Lockhart (1891) 40 N. Y. S. R. 942, 16

> An employee who is injured while and in a manner for which it was not designed,-especially where the same

If it cannot be said to be a necessary inference from the facts that the unauthorized application was dangerous and that the servant understood or ought to have understood that it was dangerous, the right to maintain the action must be determined by the jury, a material element to be considered by them being the question whether it was customary for employees doing the same kind of work as the servant, to use the instrumentality in the manner in which he was using it when the injury was received.<sup>2</sup> See § 353, infra.

- 343. Negligence in respect to the creation of the material conditions which caused the injury.—Numerous decisions illustrate the principle that, where the material conditions which caused the injury were produced prior to the time of the accident, by the culpable acts or omissions of the servant himself, he cannot be permitted to maintain an action for damages. Recovery has been denied on this ground, where the evidence disclosed the existence of the various predicaments mentioned below:
- (1) The servant had left some part of the plant in such a position that it became a potential source of danger, if certain not unlikely events should occur.1

hold of defendant's vessel, was injured bury v. Getchel & M. Lumber & Mfg. Co. by a fall resulting from his taking hold (1896) 100 Iowa, 441, 69 N. W. 743. of an unfinished sheep trough placed by defendant's workmen near the hatch, the fall of lumber or other heavy artiand trusting his weight on it, cannot receive improperly piled by him and his cover, as the trough was not placed fellow servants. Langlois v. Maine C. there for such use as the servant made R. Co. (1892) 84 Me. 161, 24 Atl. 804; of it, and he knew that the work upon Hoth v. Peters (1882) 55 Wis. 405, 13 it had not reached that stage at which N. W. 219 (decided on demurrer). Or

short to be reached from an engine ten- nishes a proper machine is not liable to der, it is negligence for a brakeman to a servant injured while using it for an attempt to walk along the spout for the improper purpose does not apply in the purpose of getting hold of it. Hum- case of an injury to an inexperienced phrcys v. Newport News & M. Valley employee who was using the machine in Co. (1989) 33 W. Va. 135, 10 S. E. 39. obedience to the direction of a superior A servant who, while coming from the whom it was his duty to obey. New-

th had not reached that stage at which N. W. 215 (decladed on demarker). Or he would be justified in assuming that by tools permitted to accumulate on the it was fastened. Gibbons v. British & floor of a mill, where their presence was N. A. Steam Nav. Co. (1900) 175 Mass. dangerous. Devlin v. Phænix Iron Co. (1897) 182 Pa. 109, 37 Atl. 927. Or by The fact that the primary purpose of stepping in a manhole on a cable line, a jaw strap is to strengthen a railway which he had himself left open. Brencar will not render it negligence, as a nan v. Front Street Cable R. Co. (1894) matter of law, for a brakeman to use 8 Wash. 363, 36 Pac. 272. Or where a it as a support for his foot in mounting car repairer was killed while repairing a moving car. Coates v. Boston & M. a car on a railroad track, by an engine R. Co. (1891) 153 Mass. 297, 10 L. R. on another track striking against a car A. 769, 26 N. E. 864. This decision moved and left by him and his fellow seems to exemplify a more rational prin- servants too near such track, and drivciple than the one cited in the last note, ing it against the car on which he was in which the accident was caused by the giving way of the brake staff.

The rule that an employer who fur
W. 47. Or where a railway employee

- (2) The servant had removed a certain safeguard designed to protect himself and his fellow workmen,2 or had failed to take certain specific measures which it was his duty to take for the purpose of keeping the place of work safe.3
- (3) Some appliance on which the servant's security depended had not been fastened, adjusted, or arranged in a proper manner.4

placed a tender, for the purpose of clean-ing out the askes, in such close proxim-ity to another track in the yard as not Co. v. Laquet (1900) 89 Ill. App. 13. There can be no recovery for the death jacent track, and was injured by cars of an employee while laying pipe in the on the other track striking the tender while he was cleaning out the ashes. construction by the employer, through Texas & P. R. Co. v. Young (1894; Tex. the caving-in of the walls of the trench, Civ. App.) 27 S. W. 145. Or where a due to insufficient shoring and bracing, workman unnecessarily placed planks of where such employee was himself in a scaffolding in an elevator shart trusted with superintendence of the through the loop of a rope suspended shoring and bracing, and paid higher from the bottom of the car and attached wages because of it. Conroy v. Clinton to permit the passing of cars on such adfrom the bottom of the car and attached wages because of it. Convoy v. Clinton to the side of the shaft, the result being (1893) 158 Mass. 318, 33 N. E. 525. that the scaffolding was overturned as the elevator ascended. Simpson v. Gerplaintiff, who was employed by defend-ken (1897) 19 App. Div. 68, 45 N. Y. ant railroad company to transfer freight Supp. 1100. Or where a workman left from one car to another, was injured by a beam lying on a pile of dirt with one reason of the failure of himself and his end projecting, and was injured by its fellow workmen to fasten a thin iron flying up when it was struck by a piece blade over which the freight was carried of a pile which he had helped to saw off. between the cars. Martin v. Louisville Geesen v. Saguin (1901) 115 Iowa, 7, & N. R. Co. (1901) 23 Ky. L. Rep. 798, 87 N. W. 745.

<sup>2</sup> Schwandt v. William Wright Co. (1901) 126 Mich. 609, 85 N. W. 1107 (servant climbed on a roof and removed a plank placed there to protect the building from the falling of heavy weights used in raising and lowering doors).

3 Where it is the duty of miners, under the rules of their employer, to prop up the roofs of their own excavations, the employer being, on his side, bound to furnish timber at the pit mouth for that purpose, it is their duty to refuse they are entitled to their days' wages in spite of such refusal if the timber has been asked for and not supplied. Hence, if one of them proceeds to work without props, although aware of the danger, he is not entitled to damages for injuries received through the fall of the roof, merely because the timber was not furnished. McNeill v. Wallace (1853) 15 Sc. Sess. Cas. 2d series, 818.

In an action for a death caused by neglect of a mine owner to furnish suit- after the loading of a steamship was able props to support the roof of the completed, to close the hatchway, and mine, evidence is admissible to show who after placing one of the hatches in that deceased endeavored to borrow position, stepped upon it to place anprops, but could get none, since it tends other, when it gave way because not

There can be no recovery for the death

Where the duty of erecting a scaffold on a bridge was left entirely to the plaintiff and others, and it appeared that the company provided suitable tim-ber therefor, and the injury was occa-sioned by the plaintiff's and his fellow workmen's negligence in not selecting proper scantling, or properly lashing or supporting the same, defendant was not liable. Hogan v. Field (1881) 44 Hun,

An employee on a towboat who, while to work if no timber is furnished, and looking after a certain line, steps upon a cover over a round hole in the deck, called a "lazarette," thus causing the cover to tip up and strike him between the legs as he fell astride it, cannot recover where it was part of his duty to take off and put on the cover, and he knew its condition better than anyone else did. Watts v. Boston Tow-Boat Co. (1894) 161 Mass. 378, 37 N. E. 197.

A longshoreman who was directed,

(4) The servant had omitted to make use of an appliance furnished by the master.5

caught upon the coaming it was intended to rest on, and who fell into the hold cotton bales on a dock cannot recover beand was injured, cannot recover there- cause the hook used in hoisting the bales for where the work was simple, requiring neither skill nor judgment. Pres- where, when properly adjusted, they ton v. Ocean S. S. Co. (1898) 33 App. Div. 193, 53 N. Y. Supp. 444.

There can be no recovery for the death of an employee in a coal mine, whose switch and runs upon the empty track, N. E. 968. onto which he steps from the main track upon the approach of the train. Beckman v. Consolidation Coal Co. (1894) 90 Iowa, 252, 57 N. W. 889.

of the pieces of wood to be sawed is guilty of negligence. Eicheler v. Hanggi his foot. When the derrick was almost (1889) 40 Minn. 263, 41 N. W. 975; raised, he tied his guy rope to the stake,

stationed there to act in an emergency with the wheel. He is therefore guilty of contributory negligence if he unlashes

rope, block, and boatswain's chair for the purpose of painting a mast, is guilty of negligence in not so securing himself as to guard against a fall, although the toggle given him is not long enough and the rope is too stiff and unpliable to bind about the toggle. Wm. Johnson & Co. v. Johansen (1898) 30 C. C. A. 675, 58 U.S. App. 104, 86 Fed. 886.

A longshoreman employed in piling allowed a bale to slip and fall upon him, were sufficient for the purpose. Recka v. Ocean S. S. Co. (1893) 3 Misc. 526,

23 N. Y. Supp. 3.

The fact that a servant injured by the duty it is to see that a spring switch falling of a press frame had assisted in connecting an "empty track" with the propping the frame does not preclude main track is in position in the morning him from recovery on the ground that for the passage of trains of cars on the he had himself been guilty of contribumain track leading to the shaft of the tory negligence in improperly propping mine, and who fails to do so, although it, where he had been called away before he knows that such switch is frequent- the work was finished and directed to ly left open by the men working in the perform other work. Goss Printingmine at night, the consequence being Press Co. v. Lempke (1900) 90 Ill. App. that a train passes through the open 427, Affirmed in (1901) 191 III. 199, 60

The servant's negligence is a question for the jury where the act alleged to have been done for the purpose of securing a structure is susceptible of being A servant who fails to attend to the construed in another sense. In a case proper setting of the gauge furnished where a servant was holding a guy rope for the purpose of regulating the width while a derrick was being raised, a stake was driven at his request as a brace for Rowland v. Cannon (1866) 35 Ga. 105. and at the foreman's direction went to An experienced seaman is bound to the top of the derrick, and while there, know that a barge nearly 300 feet in on such foreman pulling on the rope length is apt, while being moved in a holding the derrick, the stake to which narrow river, to strike some obstruction, the guy rope had been tied was pulled thereby putting the wheel, if it is not out of the ground by the strain upon it secured, in rapid motion, and that the and let the derrick fall. It was held object of his being placed in the wheel- that, as the jury would be justified in behouse under such circumstances, to lieving that the plaintiff had merely tied await orders, implies that he is simply the rope temporarily to the stake, and that the stake was not intended by him which may require something to be done as a support for the derrick, a requested instruction that, because plaintiff had the stake driven and tied the guy rope the wheel without orders, and stands so to it, the foreman had the right to prenear it that, if set in motion, it will sume that plaintiff had properly secured strike him. Hanson v. The J. B. Lyon it, was properly refused. St. Louis S. (1887) 33 Fed. 184.

An able seaman who is given a stout App.) 63 S. W. 1064.

<sup>5</sup>The Leocadia (1888) 35 Fed. 534 (rope substituted by servant broke); Oellerich v. Hayes (1894) 8 Misc. 211, 28 N. Y. Supp. 579 (ladder substituted gave way). Compare § 26, ante, and §§

341, 342, supra.

(5) The servant had adopted a dangerous method of executing the work in hand.6 See generally, as to this form of negligence, §§ 338, 339, supra.

Other decisions illustrating analogous situations are cited in the next section.

The cases in which the servant was held unable to recover, on the ground that he had failed to remedy the dangerous conditions, are collected in § 304, ante.

344. Negligence in respect to the exercise of functions of control.— (Compare preceding section.)—A superior servant cannot recover for injuries caused by his negligence in respect to the issue of orders, or in the matter of supervising the use, disposition, or movements of that part of the plant which is under his control. This rule holds,

<sup>a</sup> A brakeman on a log train who has phite & Fiber Co. (1896) 93 Wis. 437, knowledge of the negligence of his em- 67 N. W. 712. ployer in leaving a tree too close to the 'Gorham v. Kansas City & S. R. Co. track is guilty of contributory negli- (1893) 113 Mo. 408, 20 S. W. 1060 (congence which will defeat an action for his ductor injured by running of train at death caused by running into the tree, dangerous speed); Lane v. Central where he negligently loads the logs on Iowa R. Co. (1886) 69 Iowa, 443, 29 N. his train so as to strike the tree. Pow- W. 419 (conductor killed by being ers v. Thayer Lumber Co. (1892) 92 crushed under a car derailed by coming Mich. 533, 52 N. W. 937. A servant into collision with a cow, while the train who is ordered merely to load a car with was being pushed in front of the engine, angle plates, and is injured by getting this arrangement, as well as the speed

smooth surface of the iron, and was in- his post of duty). jured by its fall, he cannot recover. Brown v. Brown (1888) 71 Tex. 355, 9 injuries caused by the fall of a heavy it in the side of the pit where it was em-So. 171.

ries resulting from the emptying of pulp from a digester in which it has been cooked, without previously putting cold N. R. Co. v. Scanlon (1901) 22 Ky. L. water into and through the digester in Rep. 1400, 60 S. W. 643. accordance with the previous custom, A section master on a railroad, who where such employee was responsible for was thrown from a hand car and inthe omission. Berlick v. Ashland Sul- jured because a coemployee, who was

on the car and loading it so heavily on of the train, being entirely under his one side that it overturned, cannot reown control): Chicago & N. W. R. Co. cover. St. Louis Bolt & Iron Co. v. v. Snyder (1886) 117 Ill. 376, 7 N. E. Brennan (1886) 20 Ill. App. 555. 604 (conductor killed by collision at Where a servant, who had been emintersection of two lines); Dewcy v. ployed about six weeks in taking cinders Chicago & N. W. R. Co. (1871) 31 Iowa, and chips from a pit under a boiler and 373 (conductor directed engineer to run furnace, placed on edge one of the plates, past horses on the track); Galveston, weighing about 300 pounds, used to H. & S. A. R. Co. v. Sweeney (1896) 14 cover the pit, propping it up on the out- Tex. Civ. App. 216, 36 S. W. 800 (conside with a stick supported only by the ductor failed to see if brakeman was at

No action can be maintained for the death of a conductor who, on taking S. W. 261. There can be no recovery for charge of a train, was told that the steps at the rear end of the last car piece of iron upon a laborer who had were broken, and who fell off the car himself excavated the earth underneath through the broken steps, after he had given directions to keep the rear doors bedded. McCarthy v. Whitney Iron locked. Cameron v. Great Northern R. Works Co. (1896) 48 La. Ann. 978, 20 Co. (1899) 8 N. D. 618, 80 N. W. 885.

Negligence is inferable where an engi-An employee cannot recover for inju-neer allows a fireman who has not been declared competent for such a duty to take charge of the engine. Louisville &

even where the particular employee whose compliance with the orders of the superior servant caused the injury was unfit for his position, and the master was, or should have been, aware of that fact.2

A similar principle prevents the maintenance of the action where it was the duty of the injured servant to direct other employees by means of signals, and the injury was due to the fact that those signals

turning the crank in a negligent man- Furnace & Mfg. Co. v. Gross (1892) 97 ner, was caught by it and hurled against Ala. 220, 12 So. 36. him, was held unable to recover. Kenhim, was held unable to recover. Kenney v. Central R. Co. (1878) 61 Ga. 590. In making an experiment to increase
ney v. Central R. Co. (1878) 61 Ga. 590. the pressure for the purpose of overAn employee in charge of a hand car, coming some difficulty in the supply of
who, when a train is approaching, has gas, the superintendent of gas works,
sufficient time to get it off the track, who has full charge of the plant, acts at
and failing to do so is injured by a colhis peril upon the suggestions of perlision, cannot maintain an action. Illinois C. R. Co. v. Modglin (1877) 85 him; and for injuries received from an
Ill 481 A section foreman who has explosion during such experiment, in Ill. 481. A section foreman, who has explosion during such experiment, in three hand cars and the men upon them consequence of his own carelessness or brake upon the second car, by reason of 21 Pac. 124. which it ran into the car in front after as by the exercise of ordinary prudence tion master, to whom was given the he could have kept them at a safe dismanagement of all the freight trains

A station agent who directed the placa slight downward grade, which were as the law required him to do. It is left exactly as he directed, was guilty of difficult to admit, however, that this contributory negligence precluding rewas a proper case for the application of covery for his death from being struck the doctrine in the text, unless the enby the forward car put in motion by the rear car, which was started by a sudden storm, where he knew that the front car was not "chocked" or "braked," and it was within the scope of his duty to know whether or not the rear car had also been left in such condition, although it does not appear whether or not he did know of that fact. Brunswick & W. R. Co. v. Smith (1896) 97 Ga. 777, 25 S. E. 759.

No recovery can be had under the Alabama employers' liability act (see chapter xxxvII., post) for a furnace company's failure to keep in repair a certain article belonging to its ways, works, machinery, and plant, on account of which its master mechanic is alleged to have been killed, where he was intrusted L. 626, 44 Atl. 647. with the exclusive duty of seeing that were in proper condition. Birmingham 1011.

under his direct orders, cannot recover lack of skill, his employer is not liable. for an injury caused by a defective Taylor v. Baldwin (1889) 78 Cal. 517,

In Evans v. Atlantic & P. R. Co. such employee had fallen off in front (1876) 62 Mo. 49, it was held that no of it, causing the latter to run over him, action was maintainable, where a statance apart. St. Louis, A. & T. R. Co. within his division, and on whom the v. Denny (1893) 5 Tex. Civ. App. 359, special duty devolved of keeping the 24 S. W. 317. over by a train, owing to the failure of ing of two cars upon a side track having the engineer to give a warning signal, gineer were known to be careless or incompetent. The circumstances do not show the exercise by him of any direct personal supervision extending, at the time of the accident, to the particular operation to which the omission which caused the injury was incident; and in no respect, therefore, was he a participator in the culpable act.

> The fact that a servant did not prevent his son from following him on to a scaffold on which he was working, and that the scaffolding fell, does not show contributory negligence of the servant, as matter of law, where no one testi-fies that the scaffolding was safe even though the boy had not been on it. Cole v. Warren Mfg. Co. (1899) 63 N. J.

<sup>2</sup> Roblin v. Kansas City, St. J. & C. B. such ways, works, machinery, and plant R. Co. (1894) 119 Mo. 476, 24 S. W.

were improperly given,3 or were not given at such time and place as his duty required.4 But the employer is not absolved by the mere fact that the signal which brought about the occurrence which was the immediate cause of the injury was given by the injured servant. If the proper signal was given, the servant's obligations must evidently have been completely discharged, and there is nothing upon which to base an imputation of contributory negligence.<sup>5</sup>

The mere fact that a foreman renders manual assistance to his subordinates in performing a certain operation does not show that he was negligent.6

345. Failure of injured servant to influence the conduct of coemployees not under his control.—Where the injured servant had no right to control the conduct of the servant who inflicted the injury, it is plain that the former cannot be deemed culpable merely for the reason that he did not attempt to prevent the latter from doing the act which brought about the accident.1 Nor is an injured servant deemed to have been culpable for the reason that he failed, by remon-

A railroad company is not liable for (1882) 60 Iowa, 230, 46 Am. Rep. 65, the death of a brakeman killed while 14 N. W. 778.

making a flying switch, by the engineer's running the train at an unnecessary, unusual, and dangerous rate of speed, where the engineer was under the main track, unguarded and without the control of the brakeman at the time danger signals, allowed a switchman, of the accident, as to the rate of speed, whose duty it was to look out for signals chowed the signals given by such pals to ride in the engine calcoose in

position to see intestate at the place where he was alleged to have been when the signal was given, and did not see him there, nor any signal given. Louis- where a road master traveling on a ville & N. R. Co. v. York (1901) 128 work train, in which cars were ahead of Ala. 305, 30 So. 676.

(1896) 114 Ala. 449, 22 So. 20; Hous-

and obeyed the signals given by such nals, to ride in the engine caboose, inbrakeman. McDermott v. Atchison, T. stead of on the footboards, from which & S. F. R. Co. (1896) 56 Kan. 319, 43 latter point he could have obtained a Pac. 248. See also, to a similar effect, better view, the evidence being that the Hudson v. Charleston, C. & C. R. Co. engineer had no authority to order him (1893) 55 Fed. 248.

\*Le Bahn v. New York C. & H. R. R. switchman could have a view of the Co. (1894) 80 Hun, 116, 30 N. Y. Supp. track from his place in the caboose.

7; Muldowney v. Illlinois C. R. Co. Atchison, T. & S. F. R. Co. v. Tunnell (1874) 39 Iowa, 615.

(1897) 58 Kan. 815, Appx. 49 Pac. 661. Where the testimony of defendant's Or where an employee on a hand car engineer tends to show that the engine running at full speed into a place obcausing the injury was moved in re-scured with dense smoke failed to response to a signal from a brakeman who quest or demand the foreman to stop the was killed, it is competent in rebuttal car, after learning that it was not his to show by a witness that he was in a purpose to send a flagman in advance to learn if there were any trains on the track. Woodward Iron Co. v. Andrews (1897) 114 Ala. 243, 21 So. 440. Or the engine, but not controlling the man-See Louisville & N. R. Co. v. Morgan ner of its operation, was injured by a collision resulting from the fact that no (1896) 114 Ata. 445, 22 66. 20, 1048-1 Collision Teatring from the leading car text. Civ. App. 1, 34 S. W. 809, 46 S. W. to warn the engineer of the danger. 863.

\*Houser v. Chicago, R. I. & P. R. Co. (1901) 164 Mo. 270, 64 S. W. 124.

strance or otherwise, to procure a negligent fellow servant's compliance with a rule promulgated to protect employees of the classes to which they both belong.2 Nor is it negligence in a servant to omit to draw the attention of a fellow servant to facts indicating the propriety of a certain course of conduct, when that fellow servant has actually observed, or, in view of the functions assigned to him, ought to have observed, those facts.3

Clearly, however, it is impossible to lay down any general rule to the effect that a servant is absolutely free from any obligation to supervise, and, if need be, influence, the conduct of his fellow servants. For instance, if one servant sees that the physical condition of another is such that, if left to himself, he will be incapable of performing a certain duty the execution of which for a limited period is of extreme importance in the interests of the employer and the public, but that the possible consequences of his unfit condition may be obviated by proper supervision, it may be justifiable for the former servant to continue working in company with the latter (see § 302a), and if he does this, he is bound to exercise the necessary supervision, and do what he reasonably can to prevent the incompetency of his fellow servant from producing injury to himself and others whose safety is involved.4

346. Departure from customary methods of work.—In one case it was laid down that the servant's noncompliance with a custom, in respect to the course of action followed at the time of the accident, is a circumstance proper to be considered by the jury, as tending to prove cupability on his part; but that it is not conclusive evidence of

termined to proceed). enginee 'A jury would be warranted in in- awake. ferring negligence from testimony show-

<sup>2</sup> New Jersey & N. Y. R. Co. v. Young ing that a fireman who had, for some (1892) 1 C. C. A. 428, 1 U. S. App. 96, hours before the collision which caused 49 Fed. 722; Missouri, K. & T. R. Co. v. his injury, known that his engineer was Fowler (1900) 61 Kan. 320, 59 Pac. 648. in such a somnolent condition as to have In both these cases the contention was fallen asleep several times, had rethat a fireman should have endeavored mained on the engine without taking to induce his engineer to comply with a active steps to keep the engineer awake, rule prescribing that the speed of trains or reporting the matter to the conductrule prescribing that the speed of trains should be slackened when they are approaching switches.

\*\*Missouri, K. & T. R. Co. v. Fouler (1900) 61 Kan. 320, 59 Pac. 648 (firemany's first duty being to keep up steam, and when not thus employed to keep a fireman was not subject to the obligations for signals, he is not bound to tell his engineer of the absence of a safety signal); Lake Shore & M. S. R. is would be entitled to recover, if, at or Co. v. Wilson (1894) 11 Ind. App. 488, immediately before the moment when as N. E. 343 (similar facts,—engineer had learned of danger signal, but determined to proceed).

\*A jury would be warranted in in-

such culpability. This would certainly seem to be the correct principle, as the contrary doctrine would have the effect of assimilating a mere custom to a rule or a specific order. See subtitle D, infra. But there is one decision which, to say the least, leans very strongly in the opposite direction.2

## C. QUALIFYING CIRCUMSTANCES TENDING TO NEGATIVE THE INFER-ENCE OF CULPABILITY.

- 347. Qualifying circumstances enumerated.—In the following subtitle it is proposed to discuss several evidential factors which, in many cases of the type reviewed in the preceding subtitle, will render it necessary to take the opinion of the jury with respect to the quality of acts or omissions which, if those factors were not involved, would be deemed conclusive proof of negligence. This result may be produced by testimony which tends to establish one of the following situations:
  - (a) That the servant was not of full age.
- (b) That the servant did not control the production of the material conditions or the methods of work from which his injury resulted.
- (c) That the servant had, at the moment when the accident occurred, temporarily forgotten the existence of the danger which caused that accident.
- (d) That the servant, in doing what he did at the time of the accident, was complying with a formal rule of the employer.
- (e) That the servant, in doing what he did at the time of the accident, conformed to customary methods of work.
- (f) That the servant acted on the presumption that the master's plant was in good condition.
- (g) That the servant acted on the presumption that the various operations incident to the use of the plant would be carefully performed.

<sup>1</sup> The mere fact that it was customary it was held that contributory negligence for train hands to lie down on the top was a bar to the action of a conductor of a car while it was passing through a of a work train, who was injured by the of a car while it was passing through a current who was injured by the tunnel, and that a servant who was injured by striking the top was sitting on the cupola of a caboose, does not necessarily show that he was negligent very clear from the report, but it would in taking that position. Mexican Central R. Co. v. Eckman (1900) 42 C. C. A. 344, 102 Fed. 274.

2 Georgia, C. & N. R. Co. v. Hallman (1895) 97 Ga. 317, 23 S. E. 73. There

- (h) That the course of action pursued by the servant was, in a reasonable sense of the word, necessary.
  - (i) That the servant was acting in an emergency.
  - (j) That the servant was acting under the influence of fear.
- (k) That the servant was acting under the influence of bodily pain.
  - (1) That the servant was trying to save the life of another person.
  - (m) That the servant was trying to preserve the master's property.
- (n) That the servant acted under or in compliance with direct orders or instructions of the master or the master's representative. See chapter xxIII., post.
- (o) That he had been assured by the master or the master's representative that the act which caused his injury might safely be done. See chapter xxiv., post.

The cases relating to each of these predicaments will be reviewed in the ensuing sections.

The above list might be supplemented by adverting to the situation presented by evidence which indicates that the servant had no notice, actual or constructive, of the danger to which the injury was due. But the true logical significance of such evidence is rather that an essential element of negligence was absent, than that different opinions might reasonably have been entertained as to the quality of the conduct in question. For this reason the effect of the servant's ignorance of the risk is more appropriately discussed in connection with the subjects treated in subtitle A, supra. See §§ 319–321, supra.

348. Minority of injured servant.—(This section should be read in connection with §§ 244–251, 291, supra, and §§ 398–400, infra.)—A detailed discussion of the extent to which minors are chargeable with contributory negligence would be out of place in the present treatise. It will be sufficient, by way of introduction to the statement of the effect of the various decisions, to refer succinctly to a few of the fundamental principles which determine whether that defense is available.

In the investigation of this question three distinct subsidiary questions present themselves for settlement:

- (1) Had that person reached such an age that negligence could be imputed to him at all?
- (2) Supposing him to have reached that age, did he understand the danger from which his injury resulted?
  - (3) Supposing him to have understood the danger, had he suffi-

cient mental and physical capacity to regulate his conduct in the manner adapted to secure his safety as effectually as the circumstances admitted?

It is clear that there must be some age below which the capacity for negligence should be deemed entirely absent.1

But as it has never been proposed to ascribe absolute incapacity to children above seven years of age,2 and children under that age need not be taken into account as industrial factors or parties to contracts of employment, it follows that the first of the above questions may be considered to be of no practical importance in connection with the law of employers' liability.

With regard to the second and third questions the essential and controlling conception by which a minor's right of action is determined with reference to the existence or absence of contributory fault is that his capacity is the measure of his responsibility. If he has not the ability to foresee and avoid the danger to which he may be exposed, negligence will not be imputed to him if he unwittingly exposes himself to that danger.3 For the exercise of such measure of capacity and discretion as he possesses, he is responsible.<sup>4</sup> In a recent decision of one of the Federal courts of appeals it was laid down that, after passing the age of fourteen years, a child is

¹ See Shearm. & Redf. Neg. § 73a. In McIntosh v. Missouri P. R. Co. (1894)
58 Mo. App. 281, the court recognized three distinct periods during minority, sard (1874) 75 Pa. 367; Crissey v. Hassaying: "There is no specific age at which the courts will or will not declare a party to be possessed of sufficient experience or discretion to look after his own safety. The circumstances have much to do in settling that question. The child is often of such tender years that the courts will say, as matter of gree of care whatever, and to instruct law, that ordinary care cannot be expected of it, and that it should not be the danger was not to be taken into accharged with contributory negligence.

pected of it, and that it should not be charged with contributory negligence. Then there comes an age, attended or much as if he were an adult, that degree when capacity is a question of doubt, and in such cases the courts submit the question to the jury or triers of the fact. Passing this, the party injured may be of such age and experience that there is no longer doubt as to the possession of sufficient capacity, and then the courts will treat the matter as beyond dispute, and hold the party to the exercise of ordinary care."

\*See Shearm. & Redf. Neg. § 73a.

\*\*The danger was not to be taken into account in considering his right to recovenum in considering his right to recovenum tin considering his right to

presumed to be capable of avoiding danger by the exercise of due care. And this is probably the rule in all jurisdictions. 6 According to some courts the presumption with regard to servants of less than fourteen years is that they have neither sufficient capacity and understanding to be sensible of danger, nor the power to avoid it; 7 or, as the doctrine has also been stated, a child between the age of seven and fourteen is prima facie incapable of exercising judgment and discretion, and therefore prima facic incapable of contributory negligence.8 What may be the precise effect of this presumption, considered as a rule of procedure, is not very clear. Apparently it is not overcome by evidence showing merely that the child was unusually intelligent for his age.9 For practical purposes, perhaps, it may be said to imply nothing more than that the cases must be very rare indeed in which a court will deem itself justified in declaring the servant negligent, as a matter of law. 10 If this is really its effect, it would seem to put the servant virtually in the same position as the doctrine of the majority of the courts which is stated below.

In Scotland a somewhat similar conclusion is arrived at, but by a different route. The reasons assigned for that conclusion seem to be scarcely in harmony with the theory of contributory negligence which is accepted in the English and American courts.<sup>11</sup> See §§ 323 et seq., supra.

\*\*E. S. Higgins Carpet Co. v. O'Keefe overcome the presumption of the want (1897) 25 C. C. A. 220, 51 U. S. App. of judgment and discretion which his age prima facie implies.

\*\*See Shearm. & Redf. Neg. § 73a. It is not error to give an instruction to the effect that the jury, having seen the plaintiff, a minor of about eighteen, on the witness stand, might consider his and guard against the danger, the eviappearance in determining the question of his intelligence and capacity to apprehend and avoid the dangers incident to his employment. Disotell v. Henry a projecting sill. to his employment. Disotell v. Henry a projecting sill. Luther Co. (1895) 90 Wis. 635, 64 N.

W. 425.

In the Alabama case cited in note 1, would have imported contributory negsupra, it was held that, in an action to ligence, she may maintain an action
recover damages for the alleged neglitherefor, the legal situation being that
gent killing of a boy fourteen years old, the culpability so imputed to the mastine mere fact that the said boy was ter "displaces any contention that she
shown to be "bright, smart, and industrious," without more, is insufficient to to compensation. Sharp v. Pathhead

in An injury received by a girl of less than fourteen years of age in manipu-<sup>7</sup> Nagle v. Allegheny Valley R. Co. lating a carding machine is considered (1878) 88 Pa. 35, 32 Am. Rep. 413 to be the consequence of the fault of the (1878) 88 Pa. 35, 32 Am. Rep. 415 to be the consequence of the fault of the (omission to look out for train, when about to cross track).

\* Tutwiler Coal, Coke & Iron Co. v. may have been injured in doing some-Enslen (1901) 129 Ala. 336, 30 So. 600. thing which, if she had been of full age,

\* In the Alabama case cited in note 7, would have imported contributory neg-

In the majority of the courts the effect of the evidence is not considered with reference to any presumption entertained with respect to children under and over fourteen years. In all jurisdictions the power of controlling or setting aside verdicts is exercised more unwillingly and more rarely in the case of very young children than in the case of those who are approaching full age. But in this, as in all other circumstances in which the rights of the parties are dependent upon the view taken as to the respective provinces of courts and juries, there is a good deal of inconsistency in the treatment of essentially identical facts.

For the purpose of enabling the reader to compare the decisions regarding minors with those regarding adults, they are grouped with respect to the following predicaments, which correspond with those adopted as the basis of classification in the preceding sections. This remark is applicable more especially to cases involving injuries from moving machinery.

- (1) Failure to use appropriate precautions. <sup>12</sup> See §§ 331, 336, supra.
- (2) Failure to give proper attention to the surroundings.<sup>13</sup> § 332, supra.

the danger that soda water bottles might ercise, he could have avoided the injury. burst at a certain stage in the process Roberts v. Porter Mfg. Co. (1900) 110 of filling, a jury is warranted in finding Ga. 474, 35 S. E. 674. that she was not negligent in omitting to put on a mask provided by the em- a shaft which he was ascending by

Times L. R. 324.

A boy sixteen years of age working as signaling in some manner to those on a trackman is not guilty of contributory the surface. Snyder v. Viola Min. & negligence in going on a hand car in company with his foreman, who had neglected his duty to ascertain whether

mill for two years, and in the dye room 55 Ind. 45; Haynes v. Erk (1893) 6 Ind. for four weeks, before falling into a vat App. 332, 33 N. E. 637. for four weeks, before failing into a vat App. 332, 33 N. E. 63. and getting badly scalded, testifies that he slipped on the wet floor while leaning death of a minor employee, evidence over the vat, and that the floor was that, when shoving a car from a side to usually wet, there is a presumption of negligence on his part. Bessey v. Newick, the was looking towards the engine, when he should have been chawanick Co. (1900) 94 Me. 61, 46 looking ahead at the car before him, and that if he had been at the place where he should have been he would not have

Spinning Co. (1885) 12 Sc. Sess. Cas. alleged to have been sustained by a de-4th series, 574.

fective machine at which he was at

12 Where a young girl of seventeen work, where, by the use of such care as
years swears that she did not know of his age and experience fitted him to ex-

A minor injured by a drill lowered in ployer. Crocker v. Banks (1888) 4 means of ladders is guilty of contributions L. R. 324.

it would be safe, into a deep cut around minor might, by using his eyesight, have a curve where they meet an extra train. observed the peril to which his injury Turner v. Norfolk & W. R. Co. (1895) was due, will not enable his employer to 40 W. Va. 675, 22 S. E. 83. Where a servant aged seventeen years, ground that he was guilty of contribu-who had been employed in defendant's tory negligence. *Hill* v. *Gust* (1876)

A minor cannot recover for an injury he should have been he would not have

(3) Taking or remaining in an unnecessarily dangerous position. 14 See §§ 334, 335, supra.

been hurt, demands a verdict for the that plaintiff, a boy of thirteen years of defendant. Littlejohn v. Central R. Co. age, was carelessly playing with the

(1884) 74 Ga. 396.

It is for the jury to say whether an employee seventeen years of age is free from contributory negligence, where he guilty of contributory negligence and permits his sleeve to come into contact could not recover,—is not objectionable. with a set screw on a revolving shaft, of Rock v. Indian Orchard Mills (1886) the danger of which he has full knowl- 142 Mass. 522, 8 N. E. 401. edge. Keller v. Gaskill (1893) 9 Ind. App. 670, 36 N. E. 303.

operation of a machine of which he had chine in a scuffle between himself and charge in a pulp mill, who, with nothing another boy, where the injured boy was to distract his attention, in attempting aware of the danger. Borck v. Michito straighten a wrinkle in a piece of felt running between rollers, grasped the felt 129, 69 N. W. 254. so closely to them that his fingers were so closely to them that his fingers were twelve years old employed by a railroad

been set to work by his master, and the 81. dangerous character of which was as himself to the danger in the prosecution field (1896) 65 Minn. 355, 68 N. W. 45. of his work. Morewood Co. v. Smith The negligence of a boy of twelve (1900) 25 Ind. App. 264, 57 N. E. 199. years, whose hand was caught by the of his work.

of a freight elevator in a well-lighted Gray (1881) 9 Ill. App. 329. McDaniel v. Lynchburg Cotton

An instruction that if the jury found thrust between the cogs; but the knowl-

cotton-winding machine when he was injured (there being evidence tending to establish this fact), the plaintiff was

An employer is not liable for injury to a boy of twelve and a half years from An intelligent boy familiar with the falling into the uncovered cogs of a magan Bolt & Nut Works (1896) 111 Mich.

low v. Danielson (1899) 102 Wis. 470, company cannot be based, as a matter of 18 N. W. 599. Negligence is inferable where a boy of ance of his duties, which necessitated ordinary intelligence, over fourteen years his crossing a switch upon which cars of age, who for two months has been were standing forming no part of a regularly assisting, three times a day, train, he crawled under the cars and in tubing each of 28 "mules," allows was injured by a train backed against his fingers to be caught in gearing which them, it appearing that he had been emis in full view. Silvia v. Sagamore Mfg. ployed about the railroad yards where Co. (1901) 177 Mass. 476, 59 N. E. 73. the accident happened, for three years, That a boy attending a machine hav- and that he had been cautioned to listen ing unguarded cogwheels allowed his for signals and not to pass under or behand to slip into such wheels because of tween cars when he might apprehend his own inadvertence or inattention in danger; it further appearing, however, watching another boy who was near by that the shifting of the train to such gives him no right of recovery against track, although a matter of convenience, the employer. E. S. Higgins Carpet Co. was not one of necessity; and it further v. O'Keefe (1897) 25 C. C. A. 220, 51 appearing that no signal was given at U. S. App. 74, 79 Fed. 900. the time the train was shifted on to the A boy of seventeen who is injured by track. Omaha & R. Valley R. Co. v. dangerous machinery, near which he has Morgan (1894) 40 Neb. 604, 59 N. W.

An inexperienced boy of fifteen or sixapparent to him as to the master, can-teen is not, as matter of law, guilty of not recover therefor merely because he contributory negligence in placing his is a minor, where the injury was caused hand while engaged in his employment by reason of his own negligence and in- so near the teeth of a saw as to be attention to what he was doing; there struck by them, where they revolved so being no necessity for him to expose rapidly as to be invisible. Barg v. Bous-

A boy of twelve is deemed to be guilty cylinder of a stave planer as he was reof negligence if, while not engaged in moving the staves which had passed any duty, he falls down the open shaft through it, is for the jury. Glover v.

Any boy of twelve who has ever seen Mills Co. (1901) 99 Va. 146, 37 S. E. cogwheels at work will be presumed to know that his hand will be injured if

(4) Doing work in an unnecessarily dangerous manner. 15 See § 339, supra.

edge of the probable result of the inser- the manner of operating which he is tion of the hand, and appreciation of acquainted with, by stepping inside it the risk or possibility that the hand without fastening a belt shifter by which might be accidentally drawn between the press was set in motion, or throwing the wheels, are two entirely different the belt off the pulley, or calling assistthings. Whether there is such appreci- ance, in either of which cases the work ation in the case of a servant of that could have been done in safety, -is guiltender age is a question for the jury. ty of contributory negligence, as matter Chopin v. Badger Paper Co. (1892) 83 of law. Levey v. Bigelow (1893) 6 Ind. Wis. 192, 53 N. W. 452. App. 677, 34 N. E. 128.

A boy of sixteen set at work at a dangerous machine without instruct matter of law, guilty of contributory tion or warning of the danger is not, as negligence precluding recovery for injumatter of law, guilty of contributory ries from coming in contact with manegligence in placing his hand so near chinery in attempting to pass between the revolving knives that it is drawn the machinery and a post not more than into them, while engaged in his duty. 16 inches therefrom, upon receiving a

50, 30 N. E. 814.

ordinary understanding, who has for and he could easily have passed around three weeks been familiar with the op- outside the post. Ekendahl v. Hayes eration of machinery with revolving (1896) 10 App. Div. 487, 42 N. Y. Supp. wheels, must be taken to know that his 226. hand will be injured if allowed to come between the wheels. Patnode v. Warren goes underneath his engine to clear the Cotton Mills (1892) 157 Mass. 283, 32 ash pan, at a time and place of unusual N. E. 161.

pass over a revolving shaft 14 inches 9 Ill. App. 353. from the floor near a gearing and fricset screw, where he could pass safely by a space of but 2 or 3 inches is left at another way by waiting a moment. Wa- the edge is so manifest that a minor of bash Paper Co. v. Webb (1896) 146 lnd. fourteen is chargeable with contributory 303, 45 N. E. 474.

know that if she puts her fingers be- heel catching under a beam at the side tween two heavy rollers in a mangle, of the elevator well. Hochmann v. Moss they will be crushed. Phillips v. Mi- Engraving Co. (1893) 4 Misc. 160, 23 chaels (1895) 11 Ind. App. 672, 39 N. E. N. Y. Supp. 787.

669.

Mass. 507, 43 N. E. 294.

ordinary intelligence, well acquainted machinery, is negligent. with the danger, who is injured while removing a roller from a printing press, minor of seventeen is for the jury, where

An employee sixteen years old is, as a Stewart v. Patrick (1892) 5 Ind. App. direction from the engineer to go around to the other side of the machine, where A boy fourteen years of age and of the attempt was obviously dangerous

Where a fireman fifteen years old hazard, from the fact of cars and en-A bright, active, and intelligent em- gines being constantly in motion on the ployee of nineteen, who has worked in a track, there being no special necessity paper mill for nearly two years, and for compelling the job to be done then, he three weeks about certain machinery cannot recover for injuries caused by which he oiled daily, is guilty of con- another engine backing against his own. tributory negligence in attempting to Union R. & Transit Co. v. Leahy (1881)

The danger from riding upon an eletion clutch on which are an oil cup and vated platform so filled with goods that negligence which will prevent his re-A child of fifteen years is bound to covery for injuries resulting from his

A boy of thirteen was not necessarily An intelligent girl fourteen and two-negligent because he went to a place thirds years old, who knows how fast a where he was not called by his duties. box making uniform trips and stoppages Tutwiler Coal, Coke, & Iron Co. v. Ensmoves, and how far it comes, and has len (1901) 129 Ala. 336, 30 So. 600. worked at the same for six weeks, is See however Evans v. American Iron & negligent if she faces it on her knees Tube Co. (1890) 42 Fed. 519, where the and allows it to strike her on the head. court seems to have assumed, in a charge Gardner v. Cohannet Mills (1896) 165 to the jury, that a boy who goes to an unauthorized place in a mill, and, as a An employee eighteen years of age, of consequence, is injured by dangerous

15 The contributory negligence of a

## (5) Use of improper appliances. 16 See § 341, supra.

Disobedience to specific orders or to rules is no less fatal to the right of action where the servant is a minor than where he is an adult. See §§ 363, 365, infra.

For other cases bearing upon the contributory negligence of minors, see chapters xxIII.-xxv., post.

of a grinding machine, from which the mant M/g. Co. (1896) 66 Minn. 79, 68 stuff was discharged by a spout 5 inches N. W. 774. in length; that it was impossible to see The contributory negligence of a mifingers into it to clear it, and had them that the plaintiff had not been instruct-S. W. 8.

contributory negligence in changing the starting of the cage just after he had strength permitted him to use, although Sanford (1892) 22 Ont. Rep. 137. there may have been other and better N. W. 756.

utable to a minor of eighteen injured while attempting to fasten a bolt in a knew, through instruction, the dangers moving machine by winding a string of operating the machine. Betz v. Winabout it, although the danger attending ter (1900) 195 Pa. 346, 45 Atl. 1068. the screwing on of a nut would have been much less, where the foreman repaired a similar defect in the former way, and instructed the employee to do likewise. Greenville Oil & Cotton Co. v. Harkey (1899) 20 Tex. Civ. App. 225, 48 S. W. 1005.

An employee of eighteen who retains his hold of a set screw which he is adjusting, after the shaft to which it is attached has begun to revolve, is negligent. Carrierre v. McWilliams (1901) 104 La. 678, 29 So. 333.

of contributory negligence in cleaning rens (1900) 58 S. C. 413, 36 S. E. 661. out the boot of a sand elevator with his though the work might have been done tion was held to be for the jury.

the evidence is that he was unskilled in with a scoop, where there was no danger the use of machinery; that he had been to be apprehended by doing the work in assigned, just before the accident, to the former manner except in case of the the duty of putting corn in the hopper starting of the elevator. Hess v. Ada-

how far the machinery was from the nor of twelve years of age is a question mouth of the spout; that when the spout for the jury, where the evidence is that became choked the plaintiff thrust his he was required to operate an elevator, worked by a rope which he had to reach crushed by the machinery; and that through an aperture in the frame in-the proper way to clear the spout was closing the cage; that, although he had to strike it with some heavy object, but been cautioned not to put his head through this aperture when the cage was ed as to this method. Standard Oil Co. moving, he had not been told about any v. Eiler (1901) 22 Ky. L. Rep. 1641, 61 dangers which were incident to the machine when it was stationary; and that A minor of thirteen is not guilty of the injury resulted from the sudden gauge of a saw in the way in which he put his head through the aperture to had been taught to do it, when that was see what had caused the cage to stop the only method which his size and suddenly between the floors. O'Brien v.

A minor of seventeen who was injured methods of effecting such a change. in attempting to remove a piece of flesh Sprague v. Atlee (1890) 81 Iowa, 1, 46 from a machine in a tannery while it was in operation, when he could have Contributory negligence is not attrib- stopped the machine and removed it without danger, cannot recover if he

A boy over seventeen years old, employed to feed circular saws, is negligent in attempting to clean the machinery without stopping the same, where he has had two years' experience and knows that he is entitled to stop the machinery for the purpose of cleaning it. Larson v. Knapp, S. & Co. Company (1898) 98 Wis. 178, 73 N. W. 992. An intelligent boy of fourteen, who dismounted towards the rear of a steam

roller which was backing, when it was open to him to use the steps at the side, A boy is not, as matter of law, guilty was held negligent in Barksdale v. Lau-

<sup>16</sup> In Thompson v. Wright (1892) 22 hand, precluding recovery for an injury Ont. Rep. 127, the question whether a to his arm resulting from the sudden boy was negligent in using improper starting of the elevator by another, al- materials for cleaning machinery in mo-

349. Conditions or methods of work not under the control of the injured servant.— It is manifest that, where the injured servant was responsible neither for the creation of the conditions which caused the accident, nor for the selection of the methods of work, he cannot be debarred from recovery merely for the reason that those conditions or those methods were not such as a prudent man would have created or selected. But in some, at least, of the cases cited in the note as exemplifying this principle, it seems to be at least an open question whether the servant, having full control of his actions, should not have been deemed culpable simply on the ground that he went into, or failed to retire from, the position in which he was when the accident occurred.

350. Temporary forgetfulness of danger; -contributory negligence negatived on account of.—(Compare §§ 358-361, infra, and § 403, note, 4, § 440, note 14, post.) -- In § 281, ante, it has been shown that, according to what the writer believes to be the correct and logical theory, the mere fact that the servant, owing to his being absorbed in his duties, failed to remember, at the time of the accident, the existence of the abnormal risk which caused his injury, will not preclude the master from relying upon the plea that that risk had previously come to the servant's knowledge, and had therefore been assumed by him. A materially different situation is presented where that fact is considered in regard to its bearing upon the question of how far the servant's close attention to his duties tends to rebut the inference of contributory negligence. In this point of view the effect of the decisions may be summed up as follows: Where the servant failed to

A road master who has no control which is run with the engine behind the directed by another. Alton Paring, cars and without any flagman on the Bldg. & Fire Brick Co. v. Hudson (1897) leading car. Rinard v. Omaha, K. C. & 74 Ill. App. 612, Affirmed in (1898) 176 E. R. Co. (1901) 164 Mo. 270, 64 S. W. Ill. 270, 52 N. E. 256. 124. The fact that a section hand re-302, 5 Pac. 482.

(1889) 40 Fed. 631.

Vol I. M. & S.-57.

A servant operating a steam shovel, over the manner in which a work train who is injured by an earthslide, is not is being operated cannot be held guiny responsible for the dangerous condition of negligence for the mere reason that of the bank excavated, where he had

An instruction that if an employee turns on a hand car from the place of injured by the explosion of a boiler knew work at a later hour than usual does of the danger, it was contributory negnot import contributory negligence where ligence for him to remain in the vicinity he was entirely under the control of his without making efforts to draw the fire foreman as to the hours of labor and the or reduce the pressure, should not be movements of the car. McKune v. Calgiven, where, in connection with his asifornia Southern R. Co. (1885) 66 Cal. sertion that he knew the danger, it was manifest that he was unable to draw the The speed of a switch engine not being under the control of a brakeman, he cannot be charged with negligence for was bound to obey. Lehigh Valley Coal the reason that it was run too fast. Co. v. Kiszel (1897) 25 C. C. A. 566, 51 Lockhart v. Little Rock & M. R. Co. U. S. App. 265, 80 Fed. 470.

take such precautions as were appropriate for the purpose of protecting himself at the moment when the accident occurred, evidence that such failure was due to the fact that his attention was engrossed by his duties is always competent for the purpose of rebutting the inference of contributory negligence which might otherwise be drawn from his conduct; and if such evidence is offered, a court is very seldom justified in declaring him to have been, as a matter of law, wanting in proper care.1

states of fact:

the work. Ferren v. Old Colony R. Co. train and adjust them in it. Ohio & M. (1887) 143 Mass. 197, 9 N. E. 608. It R. Co. v. Wangelin (1892) 43 Ill. App. is not conclusive evidence of contribu- 324. tory negligence that an employee of a railroad, who was injured while coupling cars, did not observe the projecting timber on one of the cars, which caused his injury, while he was in the discharge of another duty and where his attention was directed to that duty until the very moment when it was necessary for him to go between the cars. Northern P. R. Co. v. Everett (1894) 152 U. S. 107, 38 L. ed. 373, 14 Sup. Ct. Rep. 474. Wheth-

The following decisions exemplify the failure of a brakeman to remember that application of this doctrine to various the drawheads on two cars which he was about to couple were so constructed that (a) Injuries on railways.—Whether they would overlap was not negligence, a blacksmith who had worked in the as a matter of law. St. Louis, I. M. & forging shop of a railway for seven S. R. Co. v. Higgins (1890) 53 Ark. 458, years, and at the time of the accident 14 S. W. 653. A brakeman is not, as was complying with a direction to asmatter of law, guilty of negligence in sist in pushing a car along on a track failing to discover that the drawbars near a building which it gradually apontwo cars which he is required to proached, ought to have seen and under-couple are of different heights,—espestood the risk of being caught between cially when, preparatory to making the the car and the building, was held to be coupling, he has to open and shut a question for the jury, on the ground switches, procure a link and pin, and that he was giving his close attention to then overtake the moving portion of the then overtake the moving portion of the train and adjust them in it. Ohio & M.

In an action for injuries received by a brakeman owing to the fact that one of the steps on the ladder at the end of a freight car was missing, which caused him to fall upon the track, it is error not to submit to the jury the question whether, in forgetting, or not recalling, at the precise moment when he undertook to descend the ladder, that the car was the one which he had observed to be defective, he was in the exercise of due er a railroad employee directed to make care, where the evidence is that the aca coupling of cars was negligent in fail-cident took place at night; that the ing to observe, while his attention was weather was extremely cold; that the engrossed in his duties, that stones on snow was falling heavily; and that he one of the cars to be coupled were unhad just left the caboose where he had secured, is a question for the jury. Ausgone to warm himself while the train tin v. Fitchburg R. Co. (1899) 172 Mass. was at a station, and was hastening 484, 52 N. E. 527. A railroad brakeman back to his post after the train had be-484, 52 N. E. 527. A railroad brakeman back to his post after the train had beengaged in coupling cars and necessarily gun to move. Kane v. Northern C. R. devoting his attention to that portion of Co. (1888) 128 U. S. 91, 32 L. ed. 339, the train to which the engine is attached 9 Sup. Ct. Rep. 16. The court said: and which is approaching him is not "In the case before us, the jury may, guilty of negligence in not examining the care behind him, to see whether it evidence that, while the plaintiff was was properly loaded, so as to preclude recovery by him for injuries received the purpose of reaching his post, he was from improper loading. Louisville & N. so blinded or confused by the darkness, R. Co. v. Robinson (1891) 13 Ky. L. snow, and rain, or so affected by the Rep. 153, 16 S. W. 707, 708. On the severe cold, that he failed to observe, in ground that the work required his exclusive attention, it has been held that the

This doctrine may be referred to the general principle that the failure of an employee to perform a duty will not constitute contributory

ing the previous part of the night, he 564. had discovered to be without its full of them was defective in its appointments, it was also his duty to reach his in taking up tickets. Fiero v. New York post at the earliest practicable moment, C. & H. R. R. Co. (1893) 71 Hun, 213, for not only might the safety of the 24 N. Y. Supp. 805. for not only might the safety of the moving train have depended upon the brakemen being at their posts, but the engineer was entitled to know, as the train moved off, by signals from the brakemen, if necessary, that none of the cars constituting the train had become detached. . . . And if his going back from the caboose was characterized by such haste as interfered with a critical examination of the cars as he passed over them, that may, in some measure at least, have been due to the fact that the first notice he had of the necessity of immediately returning to his post, was that the train was moving off."

In one case a doubt was expressed Co. (1871) 106 Mass. 461. whether it would be reasonable to exstantly in their minds an accurate recollection of the precise relation to trains placed alongside of and near to the track. Dorsey v. Phillips & C. Constr. Co. (1877) 42 Wis. 583. In another (where the action was against a stranger), it was laid down that, as railway servants are not bound to keep in mind ton & T. C. R. Co. v. Smith (1899; Tex. the precise position of every structure Civ. App.) 51 S. W. 506. that may be dangerous to them when by a patron of the road over the en-

negligent because, while making a coupnecessarily required his whole attention, ling, he did not see a sliver projecting he was not necessarily chargeable with from the rail. Lake Erie & W. R. Co. negligence, although he knew of the po-

down was the identical one which, dur- v. Mugg (1892) 132 Ind. 168, 31 N. E.

A conductor may recover damages complement of steps. While a proper against the company for injuries caused regard for his own personal safety, and by his stepping, in a dark tunnel, off his duty to his employer, required that the back end of a car negligently left he should bear in mind, while passing unprotected, although he knew there over the cars to his station, that one were but three cars in the train, where he had momentarily forgotten that fact

> Where a switchman is injured through stepping on to an adjacent track and being run over, the question of his contributory negligence is for the jury, which has a right to take into account the fact that he was necessarily engrossed in his duties. Bluedorn v. Missouri P. R. Co. (1891) 108 Mo. 439, 18 S. W. 1103.

> An employee of a contractor at work for a railway company is not culpable in being so engrossed in his work of holding the guy of a derrick that he fails to notice the approach of an engine. Goodfellow v. Boston, H. & E. R.

One who, in the performance of his pect that train hands should retain con- duty in setting a brake on a car, necessarily has his face turned in an opposite direction from that in which other cars of the various objects which might be are approaching, although those cars have once collided with the car upon which he is, and are reasonably certain to do so again, is not required to keep a lookout for his safety inconsistent with the duty he is performing. Hous-

It is not conclusive evidence of a want standing on the tops of cars, a brake- of due care on the part of an employee man was not, as a matter of law, guilty that he stepped into a hole between a of contributory negligence precluding tie and a switch-rod,-even if he had recovery for his death from striking his knowledge of the hole, -while in the dishead against a cross beam, maintained charge of his duty, and while his attention was directed to his work in uncouptrance of a switch track into its ling cars. Hannah v. Connecticut River grounds, 4 or 5 feet above the top of the R. Co. (1891) 154 Mass. 529, 28 N. E. car on which he was standing, although 682. A jury may properly find that an he had been on the grounds before, and open sluice 2 feet wide, and deep, with had had an opportunity to learn of the a single plank across it in the middle of position of the cross beam. McGovern the track, made the place unreasonably v. Standard Oil Co. (1896) 11 App. Div. dangerous to a brakeman whose hands 588, 42 N. Y. Supp. 595.

and eyes were engaged in coupling: and A switchman is not presumed to be that, as the act in which he was engaged negligence, where such failure results from the necessary observance of another duty of equal importance, and equally binding upon him,

and avoid a trench under a track upon track, where he was killed by the car wheel passing over him, was not negligence, as matter of law. Gustafsen v. Washburn & M. Mfg. Cc. (1891) 153 Mass. 468, 27 N. E. 179. The court emphasized the fact that the servant was not employed in digging the ditch, or about anything connected with the ditch, but was employed near it on other work, and proceeded thus: "The more exclusively he attended to his own duty, the other kinds of work done by other employees. Whether he knew of the ditch before he came upon it when he was hauling the car must, under the circumstances, be a question for the jury. it is impossible to say, as matter of law, know of the ditch."

guilty of contributory negligence in failact of making a coupling. Illinois C. R.

sition of the trench. Plank v. New York point, and his attention was not only C. & H. R. R. Co. (1875) 60 N. Y. 607. diverted by the work on hand, but his That a railroad employee did not see line of vision was necessarily above the wires. Indiana, I. & I. R. Co. v. Bundy (1899) 152 Ind. 590, 53 N. E. 175. Failwhich he, with others, was pushing a (1899) 152 Ind. 590, 53 N. E. 175. Failcar, which caused him to fall upon the ure of a track repairer to see detached cars approaching as he steps close to the track from a parallel track to avoid an approaching engine, and having his attention diverted by a companion's effort to get a tool from the track in front of the engine, cannot be held negligence on his part, as a matter of law. Tobey v. Burlington, C. R. & N. R. Co. (1895) 94 Iowa, 256, 33 L. R. A. 496, 62 N. W.

Upon the question whether an engiless he would be likely to know about neer was negligent in looking out for defects in the track, the jury in an action by him for personal injuries may take into consideration the other duties which he was required to perform. Cenbe a question for the jury. tral R. & Bkg. Co. v. Kent (1891) 87 The most formidable argument Ga. 402, 13 S. E. 502. It is a question is that, as it was daylight, and as the for the jury whether the plaintiff, a ditch was visible, and directly across his locomotive engineer, who was injured in path, he would, if he had used due care, a collision with freight cars running on have seen it when hauling the car to- the main track in violation of the rules wards it, and would have avoided it. A of the company, was guilty of contribumajority of the court think that this, tory negligence in failing to look out for too, was a question for the jury. His obstructions, where his train was runattention was necessarily more or less ning on time, when he might have seen directed to his own work, which would the freight cars sooner had he not been naturally require him to lean forward watching the fireman fix the injector. and bend down towards the track: the Hall v. Chicago, B. & N. R. Co. (1891) naturally require him to lean forward watching the fireman fix the injector. and bend down towards the track: the *Hall v. Chicago, B. & N. R. Co.* (1891) car moving constantly forward would 46 Minn. 439, 49 N. W. 239. An engisomewhat impair his freedom of action neer is not, as matter of law, guilty of if he came upon the ditch without knownegligence contributing to injuries reing beforehand that it was there; and ceived by him from the derailing of his engine at an open switch, where he looks that he was careless in putting himself to see that the switch is properly set, in the position he was in, if he did not and receives orders to move down the track, and keeps the best lookout he can A brakeman is not, as matter of law, for switches consistent with his other duties of equal importance, and is ining to notice a cattle guard constructed formed by his fireman that the switch is within the switching limits, while in the all right. Louisville & N. R. Co. v. Hurt (1893) 101 Ala. 34, 13 So. 130. A fire-Co. v. Sanders (1897) 166 Ill. 270, 46 man is not guilty of negligence because, N. E. 799, Affirming (1896) 66 Ill. App. while engaged in the duty of watching 439. The question whether a brakeman an approaching train, he failed to obinjured at night while attempting to serve a mail crane by which he was couple cars, by so falling over uncovered struck. Brown v. New York C. & H. R. signal wires along the track as to catch R. ('o. (1899) 42 App. Div. 548, 59 N. his arm between the deadwoods, assumed Y. Supp. 672, Affirmed in (1901) 166 such danger as an incident of his em- N. Y. 626, 60 N. E. 1107. It is a quesployment, is for the jury where he had tion of fact for the jury whether a firenot been notified, and did not know, man who was killed at night by his head that the wires were not boxed at such striking against a slanting telegraph

pole but 4 inches from the side of the on another track, in failing to notice locomotive, while he was looking to see that the chute so projected, although he if a journal had become heated, was guilty of negligence in not bearing in mind the location of the pole and avoiding it. Benthin v. New York C. & H. R. R. Co. (1897) 24 App. Div. 303, 48 N. Y. Supp. 503. Where water escaped from a locomotive tank owing to the substitution of a wooden plug for the valve stem, and fell onto the iron apron connecting engine and tender, where it froze, creating an icy covering, on which the plaintiff fireman slipped, receiving injuries, and plaintiff had observed the escape of water, but not the icy formation on the apron, it is for the jury to say, in view of the engrossing nature of a fireman's duties, whether, in failing to observe the formation of ice, plaintiff was guilty of contributory negligence. Mason & O. R. Co. v. Yockey (1900) 43 C. C. A. 228, 103 Fed. 265.

A yard clerk riding on a switch engine, whose duties require him to look in another direction, is not, as matter of law, negligent in failing to observe a push car so near the track as to collide with him. Atchison, T. & S. F. R. Co. v. Slattery (1896) 57 Kan. 499, 46 Pac.

941.

A foreman of a switching crew, whose attention is directed to his train, which had been cut loose by a sudden jerk of the engine, and whose back is turned to the "flag shanty," and who is wholly engrossed in the performance of his duties, cannot, as matter of law, be reasonably expected to anticipate danger by leaning out of the gangway of the engine for the purpose of signaling to the brakeman on top of the cars, though he may have been generally familiar with his surroundings. Chicago, R. I. & P. R. Co. v. Cleveland (1900) 92 Ill. App. 308. A locomotive fireman on a freight train was not, as matter of law, guilty of con-tributory negligence in failing to notice or to remember the location between the freight track and a passenger track of a mail crane, the bow of which extended to within 7 inches of the side of the cab, so as to preclude a recovery for his death from his coming in contact with the bow. Brown v. New York C. & H. R. R. Co. (1899) 42 App. Div. 548, 59 N. Y. Supp. 672. It is a question for the jury whether or not a passenger brake- Co. (1900) 111 Iowa, 347, 82 N. W. 903. man was guilty of contributory neglifrom the car, came in contact with a car negligence in failing to observe it on

stepped over it in entering the car, where it was night, the car was not brilliantly lighted, express matter was piled about ready to be unloaded, his attention was directed to his duties, and it was the first time the chute had been placed in that position. American Exp. Co. v. Risley (1899) 179 Ill. 295, 53 N. E. 558, Affirming (1898) 77 Ill. App. 476.

(b) Injuries in other occupations.— Where plaintiff was injured while removing shavings from beneath a planer which had become clogged by reason of the defective blower which was intended to carry the shavings away, evidence that plaintiff was required to hold up the boards passing through the planer, so as to let them run over a pile behind it, was competent, as showing how completely plaintiff was engaged, and was therefore relevant to the question whether he was exercising due care, or was negligent in not noticing the condition of the shavings, and the manner in which the machine was becoming clogged, sooner than he did. Bennett v. Warren (1901) 70 N. H. 564, 49 Atl. 105.

A helper in a boiler shop, injured by having a heavy crane used for moving machinery run against him without any warning or precaution being taken for his protection, while he was in a dangerous position under the foreman's orders, performing a service never before performed by him, was not guilty of contributory negligence because he did not keep a lookout for his own safety, where, when he first assumed the position, the fire in the engine was out and the crane stationary, and the service was such as to engross his attention.
Michael v. Roanoke Mach. Works (1894) attention. 90 Va. 492, 19 S. E. 261.

A servant whose attention is distracted by the necessity of attending to a truck loaded with merchandise which is being hoisted on a freight elevator is not, as matter of law, negligent in failing to observe a girder which projected into the shaft so far as to be dangerously close to the platform of the elevator, where the shaft is so dark that the dangerous object could not readily be ascertained. Olson v. Hanford Produce

It cannot be held, as a matter of law, gence precluding recovery for injuries that a school teacher who, three weeks from being struck by a chute used to before she suffered injury by stepping transfer baggage from one train to an- into a hole in the floor of one of the other, as one end, which was projecting rooms, had seen the hole, was guilty of

the neglected duty in this instance being that of keeping a vigilant lookout.2 See § 332, supra.

Or possibly the rationale of the doctrine may be said to be that a person whose faculties of observation or memory are temporarily suspended in regard to certain dangerous conditions is virtually in the same mental position as a person who has never acquired a knowledge of those conditions, and that, under the supposed circumstances, this suspension is not culpable.

Whenever the facts in evidence are such that the servant's temporary forgetfulness of the conditions may possibly be an excuse for conduct which would otherwise be culpable, the jury should receive appropriate instructions upon the subject.3

351. Limits of this doctrine.-To justify applying, for the servant's benefit, the doctrine stated in the last section, it must appear from the evidence that the circumstances were either such as to create a situation approaching to or constituting an emergency, or such as to exhibit the servant in the light of a person who was discharging a duty which demanded an unusual amount of attention. of allowing it to operate in cases where he was merely discharging, under normal conditions, some ordinary function incident to his

the occasion of the accident, the facts <sup>2</sup> See Louisville & N. R. Co. v. Hurt upon which the decision was based being (1893) 101 Ala. 34, 13 So. 130. that, as she had been engaged during the intervening period in another room, that, if the service was of such a nature the intervening period in another room, that, if the service was of such a nature it might properly have been found that as to require the exclusive attention of she was entitled to act on the assumpthe servant to be fixed upon it, and that tion that it had been repaired; that, he should act with rapidity and promptowing to her thoughts and eyes being ness, the law does not require that he taken up with her pupils, she failed to should always bear in mind the nature, notice that the hole was still unre-kind, and character of the appliances to

to the washstand in the toilet room of next section, note 1). a factory, but forgot one of them when she turned to come away a few minutes emergencies where exclusive attention, later, and stepped into it, it was held rapidity, and promptness are demanded a factory, but forgot one of them when on the ground of contributory neglicall to mind previous information or gence. Scriver v. Lowe (1900) 32 Ont. knowledge which, if remembered at the Rep. 290. This case seems rather inconsistent with those cited in the following avoid the danger from which injuries section, and is probably an illustration resulted, will not, as matter of law, conof the difference of opinion regarding stitute such negligence on his part as the respective provinces of courts and will bar a recovery. St. Louis, I. M. juries which is disclosed by a compari- & S. R. Co. v. Higgins (1890) 53 Ark. son of the American with the English 458, 14 S. W. 653 (for facts see note 1, and colonial decisions. See § 330, supra. supra).

<sup>8</sup> It is proper to instruct the jury paired; and that, on the day of the ac- be handled, or be prepared at all times cident, the cover of a book, not unlike to avoid the danger incident to handling the floor in color, had been laid over it. them. Greenleaf v. Dubuque & S. C. R. Bassett v. Fish (1878) 75 N. Y. 303 Co. (1871) 33 Iowa, 58 (brakeman (hole in floor seen three weeks before). struck by waterspout projecting over (hole in floor seen three weeks before). struck by waterspout projecting over Where a female employee had noticed the track); Martin v. California C. R. two holes in the floor while on her way Co. (1892) 94 Cal. 326, 29 Pac. 645 (see

that a nonsuit should not be directed of an employee, the fact that he fails to

employment, would manifestly be to render the defense of contributory negligence little more than a merely nominal protection to the master.1

The mere fact that an employee was required to do hurriedly what he was doing when he was injured will not absolve him from blame,

railway servant walking alongside the getting on a moving train, from striking track in the performance of his usual against a mail crane beside the track, duties in connection with the moving of not shown to be dangerous to employees the cars. An experienced switchman was accordingly held to have been guilty when he testifies that he would not have of contributory negligence where he was been hurt had he thought of the crane. Walking on a track or between the Wolf v. East Tennessee, V. & G. R. Co. tracks, toward a switch standard which he was about to move and, when he A boy fifteen years of age employed. he was about to move, and, when he A boy fifteen years of age, employed reached the standard, was struck by the as a "helper" in a carding room, who, projecting side of the rear car of a after being warned to keep his sleeves

Recovery cannot be had for the death Minn. 52, 58 N. W. 832. of a railroad employee while walking between the rails in violation of a printed order of the company, of which he has a copy, where he was familiar with the place, knew that switching was then being done on the track or that then being done on the track or that machine, is guilty of contributory negthe engine was approaching, where his mind was occupied with something else, as, reading a paper. Chicago, B. & Q. R. cn-Ware Co. (1899) 119 Mich. 331, 78 Co. v. Maney (1894) 55 Ill. App. 588. N. W. 127.

The mere fact that a conductor was varieting a brakeman throwing a switch facture of salt, in which there are two of a railroad employee while walking Supp. 330.

couplings, alleged to be dangerous when same. Foster v. Kansas Salt Co. (1899) used in combination, the action was held 60 Kan. 859, Appx., 57 Pac. 961 (the not to be maintainable for the reason excuse urged was that the steam bewilthat there was no sudden danger or dered the servant). emergency to distract the servant's at-

<sup>1</sup> An excusable diversion of attention did not object thereto, can recover from cannot be predicated in the case of a a railroad company for injuries, while

projecting side of the rear car of a after being warned to keep his sleeves train backing at the rate of 4 miles an rolled up in order to avoid having them hour, with the bell ringing and an outlook stationed at the end of the rear car, gards the caution and in a moment of who, observing the switchman, and believing that he saw the train, which was sleeve unrolled, in a place where there in view for 142 feet before reaching the is no occasion for his being, by which it standard, did not give him any special is caught and drawn between the rollers, warning. Cincinnati, I. St. L. & C. R. is guilty of such contributory negligence Co. v. Long (1887) 112 Ind. 166, 13 N. as will prevent a recovery. Truntle v. North Star Woolen-Mill Co. (1894) 57

A servant who, with knowledge of a

The mere fact that a conductor was witch a conductor was no excuse for his having failed to notice the approach of a train which with a runway 16 feet wide between struck him, inasmuch as the duty to be performed by the brakeman was simple, and the brakeman presumably comple, and the brakeman presumably competent. Redmond v. Rome, W. & O. R. prevent a recovery for his death from Co. (1890) 31 N. Y. S. R. 366, 10 N. Y. scalding, where he was injured in another pan than that from which he was other pan than that from which he was In Martin v. California C. R. Co. raking salt, and in order to get into it (1892) 94 Cal. 326, 29 Pac. 645, where must have stepped upon the drip board the servant was injured by dissimilar and passed over salt which was on the

A fireman upon a tug, who unthinkingly and carelessly steps within the Neither a minor employee nor his loose coils of a line as it is thrown to father, who knew of his employment and a boat, is guilty of contributory negliwhere he was permitted to do the act in his own way, and it was daylight at the time.2

It has been intimated that the boundary line between the cases in which the servant's absorption in his duties is an excuse for his temporary forgetfulness of a danger and the cases in which that absorption is not an excuse may sometimes be drawn with reference to the character of the instrumentality involved.<sup>3</sup> But the distinction thus suggested seems to rest on no sufficient logical basis.

The servant is manifestly not entitled to go to the jury on the ground that he temporarily forgot the existence of a danger, where that danger would not have been encountered if he had not committed an antecedent breach of duty.4

352. Compliance with a rule.—Since a rule constitutes a deliberate and formal statement of what the master himself conceives to be the

765.

In Virginia it has been held that a brakeman who knew of the location and dangerous character of an overhanging bridge, the stringers of which were but 28½ inches above the top of the front car, was, as a matter of law, guilty of contributory negligence precluding recovery for his death from striking his head against a stringer, notwithstanding that the engineer had just given a whistle for brakes. Haffner v. Chesapeake & O. R. Co. (1898) 96 Va. 528, 31 S. E. 899, First Appeal (1894) 90 Va. 621, 19 S. E. 166.

Other cases which involve a similar situation, and which impliedly propound a similar doctrine, are noticed in § 30a,

In Chicago & N. W. R. Co. v. Donahue (1874) 75 Ill. 106, where a switchman, while engaged in controlling the movements of a train in a yard, stepped on one of the tracks and was struck by another train, the court said: "Whether plaintiff in this case observed due care for his personal safety is one of the controverted facts. According to his own testimony it was not necessary, in the performance of his duty, that he should step upon the track where he received his injury. There was room enough elsewhere. It is urged in his behalf his mind was so absorbed he did not notice he was stepping into danger. had begun to move, although he had That is no valid excuse. He was in a tried unsuccessfully to remove the pin place where danger was imminent, and before they started, fell into an uncovit was his duty to keep a constant watch ered cattle guard. for his personal safety. It will avail

gence. The Ida B. Cothell (1894) 10 him nothing that he was not thinking C. C. A. 634, 23 U. S. App. 395, 62 Fed. of danger. He was in a position that, if he omitted any reasonable care for his security, it was at his peril. There was safe ground upon which he could stand and he ought to have occupied it."

<sup>2</sup> Watts v. Boston Tow Boat Co. (1894) 161 Mass. 378, 37 N. E. 197.

An oiler of the cars and repairer of the trucks of a street cable railway, who, after oiling the sheave wheels bearing the cable, leaves the manhole open upon being roughly called by the superintendent, and runs into the power house and returns with an oil can to place on a car which he has not before supplied therewith because he is a little late and hurried, and steps off the car into the manhole and is crushed to death, is guilty of contributory negligence. Brennan v. Front Street Cable R. Co. (1894) 8 Wash. 363, 36 Pac. 272.

<sup>3</sup> In Brown v. New York C. & H. R. R. Co. (1899) 42 App. Div. 548, 59 N. Y. Supp. 672, the court seems to have been of the opinion that a fireman was bound at his peril to remember the location of a bridge or station house, as a contrast is drawn between such structures and a mail crane, which it was held that he might forget without being necessarily in fault.

<sup>4</sup> See Sedgwick v. Illinois C. R. Co. (1888) 76 Iowa, 340, 41 N. W. 35, where a brakeman who undertook, in violation of a rule, to uncouple cars after they

preferable course of action under the circumstances to which it is applicable, there seem to be good grounds for adopting the theory that, by promulgating it, he impliedly declares, or estops himself from denying, that a servant who obeys it shall be deemed to have fully discharged his contractual duty in the premises, whatever might be the inference drawn as to the quality of his conduct if there had been no such rule. This theory, although not explicitly put forward in the terms here suggested, may fairly be said to represent the doctrine applied in the few cases bearing upon the subject.1 It is obvious, however, that this doctrine can only be applied with propriety when the rule in question was one which prescribed a specific course of action in respect to a specific conjuncture, and is not necessarily a protection to a servant who, in endeavoring to comply with a general rule which has no direct relation to any particular hazard, runs into imminent danger, and imperils his own safety as well as that of other persons.2

353. Conformity to a customary practice.—A circumstance frequently adverted to as one which tends to negative the inference that the servant was guilty of contributory negligence is that the course of action which he was pursuing at the time the injury was received was the one customarily followed by himself or his coemployees under similar circumstances, with the approval or tacit acquiescence of the master or his representative. How far this circumstance is actually a differentiating factor, serving to fix the line of demarcation between evidence which does and which does not warrant a court in saying, as a matter of law, that the action is not maintainable, is a question to

¹A brakeman who, while walking along the tops of rapidly moving cars, was thrown to the ground through the separation of two of them, while he was tepping from one to the other, cannot be held negligent, as matter of law where his action is shown to have been done in compliance with his duties as prescribed by the rules and usages of the company. Louisville, E. & St. L.

\*\*Consol. R. Co. v. Utz (1892) 133 Ind. 265, 32 N. E. 881.

The fact that a rule permitted brakemen to go between cars moving at a safe rate of speed was tacitly assumed in one case to exclude the inference of negligence as regards a brakeman who was injured under the circumstances where his action is shown to have been contemplated by the rule. Hollenbeck on templated by the rule. Hollenbeck of the company. Louisville, E. & St. L.

2 Such is possibly the rationale of the decision that an engineer is not only at liberty, but is required, when running over a road during or immediately after.

The fact that a servant injured while coupling cars, the couplings of which were not properly matched, was complying strictly with a rule framed with regard to a contingency of that description, was treated as an element tending to negative fault on his part, in Southern P. Co. v. Burke (1893) 9 C. C. A. 229, 13 U. S. App. 110, 23 U. S. App. 1, 60 Fed. 704.

which the cases supply no definite answer. The only doctrine which it seems possible to formulate upon the subject is the somewhat vague one, that unless what the servant did was necessarily and inevitably so dangerous that it is impossible to concede that any prudent man would have acted in such a manner, evidence showing that he complied with a custom, known to and expressly or impliedly sanctioned by his employer, will generally turn the scale in his favor, and secure for him the privilege of having the quality of his conduct determined by the jury, although he would otherwise have been declared incapable of recovering. The reasons for not inferring negligence, as a matter of law, under such circumstances, are, of course, stronger if it appears that the practice in question was pursued not only by the coservants of the injured person, but also by servants in other concerns of the same kind as that carried on by his employer.2

In order that this doctrine may inure to the plaintiff's advantage, it is not enough to show that other servants were in the habit of doing

¹ In a case where a brakeman was in-jured by striking against the eaves of a on the pilot, defendant would not be liaagainst a car standing on a side track, while he was standing on a ladder on the side of a moving car, and signaling to other train hands, may adduce evidence that it was customary to cut moving trains at that particular sta-Pennsylvania Co. v. McCormack (1891) 131 Ind. 250, 30 N. E. 27. Where a conductor of a freight train was injured while pouring water into a hot box,—he having descended a ladder on the side of a moving freight car for that purpose, and being injured by the breaking of the hand-hold, or by being struck by a cattle guard too near the track,that in like circumstances conductors Co. v. Fields (1894) 138 Ind. 58, 36 N. E. frequently went down ladders of cars to look after the running apparatus. San Antonio & A. P. R. Co. v. Engelhorn (1900) 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68.

An instruction that if plaintiff, injured while riding on the pilot of an engine, could have ridden on the steps of the engine with more safety, but for

section house, as he was descending a ble, unless its negligence increased the side ladder on a moving train, for the danger assumed, is properly refused, purpose of opening a switch, evidence where the evidence shows that the pilot that it was the general custom of brake-men on the road to do this is competent. for a brakeman while making a pilot-Flanders v. Chicago, St. P. M. & O. R. bar coupling, which plaintiff was doing Co. (1892) 51 Minn. 193, 53 N. W. 544. at the time. San Antonio & A. P. R. A brakeman injured by being carried Co. v. Beam (1899; Tex. Civ. App.) 50 at the time. San Antonio & A. P. R. Co. v. Beam (1899; Tex. Civ. App.) 50 S. W. 411.

See also Burnside v. Novelty Mfg. Co. (1899) 121 Mich. 115, 79 N. W. 1108 (here the method adopted was one which the servant had been directed by the foreman to follow); and the cases cited

in the following notes.

The absence of evidence that the servant's act was not a customary one is sometimes mentioned as a corroborative reason for declining to hold the servant to be negligent in cases where the quality of his act would otherwise be for the jury, for the reason that no proof had been offered that the course pursued evidence was held admissible to show was a dangerous one. Heltonville Mfq. 529, where a servant in a sawmill, who allowed a saw to remain in motion when not in use, and held back by a rope, was injured by its falling forward when the rope broke.

<sup>2</sup> Florida C. & P. R. Co. v. Mooney (1898) 40 Fla. 17, 24 So. 148 (flying switch).

acts similar to that which caused the injury,—it must also appear that this habit was known to the employer or his agents.<sup>3</sup>

The cases illustrating this doctrine will be collected under headings which correspond to those used in the sections in which cases of a similar type, but not involving this element, have already been discussed. See also § 363, infra.

(1) Taking a position on a railway car which is dangerous with relation to objects beside the track.<sup>4</sup> Compare § 334, subd. 5, supra.

a moving engine).

on the car, with his feet and legs hanging over its side, did not constitute such contributory negligence as would pre-clude him from recovery; the evidence being that it was a common thing for section hands to ride upon the cars in that manner, and not necessarily dangerous to do so, and that the injury was not inflicted by his foot coming in contact with a stationary object near the track. *Illinois C. R. Co.* v. *Clark* (1900) 21 Ky. L. Rep. 1549, 55 S. W.

A yard brakeman is not, as matter of law, guilty of contributory negligence in riding at one end of a car with one foot on the bumper and another in the iron stirrup at the side of the car, and is not, on this ground, debarred from recovering damages where the car is derailed owing to a defect in the track, and crushes him against a pile of lumber. Pennsylvania R. Co. v. Zink (1889) 126 Pa. 288, 17 Atl. 614.

Whether a brakeman sitting on top of a freight car, with his feet over the side, was guilty of contributory negligence precluding recovery for his death caused by being knocked from the train by a mail bag suspended from a "mail crane" is a question for the jury, where the mail bag hung about 8 inches nearer the track than required by the government, and there was evidence that a brakeman's duties require him to be on top of the cars, and that on long runs it is impracticable for them to stand up all the time, and it is customary for them to sit on the side of the car. Louisville & N. R. Co. v. Milliken (1899) 21 Ky. L. Rep. 489, 51 S. W. 796.

ployees of a railroad company employed had nothing to do with the kicking in of upon gravel trains to ride where they the car by which he was struck. Louis-

<sup>3</sup> Colf v. Chicago, St. P. M. & O. R. pleased,—in the caboose, or upon the Co. (1894) 87 Wis. 273, 58 N. W. 408 flat cars,—and such custom was known (a case where a trainhand jumped from to the company, and was not objected to "The fact that plaintiff was sitting not contributory negligence, as matter of law. Taylor, B. & H. R. Co. v. Taylor (1890) 79 Tex. 104, 14 S. W. 918. The ontributory negligence as would preduce him from recovery; the evidence trudes his person beyond the outer surface of a car is guilty of negligence which will prevent his recovering for injuries caused by a dangerous object close to the track is not applicable to a trainman. As contrivances are provided on the cars for the express purpose of enabling such an employee to ascend and descend over their sides, and it is often necessary for him to do this in the course of his ordinary duties, as well as to lean out when giving or receiving sig-nals, it will not be declared, as a matter of law, that he was negligent in ex-tending his person beyond a car, even when, under the immediate circum-stances, it was not necessary for him to do so in the discharge of his duties, unless he knew of obstructions or had reason to believe there were obstructions which injected an element of danger beyond the ordinary into the situation.

Kansas City, M. & B. R. Co. v. Burton
(1893) 97 Ala. 240, 12 So. 88.

A brakeman is not guilty of contribu-tory negligence in riding on the ladder on the side of a freight car to a point where his services are required. Martin v. Louisville & N. R. Co. (1894) 16 Ky. L. Rep. 150, 26 S. W. 801.

A brakeman injured by being struck by a car standing on a side track in dangerously close proximity to the track upon which he was riding on the ladder of the rear car after making a coupling was not guilty of contributory negligence in riding in that position, where that was the usual and customary mode When it was the custom of the em- of riding after making couplings, and he

(2) Taking a position on a railway car or engine which is dangerous with relation to the movements of such engine or car. 5 Compare § 334, subd. (6), supra.

brakeman, while he was on a side lad-denly starting without any bell signal, had begun to descend the ladder some time before the switch which he was tiff. Union P. R. Co. v. Geary (1893) about to open when the train stopped 53 N. W. 544.

A fireman who is directed by the engineer to look at a hot box is not negligent in leaning out of the gangway instead of the cab window. Such a position, though unusual, is one which the company, in erecting structures near the track, are bound to anticipate that employees will occasionally assume. Central Trust Co. v. East Tennessee, V. & & . K. Co. (1895) 73 Fed. 661, Distinguishing East Tennessee, V. & G. R. Co. v. Head (1893) 92 Ga. 723, 18 S. E. 976, where the servant unnecessarily assumed a dangerous position.

The mere fact that a switchman had seen and handled a switch negligently maintained by the railway company so close to the track that when an arrow 17 inches long on the switch is turned towards the track the point is only 9 inches from the side of a freight car, does not, as matter of law, make him guilty of contributory negligence in riding on a ladder on the side of a car while performing his duties, when the arrow is turned. Southern Kansas R. Co. v. Michaels (1896) 57 Kan. 474, 46 Pac. 938.

The fact that a brakeman, in going to take his place at the brakes, climbed out of a caboose window which was so close to the end of the car as to be dangerous, does not necessarily prove negligence, where the evidence is that the usual way to his post was through that window. Louisville, N. A. & C. R. Co. v. Hobbs (1891) 3 Ind. App. 445, 29 N. E. 934.

In an action against a railway company for the death of plaintiff's intestom of employees to ride on cars loaded naturally infer from such evidence that

ville & N. R. Co. v. Earl (1893) 94 Ky. with ties, that he was killed by being 368, 22 S. W. 607. In a case where a thrown from the car by the train sudder, came into collision with the eaves and that he was seen by the foreman of a section house, it was held that he and conductor before the latter signaled was not necessarily negligent because he the engineer to start the train,—is sufficient to sustain a judgment for plain-52 Kan. 308, 34 Pac. 887. The theory was reached. Flanders v. Chicago, St. relied on by the court was that, for P. M. & O. R. Co. (1892) 51 Minn. 193, aught that appeared, the deceased, who had been told that there was a car of ties to be unloaded, supposed that his proper place was on the car where the ties were.

<sup>5</sup> A switchman is not guilty of contributory negligence in riding on the footboard in front of the head-bar of an engine, which he accompanies in the course of his duty. Lockhart v. Little Rock & M. R. Co. (1889) 40 Fed. 631. Whether a switchman who stood upon the footboard of an engine which was pushing cars, so as to uncouple it at the proper time, was guilty of negli-gence, is a question for the jury, where he was injured when the cars ahead ran over an open switch and collided with others left upon a side track. Chicago & A. R. Co. v. Harrington (1898) 77 Ill. App. 499. Evidence of a long-standing custom to step on the footboard of slowly moving switch engines (here the rate was 3 to 4 miles an hour) pre-cludes the inference that it is negligent, as matter of law, for a brakeman or switchman to do this. O'Mellia v. Kansas City, St. J. & C. B. R. Co. (1893) 115 Mo. 205, 21 S. W. 503 (switchman injured by slipping off the board).

A freight brakeman is not, as matter of law, guilty of contributory negligence in going upon the pilot of a moving locomotive to couple a car thereto, where that is the usual manner of making such coupling. Eddy v. Bodkin (1894; Tex. Civ. App.) 28 S. W. 54.

In Missouri P. R. Co. v. McCally (1889) 41 Kan. 639, 21 Pac. 574, the court discussed the right of recovery on the assumption that it was competent pany for the death of plaintiff's intesto introduce evidence to the effect that tate, evidence that deceased was a seca brakeman had followed the usual custionman engaged in repairing the rail- tom of employees of the company when way track, that he was standing on a he rode on the pilot of a freight engine car loaded with ties in a train having while he was helping to switch cars in a caboose attached, that it is the cus- a yard. The jury, it was said, could

- (3) Taking a dangerous position near railway tracks. 6 Compare § 334, subds. (1), (2), supra.
  - (4) Taking a dangerous route. Compare § 335, subd. (5), *supra*.
- (5) Coupling cars in motion.8 Compare § 334, subd. (9), § 338, subd. (3), supra.

such an act was a necessity, arising from while in slow motion, and using a stone the structure of the engines used in as he walks along to loosen the pin, switching; that the company had sanc- where such act is not necessarily dantioned the practice; and that the brake- gerous and there is a custom of unman had only done what he had seen coupling cars in such manner. Curtis habitually done by other employees engaged in the same kind of duty.

In an action for injuries received by a brakeman who, while stepping from guilty of contributory negligence in atone car to another, was thrown between them as a result of the engineer's suddenly putting on steam, evidence is admissible to show that, where a train was slackening speed as it approached a siding, it was customary for brakemen, after they had set the brakes, to walk forward to the engine and dismount therefrom, in order to be as near as possible to the switch which was to be thrown. Whitsett v. Chicago, R. I. & P. R. Co. (1885) 67 Iowa, 150, 25 N.

W. 104.

6 An employee of a coal company who goes between a coal chute and a car which is being filled, to clear a clog in the chute, which method is customary for workmen to adopt, is not guilty of such negligence as will prevent a recovery for an injury caused by bumping another car against the one which is being loaded, without warning the employee. Wenona Coal Co. v. Holmquist (1893) 51 Ill. App. 507.

<sup>7</sup> A servant who steps onto the conveyor in an ice house and is caught by the endless chain which works in it is not negligent, as matter of law, if there is evidence that it was customary for the workmen to cross the conveyor by stepping onto it. Whitney v. Queen City Ice Co. (1900) 49 App. Div. 485, 63 N. Y. Supp. 535.

An instruction to the effect that a spinner in a manufacturing establishment is not guilty of contributory negligence in passing to the rear of the machine on which she is working to assist essary to open both jaws to make a the minder, where it is customary for "sure" coupling and that was the usual have to be stopped unless they did so, is Munch v. Great Northern R. Co. (1898) not erroneous. Colliott v. American 75 Minn. 61, 77 N. W. 541. Mfg. Co. (1897) 71 Mo. App. 163. The question in an action

going between cars to uncouple them whether it had not been a uniform cus-

v. Chicago & N. W. R. Co. (1897) 95 Wis. 460, 70 N. W. 665.

A switchman is not, as matter of law, tempting to uncouple cars while they are slowly moving, where such practice has long been carried on with the knowledge and approval of the company. Hennesey v. Chicago & N. W. R. Co. (1898) 99 Wis. 109, 74 N. W. 554.

Evidence of a custom of long standing for brakemen and switchmen to walk ahead of slowly moving cars when adjusting couplings is admissible upon the question of contributory negligence of a switchman in so doing. Rifley v. Minneapolis & St. L. R. Co. (1898) 72 Minn. 469, 75 N. W. 704.

Compliance with custom is an element tending to negative fault in a case where the injury was caused by attempting to couple moving cars. Illinois C. R. Co. v. Cozby (1898) 174 Ill. 109, 50 N. E. 1011, Affirming (1896) 69 Ill. App. 256.

A railroad brakeman is not, as matter of law, guilty of such contributory negligence as will preclude a recovery for injuries sustained while coupling cars equipped with a "standard coupler, because he stepped in front of a slowly moving car 5 or 6 feet distant from the stationary car, to open a movable jaw of the coupling, and was caught between the cars while pushing the jaw back into place, upon discovering that the pin which secured it was broken, which rendered it liable to fall to the ground, although the jaw of the coupling on the stationary car was open, and couplings could ordinarily be made with but one jaw open, where it was sometimes necspinners to do so and the machine would manner in which they were made.

The question in an action against a A switchman is not, as matter of railroad company for personal injuries law, guilty of contributory negligence in to a helper in a switching crew, as to

(6) Using appliances for a purpose for which they were not de-

signed.9 Compare § 342, supra.

The complement of the doctrine thus illustrated is that the existence of a custom to do acts like the one in question is not a protection to a servant who complied with it, where the practice sanctioned by the custom cannot reasonably be regarded as a safe one.10 That is to say, the responsibility of a servant for his own injury cannot be determined by considering whether other employees of the road, similarly situated, engaged in negligent practices, even with the knowledge

tom for many years of all helpers in it negligently, so as to contribute to switching crews in the yard where the the injury received, is erroneous. Bodie accident occurred, after going between v. Charleston & W. C. R. Co. (1901) cars to couple them, to come out again immediately if they failed to make the coupling the first time, and look for (1891) 94 Ala. 277, 14 L. R. A. 552, 10 coming cars, should be submitted to the So. 276, the following language was used in the request of defendant where so, 276, the following language was used jury at the request of defendant, where there is evidence of such a custom and of facts applicable to the question of plaintiff's contributory negligence, and negligence by the foreman of the switching crew. Andrews v. Chicago, M. & St. P. R. Co. (1897) 96 Wis. 348, 71 N. W.

One of the grounds on which a court has declined to rule that a servant was negligent in attempting to mount a moving car by putting his foot into the jawstrap underneath it was that there was in this way, yet it has never been supevidence that this method was customary. Coates v. Boston & M. R. Co. (1891) 153 Mass. 297, 10 L. R. A. 769, 26 N. E. 864.

A servant is not, as a matter of law, guilty of contributory negligence in riding upon a freight elevator operated by and it was customary, if not necessary, for employees to ride on the elevator with the freight. Stomne v. Hanford Produce Co. (1899) 108 Iowa, 137, 78

N. W. 841.

"The doing of a dangerous and need-

to him in the usual and customary man- 432. ner, he could not be charged with doing

by the court: "The fact that one is in the habit of doing an obviously dangerous thing does not make his act any the less a dangerous one. The fact that many or all of a limited class of persons customarily ride upon the pilot of an engine does not alter the characteristic of obvious peril which the law imputes to that position. It is negligence per se for persons to walk upon the track of railroads. Doubtless many persons are in the habit of using the track posed, and it cannot be the law, that such custom would convert the track, which the law declares to be per se a dangerous place, into a safe place. . . . Custom and usage may be relied on to excuse the violation of a rule, when the act involved is not negligent itself, but only by relation to the rule a cable which he knew was worn, alitself, but only by relation to the rule though there was another elevator which violated; and so, when an act may be he might have used, and there was a done in two or more ways, a resort to stairway which afforded him access to neither of which involves such obvious the upper floors, where he was informed peril as raises the legal presumption or by the superintendent that the cable was conclusion of negligence in the doing safe enough for the rest of the season, of it, a custom or usage to do it in a particular way may be looked to as tending to show that it was not negligence to resort to that method in the instance under consideration. But custom can in no case impart the qualities of due care and prudence to an act which less act by any number of persons, any involves obvious peril, which is volunnumber of times, cannot make the act tarily and unnecessarily done, and which right." Chicago, R. I. & P. R. Co. v. the law itself declares to be negligent." Clark (1883) 108 Ill. 113. This statement of principles was re-An unqualified instruction that if peated in Andrews v. Birmingham Minplaintiff employee did the work assigned eral R. Co. (1892) 99 Ala. 438, 12 So.

of the employer himself. 11 Considered with reference to the facts involved, some of the cases illustrating this phase of the subject seem to be scarcely reconcilable with several of a similar type in which the servant has been allowed to recover. 12

Of course the mere fact that a breach of statute was customary, and that the custom was approved and sanctioned by the master, will not repel the inference of contributory negligence which that breach requires.13

354. Course of conduct selected by the servant, with reference to the presumption that the plant was not defective.—(Compare § 440, subd. b, post.)—It is a general principle of jurisprudence that "every person pursuing his lawful affairs in a lawful way has a right to assume,

61 Kan. 447, 59 Pac. 1075 (approving pushing two cars, which collided with exclusion of evidence that the servant others, evidence of a usage of switchmen had made a coupling in the ordinary to occupy that position is inadmissible. manner); Andrews v. Birmingham Min-Chicago & A. R. Co. v. Harrington eral R. Co. (1892) 99 Ala. 438, 12 So. (1898) 77 Ill. App. 499. 432 (similar decision, where the plain-tiff offered to prove by his own testi-ling and uncoupling cars is inadmissible mony that it was the custom and practure on defendant's road and on other adopted by the servant was negligent. well-regulated railroads, for brakemen, Chicago, R. I. & P. R. Co. v. Clark when doing switch work in the yard (1883) 108 Ill. 113; Henderson v. Coons limits, to stand and ride upon the pilot (1888) 31 Ill. App. 75 (holding that of the engine, and to jump off the pilot custom was no excuse for attempting to to do switching before the engine came ever \$ 364 subd 9 infra. to a full stop).

<sup>12</sup> A brakeman who attempts to pull a coupling pin out of a drawhead while ing to board a train while it is running he is standing on the deadwood of a 10 or 12 miles an hour is negligence. moving car is deemed to be negligent, Dowell v. Vicksburg & M. R. Co. (1884) moving car is deemed to be negligent, pour v., solution v., although he and his coemployees have been accustomed to do this. Kroy v. The custom of other switchmen will not excuse a switchman for going between the pilot of an engine and a box

which is running 15 miles an hour, George v. Mobile & O. R. Co. (1896) 109 though apparently not only dangerous Ala. 245, 19 So. 784.

It is proper to reject evidence to the effect that, in jumping off a moving ing, if, in the experience of railroad train without looking to see where he men, it is actually safe, and the injury would alight, the plaintiff, a brakeman, resulted solely from the fault of the encircular in managing the engine. Reply v. gineer in managing the engine. Rebb v. East Tennessee, V. & G. R. Co. (1891)
87 Ga. 631, 13 S. E. 566.
The fact that switchmen are in the

In an action for injuries received by Coal & Min. Co. v. Floyd, 25 L. R. A. a switchman who was riding on the foot- 848, 38 N. E. 610.

"Carrier v. Union P. R. Co. (1900) board of a switch engine while it was

ever, § 364, subd. 9, infra.

Whether it was customary or not, try-

Attempting to couple cars while car to uncouple them, while they were standing on the footboard of a tender moving at the rate of a rapid walk.

by employees of the same class under similar circumstances. Thompson v.

87 Ga. 631, 13 S. E. 566.

The fact that switchmen are in the habit of riding on the cowcatchers of engines is no excuse for taking that position. Glover v. Scotten (1890) 82 386; Coal & Min. Co. v. Clay (1894) Mich. 369, 46 N. W. 936.

In an action for injuries received.

and act upon the assumption, that every other person will do the same thing."1

As applied to the relation of master and servant, this principle involves the corollary that the servant, except in so far as he is chargeable with knowledge, actual or constructive, of some specific breach of duty on the master's part, is entitled to act on the presumption that the various instrumentalities and materials by which his safety may be affected are in such a condition that he will not encounter any abnormal dangers in the course of his employment.<sup>2</sup>

2 "In determining whether plaintiff exhibited ordinary care in the situation in which he is found in the case before us, we should, with the other facts, consider the exigency of his duty as a of knowledge or notice to the contrary) that the master's personal obligation, in respect to the machinery before him, had been met." Blanton v. Dold (1891) 109 Mo. 75, 76, 18 S. W. 1149.

"The degrees of care in the use of a place in which work is to be done, or in the use of other instrumentalities for its performance, required of the master and servant in a particular case, may be, and generally are, widely different. Each is required to exercise that degree of care in the performance of his duty which a reasonably prudent person would use under like circumstances; but the circumstances in which the master is placed are generally so widely differand the primary duty of using care to furnish a reasonably safe place for others is so much higher than the duty of the servant to use reasonable care to protect himself in a case where the

<sup>1</sup> Jetter v. New York & H. R. Co. inspection of such a place as a room in (1865) 2 Keyes, 154. "In general, it a mine that is not, in the first instance, is not negligent not to anticipate wrong-demanded of the servant. The former ful negligence on the part of a defend-must watch, inspect, and care for the ant." Davis v. New York, N. H. & H. slopes through which and in which the R. Co. (1893) 159 Mass. 532, 34 N. E. servant works, as a person charged with 1070, Citing Hayes v. Hyde Park (1891) the duty of keeping them reasonably 153 Mass. 514, 12 L. R. A. 249, 27 N. E. safe would do. The latter has a right to presume, when directed to work in a particular piace, that the master has performed his duty, and to proceed with his work in reliance upon this assumption, unless a reasonably prudent and intelligent man in the performance of his faithful employee, and the confidence he work as a miner would have learned might fairly entertain (in the absence facts from which he would have apprehended danger to himself." Union P. R. Co. v. Jarvi (1892) 3 C. C. A. 433, 10 U. S. App. 439, 56 Fed. 65 (loose rock fell from roof of entry), Followed in Western Coal & Min. Co. v. Ingraham (1895) 17 C. C. A. 71, 36 U. S. App. 1, 70 Fed. 219 (defective timbering in mine).

The doctrine thus laid down has been applied in the following cases: Denver, T. & Ft. W. R. Co. v. Smock (1897) 23 Colo. 456, 48 Pac. 681 (railway servant entitled to assume that a foreign car standing on a side track, and apparently in a condition for hauling, is reasonably safe); Louisville & N. R. Co. v. Baker (1895) 106 Ala. 624, 17 So. 452 (apent from those surrounding the servant, proving of a charge embodying the doctrine in the text); The Lizzie Frank (1887) 31 Fed. 477 (chock used in towing was insecurely fastened); Gillin v. Patten & S. R. Co. (1899) 93 Me. 80, 44 Atl. 361 (frogs not blocked as reto protect himself in a case where the primary duty of providing a safe place or safe machinery rests on the master, (1901) 165 N. Y. 420, 59 N. E. 202, Re that a reasonably prudent person would versing (1898) 28 App. Div. 621, 51 N. ordinarily use a higher degree of care to keep the place of work reasonably (plaintiff, while engaged in carrying safe, if placed in the position of the master who furnishes it, than if placed in hole therein); Galveston, H. & S. A. R. that of the servant who occupies it. Of Co. v. Adams (1900; Tex. Civ. App.) the master is required a care and diligence in the preparation and subsequent (1900) 94 Tex. 100, 58 S. W. 831 (rot-

Especially will a court refuse to say that a servant was negligent in making use of an appliance for a certain purpose, where his fellow

elevator, after signaling for it to dethrough tunnels. Mexican C. R. Co. v. scend, was injured by the fail of the Eckman (1900) 42 C. C. A. 344, 102 car, due to a defective chain); Gulf, C. Fed. 274. & S. F. R. Co. v. Winton (1894) 7 Tex. A servant in a mine is not negligent, Civ. App. 57, 26 S. W. 770 (defective as matter of law, in riding on an ore v. Kostka (1900) 92 Ill. App. 91, Af- into collision with the roof of an entry, firmed in (1901) 190 Ill. 130, 60 N. E. although he knew that it was higher been properly performed when it was 161, 108 Fed. 19.
once begun); Hoss v. Ocean S. S. Co. A brakeman, having the right to as-(1900) 56 App. Div. 259, 67 N. Y. Supp. sume that structures will not be lo-782 (oiler on steamship turned steam cated dangerously close to the track, into feed pump which had just been re- is not guilty of contributory negligence paired, and was killed by the blowing in climbing the side ladder of a moving out of the cushion valve).

his duty in compliance with a specific R. Co. (1896) 19 R. I. 587, 35 Atl. 305. order to flag the rear end of the train, An engineer who is struck by a mail requiring him while riding on top of a crane, while leaning out of his cab to posite that in which the danger lay, not debarred from recovery on the was not negligent in so riding, although ground he knew there were low bridges, since where the crane was 7 inches closer to he had the right to suppose that tell- the track than any other on the road. tales would be in proper order and po- International & G. N. R. Co. v. Stephensition to give him timely warning. Maher v. Boston & A. R. Co. (1893) 158 Mass. 36, 32 N. E. 950 (distinguishing some earlier Massachusetts cases turning on the failure of the servant to keep a proper lookout).

A brakeman, seeing that the entrance to a tunnel is high enough to permit safe passage while standing on top of a train, has a right to assume, in the absence of notice to the contrary, that the tunnel is of such height throughout. Hunter v. New York, O. & W. R. Co. (1889) 116 N. Y. 615, 6 L. R. A. 246, 23 N. E. 9. Whether a conductor of a freight train, who was injured by striking his head against a rock in the roof of a tunnel, while seated on the cupola himself that he might see the engineer,

ten platform was covered with paint and struck, he had already passed safely appeared safe); Musick v. Jacob Dold through two or three tunnels, that he Packing Co. (1894) 58 Mo. App. 322 had received no notice that the tunnel (cover left off tank of hot water after in which he received the injusy was the employees had quitted work); not of a uniform height, and that his Hackett v. Middlesex Mfg. Co. (1869) position was not improper, although it 101 Mass. 101 (servant who had put was the custom for train hands on the his head inside the shaft of a freight tops of cars to lie down in passing

tie in platform of turntable); La Salle car which is so high that it brings him 72 (workman entitled to presume that than the others in use. Tennessee Goal, the work of bracing walls of trench had I. & R. Co. v. Currier (1901) 47 C. C. A.

car without looking forward to see if A brakeman killed by coming in con- he was imperiled by a certain telegraph tact with a low bridge while performing pole. Whipple v. New York, N. H. & H. freight car to look in the direction op- ascertain the condition of his engine, is of contributory negligence, son (1899) 22 Tex. Civ. App. 220, 54 S. W. 1086.

It is not contributory negligence, as matter of law, for a switchman directed by the foreman of the switching crew to assist him in coupling an engine to a flat car, to stand on the footboard of the engine on the inside of a curve of the track while helping to make the coupling, in making which he is injured by being caught between the car and the engine, as a result of the vielding of a defective drawhead. Bennett v. Northern P. R. Co. (1892) 3 N. D. 91, 54 N. W. 314.

A conductor to whom has been delivered a sleeping car as part of a regular of the caboose, where he had stationed through passenger train is justified in assuming that such car and the steps was negligent in taking that position, leading from it are safe, until he actuis a question for the jury, where the ally discovers that the steps have been evidence tends to show that, before being removed. Cameron v. Great Northern

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A brakeman who, to couple an engine to a standing car, placed the pilot bar upon his knee which, after the coupling was made and before the car had run 3 feet, was crushed by reason of one of the car wheels sinking at a low joint, is not guilty of such contributory negligence as will bar a recovery. Texas d P. R. Co. v. McCoy (1897) 17 Tex. Civ. App. 494, 44 S. W. 25.

A fireman is not, as matter of law, negligent in taking hold of a piece of cord which had been spliced for the use of short men to the end of a rope provided to operate the valve of a water tank, although the cord was in fact rotten, and he could, with great inconvenience, have reached the main rope. International & G. N. R. Co. v. Elkins (1899; Tex. Civ. App.) 54 S. W. 931. The action of a laborer who, while

working in the hold of a grain ship, is injured by the fall of a number of sacks of grain, owing to the breaking of a defective hoisting chain, cannot be barred on the ground that he was guilty of negligence in not standing back underneath the deck, while the sacks were being hoisted. Rooney v. Allan (1883) 10 Sc. Sess. Cas. 4th series, 1224.

One engaged in shoveling cinders into a bag to be hoisted from the hold of a vessel is not guilty of negligence in working beneath the hatch while a bag of cinders is being hoisted, and by the fall of which, due to a weak handle, he was injured, where there are cinders there which need to be shoveled up, and he has only been notified to keep from under the hatch while a bag is descending. The France (1893) 53 Fed. 843. (This decision was reversed in (1894) 8 C. C. A. 185, 20 U. S. App. 212, 59 Fed. 479, on the ground that no negli-gence that could be charged to the defendant was proved. The question of contributory negligence was not discussed.)

An employee attending to his work in the usual manner has the right to rely on the safety of the machinery, and is not required to anticipate danger from the falling of a derrick. Ashley Wire Co. v. McFadden (1895) 66 Ill. App.

R. Co. (1898) 8 N. D. 124, 77 N. W. ple off, so that an action for injuries 1016. must be taken from the jury, where the plaintiff is a common laborer, the car has been operated six months without accident, and the plaintiff relies on the exercise of care by his employers in furnishing safe appliances for the work. James B. Clow & Sons v. Boltz (1899) 34 C. C. A. 550, 92 Fed. 572. A railroad brakeman has the right to rely upon the presence of a telltale as a means, not only of warning him of the approach of a train to a low bridge, but of arresting his attention at the place where the telltale is located and causing him to look out for danger ahead, where the company has adopted such manner of warning its servants of approach to a bridge; and the failure of such brakeman to heed and remember a warning given by his fellow servant, and to see the bridge when within a short distance of it, with his face turned toward it and the bridge distinctly visible, does not necessarily constitute contributory negligence. Savannah, F. & W. R. Co. v. Day (1893) 91 Ga. 676, 17 S. E. 959. (Lumpkin, J., dissented on the ground that the brakeman had received ample warning as to the danger, and that his attention had apparently not been diverted by any necessity for attending to his duties, or by any other occurrence.)

A carpenter employed by a railroad company is not, as matter of law, guilty of negligence contributing to injuries in falling over an unprotected wing-wall of a bridge carrying a highway over the track, while on his way to work, before daylight, in running to catch the train by which he was to be taken to his work. Gates v. Pennsylvania R. Co. (1893) 154 Pa. 566, 26 Atl. 598. A lineman who was ordered to take down a guy wire extending from the top of a pole to a tree 120 feet distant, and cut the wire at the end next to the pole, the result being that the pole fell with him, cannot be held negligent, as a matter of law, where he had no reason to suppose that the pole was not sunk sufficiently deep to stand without the support of the wire. Bland v. Shreveport Belt R. Co. (1896) 48 La. Ann. 1057, 36 L. R. A. 114, 20 So. 284.

A servant is not guilty of contribu-It cannot be said, as matter of law, tory negligence in assuming that his emthat a workman is negligent in using a ployer or his employer's agents were docar for carrying cores for forming iron ing and had done their duty in erecting pipe, of great weight, upon standards a scaffolding, which proved defective. the point of equilibrium of which is so Stuart v. Evans (1883) 49 L. T. N. S. parrow that the cores are liable to top- 138, 31 Week. Rep. 706. A verdict workmen have been using it without injury up to the time of the accident.3

The cases dealing with a servant's duty to examine into the condition of the appliances which he uses (chapter xxi., subtitle E) should be compared with those cited in this section. See also § 440, subd. b, § 451, post.

It will be observed that the circumstances under which the doctrine explained becomes applicable are such that it may also be regarded, in a logical point of view, as a direct deduction from the general principle that negligence cannot be imputed to a servant to whom the existence of the conditions which caused his injury and the dangers created by those conditions were not known, either actually or constructively. See §§ 319-321, supra.

355. — and that the work done in connection with the plant will be prudently done. -- Another obvious corollary of the general principle stated at the beginning of the last section is that, in the absence of some special reason for ordering his conduct upon a different footing, a servant is entitled, when he is undertaking any particular duty or selecting any particular method of performing a certain piece of work, to assume that, in carrying on the various operations incident to the conduct of the business, both his master and his coemployees will, so

negativing contributory negligence is sustained by evidence which shows, among other things, that the plaintiff was not present while the scaffold which proved defective was being placed; that he was told by the scaffold builders that it was all right; that before getting down upon it he looked over the side of the vessel to see if it was all termining the question of his contribution, and it appeared to be so; and that two other persons who viewed it from to entertain this presumption. Chicadifferent directions testified that it go & A. R. Co. v. Cullen (1900) 187 tipped the wrong way. Cadden v. Ill. 523, 58 N. E. 455, Affirming (1899) American Steel Barge Co. (1894) 88 Wis. 417, 60 N. W. 800. Wis. 417, 60 N. W. 800.

digging a trench for a water main where the ground was solid, was ordered to another part of the trench, which had been dug by other workmen, where the ground was loose, and largely composed of gravel, the fact that he walked along the bottom of the trench to the designated point, and had a good opportunity to notice the change in the character of the soil, is not sufficient to charge him, as a matter of law, with contributory negligence. Ft. Wayne v. Patterson wharf, and a rathine gave way under one (1900) 25 Ind. App. 547, 58 N. E. 747. of them, while he was stepping from the In an action for the killing of a sec- rigging to the wharf,

It is not negligent, as matter of law, Where deceased, who was engaged in to carry a naked light into a mine tunnel, when the foreman sees it done and makes no remark. Cowler v. Moresby Coal Co. (2 B. D., 1885) 1 Times L. R.

> See also Lawless v. Connecticut River R. Co. (1883) 136 Mass. 1, § 322, note 2, supra.

> <sup>8</sup> McDonald v. Svenson (1901) 25 Wash. 441, 65 Pac. 789, a case where workmen employed in loading a ship had used the rigging in ascending to the

far as they can attain that result by the exercise of proper care, avoid subjecting him to abnormal risks of a transitory character.1

The extent to which he may rely upon the assumption that proper measures will be taken to secure his safety is primarily a question for the jury.<sup>2</sup> But see next section.

Some of the cases in which it has, on this ground, been held unjustifiable to declare the servant guilty of contributory negligence, as a matter of law, present situations in which it would have been practically impossible for the servant, without instituting special inquiries which would have been quite incompatible with an expeditious performance of his work, to have ascertained that he was being exposed to a danger against which he should have been protected.3 In other cases the essence of the situation is that his reliance upon a proper performance of their duties by his master or his fellow servants led him to omit certain precautions which it was in his power to take, but which were unnecessary if those duties were properly performed.4

1 "One may, without fault of his own, for the purposes of ready comparibe in a situation where he must choose a son with the decisions in the preceding perilous alternative. The degree of dan- subtitle, the rulings exemplifying this ger, the stress of circumstances, the expectation or hope that others will fully lowing heads: perform the duties resting on them, (a) Dangers incurred by servants enmay all have to be considered." Miner gaged in the operation of trains.—The

An employee of an electric-light comthat no negligent act of omission or commission on the part of the employer will contribute to make it a live one, where the trimmers are not set at work during the daytime trimming lamps on during the daytime trimming lamps on live wires. Harroun v. Brush Electric Light Co. (1896) 12 App. Div. 126, 42 N. Y. Supp. 716, Appeal Dismissed in (1897) 152 N. Y. 212, 38 L. R. A. 615, 46 N. E. 291. A carpenter sent during the daytime to remove a lamp from an electric light term in the relationship. electric-light tower is not negligent, as on at an earlier hour than usual. Colo- certain whether the crossing could be rado Electric Co. v. Lubbers (1888) 11 safely made before proceeding. Walker Colo. 505, 19 Pac. 479. A servant is v. Brantner (1898) 59 Kan. 117, 52 Pac. entitled to act on the presumption that 80. An engineer is not negligent in not the master has done his duty in regard stopping at a station to inquire of the to ascertaining the existence of danger whereabouts of a train ahead, a signal from unexploded blasts. Kelley v. Ca-being there displayed meaning no orders, ble Co. (1887) 7 Mont. 70, 14 Pac. 633, but a clear track, and to go on. Hous-

situation may be arranged under the fol-

v. Connecticut River R. Co. (1891) 153 crew on a passenger train are not guilty Mass. 398, 26 N. E. 994. Mass. 398, 26 N. E. 994.

<sup>2</sup> Bartolomeo v. McKnight (1901) 178

Mass. 242, 59 N. E. 804.

<sup>3</sup> Alagoria passenger train are not guilty of negligence in assuming that the crew on a freight train which has passed a given point a short time had a senger train have not left open a switch pany engaged in trimming electric lamps which it was the duty of such crew to during the daytime has the right to as- close. Chicago & A. R. Co. v. House sume that the wire used for lighting a (1898) 172 Ill. 601, 50 N. E. 151 Affirmhouse which he is trimming is dead, and ing (1896) 71 Ill. App. 147. It is for the jury to say whether a locomotive engineer was guilty of contributory negli-gence, precluding recovery for his death, in a collision between his train and another train at the crossing of two tracks, in assuming that the engineer of any train approaching on the other track would avail himself of the opportunity to observe the rear portion of the former train, afforded by a clear view while passing between obstructions on the side of the track which prevented the dematter of law, in acting on the presump-ceased from seeing the other train, or in tion that the current will not be turned failing to send a flagman forward to as-

Another situation in which some relaxation of vigilance is always deemed excusable is presented in those cases in which he had reasonable grounds for believing that, if he was threatened by some transi-

22 Tex. Civ. App. 430, 55 S. W. 744. other company).

(b) Dangers incurred by servants Shoner v. Pennsylvania Co. 135, 33 N. E. 403. (1891) 130 Ind. 170, 28 N. E. 616, Re-

Co. (1878) 44 Wis. 638. A railroad point and given him warning. Bethlehem liceman is not guilty of negligence, as a Iron Co. v. Weiss (1900) 40 C. C. A. matter of law, where he was struck by 270, 100 Fed. 45. an engine moving at an unlawful rate of speed, while he was standing near the where he is liable to be struck by trains, track loading his revolver, and with his and in a place where he cannot see them back to such engine. St. Louis, A. & T. approaching until they are quite close, H. R. Co. v. Eggman (1896) 161 Ill. he is not bound to exercise greater care 155, 43 N. E. 620, Affirming (1895) 60 than would be adequate to protect him

vard, without a light being displayed, or approaching the ash pit, and that on the a person stationed on the rear end of occasion in question the locomotive ran the train to give warning of its ap- towards the pit at a greater than the proach, and that this occurred at a time usual rate of speed. Sullivan v. Tioga when another train, with its bell ring- R. Co. (1887) 44 Hun, 304. ing and steam escaping, so as to drown A brakeman is not guilty of contributhe noise made by the backing train, was tory negligence, where, in jumping from also passing. Cleveland, C. C. & St. L. a moving train after dark to throw a

ton & T. C. R. Co. v. Higgins (1900) 306, 45 N. E. 531 (action against an-

A member of a track gang, struck by working on or near railway tracks .- an engine while leaning over the track A trackman working at the crossing of as required by the discharge of his duty, two railroads is justified in assuming is not, as matter of law, guilty of conthat an engineer will obey the statutory tributory negligence, where he could not mandate to come to a full stop before see any considerable distance along the crossing, to ascertain whether any other track, and no warning was given of the train is approaching on the other track; approach of the engine, although no unand the fact that he worked for five or usual cause existed why he should not six minutes without looking will not be hear or see the train. Lake Shore & M. held contributory negligence; as matter S. R. Co. v. Murphy (1893) 50 Ohio St.

The contributory negligence of the hearing overruled in (1892) 130 Ind. servant was held to be for the jury, 179, 29 N. E. 775. where the evidence was that he was Where a train which struck a servant struck by an engine which issued from a while he was crossing or working on or doorway close to a crossing over which near the track was running at an illegal he was required to run a wheelbarrow speed, it is only under very exceptional several times every night; that the doorcircumstances that a court is justified way was obscured at the time by steam in declaring, as a matter of law, that he from an exhaust pipe close by it; that was guilty of contributory negligence in he had been working only three nights failing to observe it in time to escape in- prior to the accident; that, during that jury. See Nelson v. New Orleans & N. time, an engine had come out only once E. R. Co. (1900) 40 C. C. A. 673, 100 when he was passing; and that on the Fed. 731; Schultz v. Chicago & N. W. R. occasion in question a boy had preceded

Where a servant is working on a track if proper provision had been made for No presumption of contributory negli- giving him the warning to which he was gence is raised by a declaration which entitled. Felice v. New York C. & H. R. alleges substantially that the plaintiff, R. Co. (1897) 14 App. Div. 345, 43 N. a car inspector in the employ of a rail- Y. Supp. 922. It is for the jury to say way company which was using the yard whether a servant in a railway ash pit jointly with the defendant, was injured was negligent in failing to discover an by reason of the fact that a locomotive approaching locomotive in time to esand cars of the defendant were placed in cape, where there is evidence of a custom the hands of inexperienced and unskil- of the station yard for the bells of locoful servants, and backed through the motives to be continuously rung while

R. Co. v. Kernochan (1896) 55 Ohio St. switch, and going on ahead to make a

Rep. 1478, 49 S. W. 419.

not show such contributory negligence they are moving about. Ditberner v. as will preclude recovery for an injury Chicago, M. & St. P. R. Co. (1879) 47 caused by other cars running onto the Wis. 138, 2 N. W. 69. siding, where it is also in evidence that he had notified the yard master that he tributory negligence in attempting to was at work on the car, and had there- pass between two cars, relying upon the fore a right to suppose that no cars ringing of the bell, as required by ordiwould be switched on the siding without nance, to apprise him of the approach of notice to him, or that, if they were so an engine which he knows is on the switched, the operation would be contrack for the purpose of pushing cars toducted in a reasonably careful manner. gether, where before making the attempt Berry v. Central R. Co. (1875) 40 Iowa, he looks, but fails to discover the ap-

is ordered to work is not necessarily or er, causing his death. *Gulf*, C. & S. F. inherently dangerous, he has a right to R. Co. v. Calvert (1895) 11 Tex. Civ. presume that he will not be exposed to App. 297, 32 S. W. 246. unnecessary danger, and that the master has used proper care to render the struck, while crossing a track, by the

20 Utah, 210, 58 Pac. 326.

to anticipate the transfer of cars onto by. Griffin v. Boston & A. R. Co. (1889) the repair track by a flying switch, 148 Mass. 143, 1 L. R. A. 698, 19 N. E. where there was no light on the cars, 166. and no notice was given of their ap-App. 138.

An employee in a yard has a right to 228, 42 Pac. 724. assume that the company's agents in

necessary coupling to get his train off approach. Sours v. Great Northern R. the track of an over-due fast train, he Co. (1900) 81 Minn. 337, 84 N. W. 114. steps into a hole and is run over because A track repairer is not negligent in actthe engineer comes after him without ing on the assumption that a bell will, waiting for proper signals. Richards v. as usual, be rung before the starting of Louisville & N. R. Co. (1899) 20 Ky. L. a train. Schultz v. Chicago & N. W. R. Co. (1878) 44 Wis. 638. A section hand The fact that an employee who went working on a side track in a yard is not, under a car on a siding to do some work, as matter of law, negligent in relying omitted to station someone near the car upon the due observance of a custom to to watch for approaching trains, does ring the bells of locomotives whenever

A station agent is not guilty of con-44. proach of the engine, which, without Where the place where a car repairer ringing the bell, pushes the cars togeth-

In a case where an employee was place where he is to work reasonably rear section of a train which had broken safe. Pool v. Southern P. Co. (1899) in two from an unusual cause, it was held that he was not negligent in assum-A night watchman is not chargeable ing that there were no other cars comwith contributory negligence in failing ing after the front section had passed

In an action for the killing of a trackproach, and the transfer, contrary to the walker by a train which approached usual custom, was made by an engine from the rear, it is competent to show which was pushing cars as well as draw- that the statutory signals were not giving those which were transferred. Gale on at a highway crossing  $\frac{1}{2}$  of a mile veston, H. & S. A. R. Co. v. Hynes from the accident, not as showing a sub- (1899) 21 Tex. Civ. App. 34, 50 S. W. stantive right of recovery, but as tend- 624. Where plaintiff, a section hand, ing to negative want of care and caution knew of a rule requiring two certain on the deceased's part. Baltimore & O. tracks to be kept clear for ten minutes S. W. R. Co. v. Alsop (1898) 52 N. E. before the time of two certain trains, 253, 732, 176 Ill. 471, Affirming (1897) and was injured, while walking along 71 Ill. App. 54. Evidence to show the one of such tracks, by an engine being duties of a foreman with reference to propelled along such track in violation keeping the time of trains and warning of the rule or instruction that the rule workmen of the approach of trains is adof the rule, an instruction that the rule workmen of the approach of trains is adwas made for the dispatch of defendant's missible upon the question of the neglibusiness, and that plaintiff had no right gence of a section hand who was struck to rely on it, is erroneous. Kingma v. by a train while working upon the track Chicago & N. W. R. Co. (1899) 85 Ill. under the foreman's direction. Comstock v. Union P. R. Co. (1895) 56 Kan.

Where a switchman signaled a tower charge of cars allowed to drop down a man, who controlled the manual throwtrack by gravity will comply with the ing of all the switches in a railroad custom of stationing a man on such cars yard, to throw a certain switch, and the to warn persons on the track of their tower man threw a wrong switch, caus-

ing an aproaching train to run against is broken, and they are connected by a the signal man, it is error to direct a chain, the question whether an employee verdict for the defendant, though the was guilty of contributory negligence in ground was covered with snow, and a going between cars to pull a coupling snowstorm was raging, and the signal pin, although he knew they were going man failed to go to the foot of the tow- to be moved, to loosen the tension of the er, and clear away the snow and ice coupling, is one of fact for the jury, covering a dwarf switch, which would since he may have been justified in ashave shown him that his signal was not suming that they would not be moved obeyed. Welch v. New York, N. H. & enough to bring them together. Kolb II. R. Co. (1900) 176 Mass. 393, 57 N. v. Carrington (1897) 75 III. App. 159. E. 668.

watchman, was overtaken by a train and standing car is not guilty of contribu-killed, while on a trestle leading to a tory negligence in not noticing that the bridge, and while attempting to get his conductor had not gone upon the moving tricycle to a platform a short distance train to apply the brakes, and that the ahead of him, the train schedule showspeed was not lessened, where it was
ing that the train, which was running the duty and custom of the conductor
40 miles an hour, was limited to a speed to go upon the cars and apply the
of 22 miles, was admissible as bearing brakes, and the brakeman believed he
on the question of contributory negligence. Louisville & N. R. Co. v. Seibert City & P. R. Co. (1888) 75 Iowa, 84, 39
11000 21 Kr. J. Pen 1602 55 S. W. N. W. 102 Former Appel (1885) 66 892.

See also note 5, infra.

by a brakeman, steps upon the track, portion, precluding recovery for injuries and is struck by the train through mis- from being caught between such drawgineer. Bucklew v. Central Iowa R. Co. of the front section, owing to the enbrakeman is not necessarily negligent in obedience to orders of the conductor, kicked forward upon the track in front gineer had been instructed to take the of the moving engine which he had sig- front section to a side track. Tibbs v. naled to stop, and believed had done so. Alabama (t. S. R. Co. (1895) 111 Ala. Pringle v. Chicago, R. I. & P. R. Co. 449, 19 So. 969.(1884) 64 Iowa, 613, 21 N. W. 108. Where the junction Where a brakeman has attempted to from the evidence that a fireman was uncouple cars, and finding them moving handling an engine under the direction too fast, has signaled the engineer to and supervision of the regular engineer, slow up, and, without waiting to see the mere fact that a brakeman, who, whether his signal was obeyed, makes a while making a coupling, was injured by second attempt, and is killed, he is not the carelessness of the fireman, knew guilty of contributory negligence, as he that he was handling the engine, will has a right to believe that his signal not disable him from recovering damwill be immediately obeyed. Beems v. ages, inasmuch as he had a right to as-Chicago, R. I. & P. R. Co. (1882) 58 sume that the engineer would exercise Iowa, 150, 12 N. W. 222; Nichols v. Chi- ordinary care in controlling the movecago, R. I. & P. R. Co. (1886) 69 Iowa, ments of the engine. Leonard v. Minne-154, 28 N. W. 571.

A train coupler who is injured be- 62 Minn. 489, 65 N. W. 1084. tween cars which are started in disregard of a known rule of the company is (d) Dangers caused by objects above not guilty of negligence. Central R. Co. railway tracks.- In an action for injuv. Harrison (1884) 73 Ga. 744. Where ries to a trainman from a guy stretched a bumper on one of two adjoining cars across the track, it is proper to refuse

A brakeman injured while making a Where plaintiff's intestate, a bridge coupling between a moving train and a (1900) 21 Ky. L. Rep. 1603, 55 S. W. N. W. 193, Former Appeal (1885) 66 892. Iowa, 52, 23 N. W. 260.

A brakeman is not guilty of contribu-(c) Dangers incurred in coupling or tory negligence, as a matter of law, in uncoupling railway cars.—Negligence is taking a position in front of the drawnot a necessary inference where a car head of a car while walking backward coupler, after having given the signal to in front of it endeavoring to fix an air stop the train, though not on the usual cock in order to stop the forward moside, as the train was on a curve, and tion of the rear section of the train, having seen his signal correctly repeated which he had uncoupled from the front understanding of the signal by the en- head and the drawhead on the rear car (1884) 64 Iowa, 603, 21 N. W. 103. A gincer's stopping the front section, in stepping from a car which had been where the brakeman knew that the en-

Where the jury are entitled to find apolis, St. P. & S. Ste. M. R. Co. (1896)

See also subd. i, infra.

an instruction that plaintiff cannot re- the work in the former manner except cover if he knew the work requiring the in case of the starting the elevator. guy was going on and paid no attention Hess v. Adamant Mfg. Co. (1896) 66 at all to it, if there is no evidence that Minn. 79, 68 N. W. 774. he paid no attention, and the element of road company to see that the tracks matter of law, guilty of negligence in were not lett in a dangerous condition proceeding to oil it from underneath in was not stated. New York, N. H. & H. R. Co. v. O'Leary (1899) 35 C. C. A. 562, 93 Fed. 737.

(e) Dangers caused by objects near negligent in extending his person behis duties, so as to be struck by another v. Walworth & N. Mfg. Co. (1894) 98 car negligently left standing on an adja- Mich. 411, 57 N. W. 251. A man encent track in dangerous proximity, even gaged in repairing the separator of a though it was not necessary for him to threshing machine has a right to assume do so in the discharge of his duties, un- that the machine will not start, unless less he knew or had reason to believe it is set in motion by the engineer, and track. Kansas City, M. & B. R. Co. v. necting the separator from the engine, Burton (1893) 97 Ala, 240, 12 So. 88.

In an action by a street railway em- (1901) 24 Wash. 556, 64 Pac. 755. ployee for personal injuries caused by the crushing of his leg between a bank the "tail stock" while one of the employ-of rock and the side of a motor upon ers operates the carriage has the right which he was being transported home, to assume that such employer will not and over the edge of which his leg was start the carriage back while the former 20 Colo. 132, 36 Pac. 1106, Reversing 44 Mo. App. 51. (1893) 3 Colo. App. 408, 33 Pac. 815.

of law, of contributory negligence in is a question for the jury where one emfailing to discover that one of a number ployed in loading rails upon flat cars by of cars placed on the switch was left means of skids placed for the work unstanding too near the main track, by der orders of the foreman in the emreason of which he is injured, although ployee's absence is injured by the fall of there was a general duty resting on the one of the skids, which caused the rail crew of which he was a member to look to strike him. Great Northern R. Co. after such matters, where under the v. McLaughlin (1895) 17 C. C. A. 330, particular circumstances a special duty 44 U. S. App. 189, 70 Fed. 669.

with his hand, precluding recovery for 87 Fed. 534. an injury to his arm resulting from the no danger to be apprehended by doing tory negligence as will prevent a recov-

One in charge of a machine and under his right to rely on the duty of the rail- the duty to keep it in order is not, as a place where it is necessary to put his hand between the spokes of a wheel, contributing to injuries from the starting of the machine by an officer of the corrailway tracks.—A switchman is not poration employing him having charge of the factory, where he had no reason yond a car on which he is performing to anticipate such starting. Shumway that there were obstructions near the is therefore not negligent in not disconwhile he is at work. Hencke v. Babcock

An employee in a sawmill who attends projecting, after he had been carried be- is seen by him to be in a place of danyond a certain switch where he was to ger. Rhoades v. Varney (1898) 91 Me. get off, evidence that such switch was a 222, 39 Atl. 552. A servant who is enregular stopping-place is competent as gaged in repairing a block and pulley showing that he had a right to expect used for dragging rails up a river bank that he would have an opportunity to is entitled to assume that the engine get off, especially if he signaled the mo- which operates the tackle will not be set torman for that purpose. Denver & B. in motion without warning. Wills v. P. Rapid-Transit Co. v. Dwyer (1894) Cape Girardeau S. W. R. Co. (1891)

(g) Dangers incurred in handling An employee is not guilty, as matter heavy objects.—Contributory negligence

rested upon another member of the crew. A stevedore is not guilty of contribu-International & G. N. R. Co. v. Sipole tory negligence in being under a hatch (1895; Tex. Civ. App.) 29 S. W. 686. when a sling load is being lowered into when a sling load is being lowered into (f) Dangers incurred in handling ma- it, if his duties require him to work chinery.—A boy is not, as a matter of there, and he is justified in expecting law, guilty of contributory negligence in notice before drafts are swung over and cleaning out the boot of a sand elevator lowered. McGough v. Ropner (1898)

An employee engaged in the construcsudden starting of the elevator by an- tion of the walls of an elevator, though other, although the work might have he is an experienced carpenter, is not, as been done with a scoop, where there was matter of law, guilty of such contribucry for an injury by the breaking of a though he knew that some had been staging on which he is standing by the found therein, where he did not know fall of a heavy cross beam, one end of that it was found at the place where he which a fellow servant negligently pried was injured by its explosion, and he had off a wall at the order of the employer, heard the foreman order its removal. where such order was wholly unexpect- Alton Lime & Cement Co. v. Calvey ed, and the injured employee was not in (1892) 47 Ill. App. 343. a position to know how the order was being executed. Myhre v. Tromanhaus- banks of earth, etc.—An employee is not, er (1896) 64 Minn. 541, 67 N. W. 660. as a matter of law, guilty of contribu-The question of a servant's due care is tory negligence in continuing to excafor the jury, where he was working a vate an embankment at its base after jackscrew with a bar in the usual and seeing the bulged condition of the bank customary way, and stopped lowering overhead, with knowledge that earth had when told to do so, and started again frequently fallen from the embankment when directed to lower 2 inches more, at other points, where the bank had been whereupon a timber came loose, fatally in such condition for three or four hours him. Wheel Co. (1899) 174 Mass. 455, 54 N. move the overhanging portion as fast as

any warning or explanation, to rely on a work at the foot of a bank, and who vice principal to hold and steady a does not know of the dangerous condiheavy iron which the latter undertook to tion into which it has been brought, as do while attempting to raise it. Pitts- a result of the efforts of his colaborers burg Bridge Co. v. Walker (1897) 70 to throw out a large mass by inserting Ill. App. 55, Affirmed in (1897) 170 Ill. levers into the upper surface of the

550, 48 N. E. 915.

gin pole is to be taken down, is justified superiors. Deppe v. Chicago, R. I. & P. in acting on the assumption that his di- R. Co. (1874) 38 Iowa, 592. rections will be followed, and is not necessarily negligent because, instead of su-ships.—(See also subd. (7), supra.) pervising the work, and giving his at- grain trimmer who proceeds to work untention to seeing that his orders are der a hatchway, after an indication by obeyed, he turns away from the pole and the mate that it is time to resume work, proceeds to render manual assistance to and the hatch covers have been placed in some other members of his crew in perposition, so as to exclude the light, has forming another operation. *Houser* v. a right to assume that the adjustment *Chicago*, R. I. & P. R. Co. (1882) 60 of the hatch covers has been completed, Iowa, 230, 46 Am. Rep. 65, 14 N. W. and is not negligent in being under the 778.

A seaman knocked into an open hatch- (1889) 38 Fed. 47. way by a barrel which was being loaded on the vessel, and killed, is not guilty doors, etc. - A servant does not assume of contributory negligence merely be- the risk from an open trap door in a cause he did not anticipate negligence passageway, over which he is required on the part of the man in charge of the to pass in the course of his duty, alloading. Davies v. Oceanic S. S. Co. though he knows of the existence of the (1891) 89 Cal. 280, 26 Pac. 827.

explosives.—A servant is entitled to act duty to place lights or guards to protect on the presumption that the master has him from danger. Irmer v. St. Louis done his duty in regard to the ascertain- Brewing Co. (1897) 69 Mo. App. 17. ment of the existence of danger from A workman who is injured, during unexploded blasts. Kelley v. Cable Co. the construction of a ship, by falling (1887) 7 Mont. 70, 14 Pac. 633.

ing to discover a quantity of dynamite foreman, a person "exercising superinthat had been left in the quarry, altendence," to see that the doors were

(i) Dangers incurred in excavating Knight v. Overman and he relied upon the foreman to resafety required. Bradley v. Chicago, M. An employee in the construction of a & St. P. R. Co. (1897) 138 Mo. 293, 39 bridge has the right, in the absence of S. W. 763. A laborer who is set to 50, 48 N. E. 915.

bank, at a place where he cannot see The foreman of a crew of bridge re-what has been done, is not necessarily pairers, who has just given directions negligent because he remained at work, with regard to the manner in which a relying on the exercise of care by his

(j) Dangers incurred by workman on hatch. Crawford v. The Wells City

(k) Dangers caused by open trap door, where he does not know that it is (h) Dangers incurred in dealing with open, and the master has neglected his through an unbolted door at the side of An employee in a quarry was not the ship, is entitled to go to trial on guilty of contributory negligence in fail- averments that it was the duty of the

tory danger, he would receive timely warning of its approach from the employee or employees whose duty it was to give the warning.<sup>5</sup>

they were not fastened; that this person failed to perform either of these duties; and that the plaintiff, having to step back in the course of his work, came against what he was entitled to assume was fixed, and fell through to the dock. Thomson v. Scott (1897) 25 Sc. Sess. Cas. 4th series, 54.

This is the rationale of the decisions asserting the action to be maintainable where a part of a train which had been uncoupled and drawn some little distance, backed up again without warning and struck the brakeman, who, after uncoupling the cars, had proceeded to do some work on the coupler. Hooper v. Great Northern R. Co. (1900) 80 Minn. 400, 83 N. W. 440. Where a switchman engaged in engrossing duties was run down by a train. Cincinnati, I. St. L. & C. R. Co. v. Long (1887) 112 Ind. 166, 11 N. E. 322. Where a switchman, engaged in coupling cars that were being kicked towards him by another switching crew on a transfer track, was injured, eight or ten cars being kicked towards him at a high rate of speed. St. Louis, I. M. & S. R. Co. v. McCain (1900) 67 Ark. 377, 55 S. W. 165. Where an engine wiper was injured, while engaged in coupling, owing to his having stood with his back to an approaching engine, which did not give the usual signal as it drew near. Rahman v. Minneapolis & N. W. R. Co. (1890) 43 Minn. 42, 44 N. W. 522. Where a car inspector stood upon a track in a railroad yard, relying upon of the employees to keep the bells ring-(1896) 89 Tex. 635, 35 S. W. 1058, Reversing (1896; Tex. Civ. App.) 34 S. W. unloading a car-work requiring his down by a freight train. Snyder v. in failing to discover an approaching Clercland, C. C. & St. L. R. Co. (1899) cars were run against the one which the road, and the customary signal on apinjured servant was loading. Freeman proaching a crossing near at hand was W. Illinois C. R. Co. (1901) 107 Tenn. not given. Houston & T. C. R. Co. v. 340, 64 S. W. 1. Where a section hand Rodican (1897) 15 Tex. Civ. App. 556, was struck by a train while working upon the track in a stooping position. whom was at work at the end of a car,

fastened, or to have warned him that man, while walking so near an adjoining track, only 6 feet distant, in compliance with an order to walk from the rear end of the train on a particular side of the same, that he was struck by a switch engine thereon. McLeod v. Chicago & N. W. R. Co. (1897) 104 Iowa, 139, 73 N. W. 614. Where a station agent attempted to pass between two cars, relying upon the ringing of the bell, as required by ordinance, to apprise him of the approach of an engine which he knew was on the track for the purpose of pushing the cars together. Gulf, C. & S. F. R. Co. v. Calvert (1895) 11 Tex. Civ. App. 297, 32 S. W. 246. Where a servant working in the hold of a vessel was injured by a sack of bran, which was thrown down after he had requested that no more be thrown down. Lago v. Walsh (1898) 98 Wis. 348, 74 N. W. 212.

A railroad switchman is not per se guilty of negligence in going between detached cars which he has been ordered to couple, notwithstanding that an engine is attached to the body of the train and the train has been moved a short time before towards the cars, when it has been the custom to give notice of such movements to those making such couplings, and no notice was given of any further movements. Lee v. Michigan C. R. Co. (1891) 87 Mich. 574, 49 N. W. 909.

A section foreman who, before proceeding to repair a broken frog on a trestle, gives an engineer personal no-tice not to move his train forward over the observance of the duty and practice the trestle until signaled to do so by the foreman, has the right to rely on his ining on engines moving within the yard. structions to the engineer, and is not Missouri, K. & T. R. Co. v. McGlamory bound to be on the lookout for the approach of the train until it is signaled. Richmond & D. R. Co. v. Farmer (1892) 359. Where a station agent engaged in 97 Ala. 141, 12 So. 86. A section hand riding on a hand car is not, as matter. presence on the main track—was run of law, guilty of contributory negligence freight train until it is close at hand, 60 Ohio St. 487, 54 N. E. 475. Where where it was hidden by a curve in the Comstock v. Union P. R. Co. (1895) 56 and the other was holding a light for Kan. 228, 42 Pac. 724 (appeal was on him, were not guilty of negligence in demurrer to evidence). Where a brake- failing to observe the approach of an en-

In some instances the servant's right to rely upon the performance of a coservant's duty is rendered, if possible, still more unquestionable by the fact that he himself had taken specific steps calculated to secure such performance,6 or by the fact that the coservant on whose acts

gine and car belonging to another com- plaintiff to get out of the way. Steffe pany toward the other end of the car, v. Old Colony R. Co. (1892) 156 Mass. where there were signals upon that end 262, 30 N. E. 1137. of the car indicating that it was the end with such car without previous notice or on the fact that until he should give diit had been stopped by his directions, and that while engaged in changing the pin, with his hand between the bump-crs, it was caught and injured because

it was customary to examine trains in Contributory negligence is not available motion, and that the plaintiff was in- as a defense to an action by a brakeman specting such a train; that the train who attempted to pick a coupling pin which struck him came upon him unexpectedly and rapidly, without such backing towards him, having first sig-warning or signal as he might well ex-pect to have received; that his duty the locomotive to stop, and was injured called him to work in dangerous places, where it would be careless for ordinary persons to go; and that there was a 43 Iowa, 109. brakeman on the coming train, who, according to the usual custom, and in the tory negligence in returning to his work proper discharge of his duty, would for the purpose of igniting a blast, after either slacken the speed of the train, or going to notify the person in charge of give sufficient warning to enable the the ventilation of the mine that a dan-

<sup>6</sup> The fact that an employee of a railcar of a train, and they had no reason road company while under and repairing to believe that any other car was to be a car on a branch track, in the act of attached, or to believe that a car would turning a nut upon a bolt between the be run upon their track and coupled bumpers, took hold of the bumper with one hand for the purpose of supporting permission. Abbitt v. Lake Erie & W. himself, is not negligence, as a matter R. Co. (1895; Ind.) 40 N. E. 40. The of law, as he had the right to suppose mere fact that an employee in a car shop that the company's servants would disremained under a car repairing it when charge their duty, and that a conductor he knew that the foreman, who had would not disregard his signal flag, and promised to protect him, had gone to an-shunt an unattended freight car down other portion of the shop, will not bar a upon the branch track against the car he recovery unless he knew that the forewas repairing. Murphy v. New York man was not keeping watch, and had C. & H. R. R. Co. (1890) 118 N. Y. 527, taken no other steps to secure the safety 23 N. E. 812. An engineer is not guilty of the employee as effectually as his of contributory negligence precluding reown personal attention would have done. covery for his death caused by another Missouri P. R. Co. v. Williams (1889) train running into the rear of his train, 75 Tex. 4, 12 S. W. 835. A verdict in in going under his engine to remedy a favor of a railroad brakeman for inju- hot box without ascertaining whether ries sustained in coupling cars is sup- the conductor had sent back a flagman ported by evidence that he was directly to protect the train when it stopped, as in the line of his duty when injured, do-required by the rules of the company, in ing the particular thing necessary to be the absence of any negligence on his done to make the coupling, and relying part in giving the proper signal to the conductor to send back a flagman. Inrections the train would remain where ternational & G. N. R. Co. v. Culpepper (1898) 19 Tex. Civ. App. 182, 46 S. W. 922. Trackmen on a hand car have a right to suppose that an approaching train will slow up in obedience to a of the negligent act of the fireman in warning that has been sent by a flagstarting the train back without ratice. man, and are not negligent in remaining Nicolaus v. Chicago, R. I. & P. R. Co. at their places upon the hand car, with (1894) 90 Iowa, 85, 57 N. W. 694. their boss, until it appears that the (1894) 90 Iowa, 85, 51 N. W. OUZ.

It is for the jury to say whether a car train is not about to need the signal inspector was in the exercise of due care, Howard v. Delaware & H. Canal Co.

Wildense tended to show that (1889) 6 L. R. A. 75, 40 Fed. 195. from the track, as a train was slowly naled the fireman who was in charge of by the failure of the fireman to obey the signal. Stecle v. Central R. Co. (1876)

A miner was not guilty of contribu-

his safety depended had expressly promised to protect him; or by the fact that the duty, from a breach of which his injury resulted, had to his knowledge been regularly fulfilled for a considerable period.8

The right of a servant to rely upon the master's having taken precautions to meet certain contingencies is not affected by his knowledge that his fellow servants are habitually guilty of a practice which endangers his safety.9

356. Limits of the servant's right to act upon these presumptions.— The servant's right to act upon the presumptions exemplified in the two preceding sections is predicated only in so far as he is not affected with notice of circumstances which would indicate to any reasonably intelligent man that those presumptions were unjustifiable. ascribe any larger effect to such presumptions would virtually result

is not shown that he did not allow a (b), supra, the court said: "The fact reasonable time to elapse before return- that the appellant had worked on that reasonable time to elapse before return-that the appellant had worked on that ing, in which to free the place of the same section and had resided in the imgas. Sommer v. Carbon Hill Coal Co. mediate vicinity for three years, only (1898) 32 C. C. A. 156, 59 U. S. App. strengthens the conclusion we have 519, 89 Fed. 54. A carpenter employed reached. In the absence of any showing to reconstruct the pancling around an elevator, who, while thus engaged, is during those years the employees of the struck by a descending elevator, after he appellee, working at that point, had had told the elevator boy who had gone up with the elevator to stay up, because he had got to do the work, can recover the law imposes on them, and had also for the injuries received from the owner obeyed the law requiring the stopping of for the injuries received from the owner obeyed the law requiring the stopping of of the building, by whom the elevator trains, and observation of the track be-boy was employed. Donovan v. Gay fore attempting to run over the crossing. (1888) 97 Mo. 440, 11 S. W. 44.

the inspection of the cars after he had consented to the removal of certain other cars from the train, reliance being placed upon the promise of the yard foreman, who controlled the movement of cars, that none would be sent back on that track. Canon v. Chicago, M. & St. P. R. Co. (1897) 101 Iowa, 613, 70 N. W. 755.

The contributory negligence of a brakeman is a question for the jury, upon evidence that his conductor ordered him to examine the couplings, promising to keep watch, and that while he was engaged in repairing a defective coupling the conductor, without warning, sig-naled the engineer to back other cars against the stationary one on which the brakeman was at work, thereby injuring him. Walker v. Gillett (1898) 59 Kan. 214, 52 Pac. 442.

In Shoner v. Pennsylvania

gerous amount of gas had accumulated (1891) 130 Ind. 170, 28 N. E. 616, the at the place where he was working, if it facts of which are given in note 4, subd. trains, and observation of the track be-1888) 97 Mo. 440, 11 S. W. 44. If so, his knowledge, thus acquired, as, where a car inspector continued would indicate that the safest place for a workman, on the line of the track, would be the crossing, as he would there be reasonably certain to be seen and warned in time to escape danger."

<sup>9</sup> Pennsylvania Co. v. McCaffrey (1894) 139 Ind. 430, 38 N. E. 67, where it was held that the knowledge of a section foreman that a train crew was habitually depleted at the point where his hand car was thrown off the track by the train, while running with only part of the crew, did not charge him with contributory negligence in attempting to place the hand car on the track without knowing that the crew was on the train. The theory of defendant was that the plaintiff's knowledge of the habit threw upon him the duty of in-quiring, with a view to finding out whether the habit was persisted in on

any particular occasion.

in absolving him from the obligation of using ordinary care to secure his own safety.1

Nor is the servant who has to work in a position where he is exposed

that the master has done his duty in charge that he could act upon presumpfurnishing safe appliances with which tions, without charging in the same conto work, and, acting on this assumption, nection that he must act upon what he to neglect the exercise of ordinary care saw and heard at the time; and if he for his own safety against open and saw that the engine was moving at a patent dangers discoverable by the use high rate of speed, he had no right to of his own senses. Anderson v. C. N. act upon the presumption that it was Nelson Lumber Co. (1896) 67 Minn. 79, moving at a rate different from that at 69 N. W. 630.

an assumption which he knows to be slower rate. false." Jennings v. Tacoma R. & Motor Co. (1893) 7 Wash. 275, 34 Pac. 937 be negligent in continuing to walk alongside a car which he was pushing, when it was approaching a place where the distance between it and a wall would being obeyed. Nichols v. Chicago, R. I. & be so small that he would be crushed).

ant, has notice of a defect, the latter is assume that an engineer could see the not justified in assuming, when he has signals he made before going between occasion to use the defective appliance cars to couple them, although he could after the lapse of a few weeks, that it not himself see the engineer because of has been repaired. Pennsylvania Co. v. the cars standing on a curve. Long v.

made it the duty of the engineer to slow and also made it the duty of a brakeman to signal the engineer to slow up at Butts (1894) 90 Va. 405, 18 S. E. 837. such a place, the brakeman cannot refrom that failure. In such a case he would have no more right to presume that the engineer would do his duty by slowing up and stopping than the engineer has to presume that the brake-Louisville & N. R. Co. v. Mothershed (1893) 97 Ala. 261, 12 So. 714.

negligence if he relies on a signal of a watchman at a bridge, which is not given in accordance with the rules of the ing on the turntable. Cowles v. Chicacompany; and if he does, he cannot recover for an injury received by him in consequence. Columbus & W. R. Co. v. Bridges (1888) 86 Ala. 448, 5 So. 864.

(1893) 93 Ga. 259, 20 S. E. 98, where train, and that the rules of the company a servant was injured by reason of the require the train to remain at the stafact that a train was run at a rate ex- tion where it is until the arrival of a ceeding that allowed by the company's train from the opposite direction, and rules and by a municipal ordinance, the that there will probably be a collision

A servant has no right to assume court laid it down that it was error to which he saw it was moving, merely be-"No sane man is expected to act upon cause the law required it to move at a

A brakeman about to couple cars is not justified in acting on the presumption (servant of street car company held to that a stop signal given by him will be obeyed, where he knows, or by the exercise of ordinary care might know, that the signal has been misunderstood, or is not P. R. Co. (1886) 69 Iowa, 154, 28 N. W. Unless the master, as well as the serv- 571. It is negligence for a brakeman to Burgett (1893) 7 Ind. App. 352, 33 N. Coronado R. Co. (1892) 96 Cal. 269, 31 E. 914, 34 N. E. 650 (wagon). Pac. 170. It is negligence for a brake-If the rules of a railway company man to give signals to an engineer out of sight, and then proceed with a coupup or stop as he approached a switch, ling, on the assumption that the signals were seen. Richmond & D. R. Co. v. De

A brakeman who, after seeing that cover if he fails to perform this duty, his signals to the cars to slow up while and is injured by a derailment resulting approaching for coupling were not obeyed, steps in between them to make the coupling, is negligent. Norfolk & W. R. Co. v. Cottrell (1887) 83 Va. 512, 3 S. E. 123.

An employee who goes in front of an man would do his duty by giving the engine which has almost reached a turntable, knowing that it is still moving with substantially unchecked speed, is The conductor of a train is guilty of negligent, although it was the duty of the hostler in charge of the engine to stop it, and wait for a signal before gogo, R. I. & P. R. Co. (1897) 102 Iowa, 507, 71 N. W. 580.

An engineer who knows that the conductor of his train has received notice In Central R. & Bkg. Co. v. Brantley that there are no further orders for his

to certain well-known dangers of a transitory nature relieved entirely of the duty of keeping a lookout for those dangers.2

The presumption that a coemployee will perform a certain duty inures to the benefit only of servants who know that the duty in question has been imposed on that coemployee, and whose work requires

if he starts his train, is guilty of such contributory negligence as will prevent of railroad men to the engineer on a a recovery for his death by obeying a yard engine to look out for the men signal of the conductor to start the when he comes back does not entitle one train, where one of the rules provides of such men to go upon the track after that the conductor shall have charge and dark without any light, in reliance upon control of all persons employed on the the engineer's warning him on coming train except where his directions conflict with the rules, or involve risk or York, N. H. & H. R. Co. (1898) 170 hazard, in which case the engineer will Mass. 164, 49 N. E. 85. be held equally accountable. York v. Chicago, M. & St. P. R. Co. (1896) 98 Iowa, 544, 67 N. W. 571. The court

It is error to give an instruction in such terms that the jury may infer that the rule of law is "that the right of one employee to presume that other employees will do their duty will exempt struck by the engine. St. Louis, I. M. him from responsibility for his own & S. R. Co. v. Ross (1892) 56 Ark. 271, negligence." Alabama G. S. R. Co. v. 19 S. W. 837.

Roach (1895) 110 Ala. 266, 20 So. 132

An instruction which relieves a brake-(a case in which the injury was due to the fact that the servant, a car repairer, in going between a standing and a movhad not put out danger signals).

<sup>2</sup> The failure of a train which a section hand knows customarily signals at a whistling post, to give such signal, will not of itself excuse him from want of performance of the general duty of using his eyes while working upon the track, but he has a right to depend upon the knowledge of such custom to some extent. Davis v. New York, N. H. & H. R. Co. (1893) 159 Mass. 532, 34 N. E. 1070.

A railroad employee engaged in cleaning under a switch bar in the yard, so that his attention will naturally be withdrawn from approaching trains, but separated from the other section men, who, as well as himself, are under charge of a foreman who ordinarily looks out for the men and warns them, must know that under such circumstances he is not relieved from the necessity of keeping watch for himself, and is not free from negligence in failing to do so. Lynch v. Boston & A. R. Co. (1893) 159 Mass. 536, 34 N. E. 1072,

A request by the foreman of a gang

The mere fact of the engineer's not having rung his bell, as was customary Chicago, M. & St. P. R. Co. (1890) so maying rung ms och, as was customary lowa, 544, 67 N. W. 571. The court when returning with the engine after making a flying switch, will not prein acting on the assumption that the conductor had received information brakeman, who was familiar with this which would warrant moving the train. track just after the passage of the en-gine, for the purpose of blocking the car being switched, so as to prevent it from colliding with another one, and

man of any imputation of negligence ing car to examine the automatic couplers, if he gave the signal to stop under such circumstances as would reasonably impress him with the idea that the signal would be observed by the engineer, or by the conductor and communicated to the engineer, although he did not look to see whether his signal had been obeyed, imposes too low a degree of caution upon the brakeman. Western R. Co. v. Williamson (1897) 114 Ala. 131, 21 So. 827.

3 A rule of a railroad company requiring yard engines to carry two green lights at night except when provided with headlight both front and rear does not relieve an employee who does not know of such rule from being guilty of contributory negligence in walking on a dark night upon a track, at a place which is very dangerous even in the daytime. Tumalty v. New York, N. H. & H. R. Co. (1898) 170 Mass. 164, 49 N. them to be at the place where the nonperformance of the duty will expose them to danger.4

357. Necessity of act which caused the injury. -- An act of a nonculpable character cannot be converted into a culpable one merely by showing that it was not necessary under the circumstances.<sup>1</sup> But the fact that a certain course of conduct which is deemed to import negligence was adopted without any necessity is frequently adverted to as an element which constitutes a corroborative or cumulative reason for declaring the action not to be maintainable.2 And this conception may evidently be regarded as an implied element in numerous other cases where it is not mentioned.

On the other hand, it is conceded that evidence which tends to show that the servant acted under the pressure of necessity will frequently render it impossible to say, as a matter of law, that he was negligent, although the circumstances may have been such that, if the factor of necessity were abstracted, he could not have recovered.3

\*In Loeffler v. Missouri P. R. Co. the necessity of the case, to go between (1888) 96 Mo. 267, 9 S. W. 580, it was the cars while in motion. Parrott v. held that a servant who was run over in New Orleans & N. E. R. Co. (1894) 62 a tunnel where he had no right to be at Fed. 562. Contrast cases cited in § 334, that time was guilty of contributory note 16, supra.

negligence, and could not recover, even A ruling which assumes that a cerif the bell on the engine was not rung, tain act of the plaintiff was unnecessary, no ordinance having been violated by when such necessity is one of the issues this omission. Compare cases cited in directly involved in the case, upon which \*\*S 337, supra, and chapter xxxIII., post. evidence is introduced on both sides, is 

\*\*Hollenbeck v. Missouri P. R. Co. properly refused. Hannah v. Connecti(1897) 141 Mo. 97, 38 S. W. 723, Af-cut River R. Co. (1891) 154 Mass. 529, 
firmed in Bane in 141 Mo. 113, 41 S. W. 28 N. E. 682. 887 (brakeman went between slowly moving cars to couple them, such an act

<sup>8</sup> Evidence that, owing to its peculiar moving cars to couple them, such an act not being deemed negligent in Missouri).

2 See, for example, Texas & P. R. Co. v. Patton (1894) 9 C. C. A. 487, 23 U. S. App. 319, 61 Fed. 259; Osborne v. Know & L. R. Co. (1877) 68 Me. 49, 28 Am. Rep. 16; Union P. R. Co. v. Estes (1887) 37 Kan. 715, 16 Pac. 131; Dandie v. Southern P. R. Co. (1890) 42 La. Ann. 686, 7 So. 792; Larkin v. New York C. & H. R. R. Co. (1896) 166 Mass. 110, 44 M. E. 122; Harris v. Chesapeake & O. R. Co. (1895; Va.) 23 S. E. 219.

In one case it was declared that a perition which alleged that a foreman of a switching crew was compelled, in the performance of his duties, to cut off three cars while a train was in motion, and was injured by the unballasted condition of the track, was demurrable, as there was no averment with regard to the rate at which the train was moving, nor any statement that he was compelled either by duty, or by an order, or by son of a sudden lurch of the car some construction, a certain engine could not well be oiled when it was stationary has either by duty, or by an order, or by son of a sudden lurch of the car some

portion of his person was forced beyond the time. San Antonio & A. P. R. Co. v. the line of the car and thus came into Beam (1899; Tex. Civ. App.) 50 S. W. collision with a switch stand. Boss v. 411. Northern P. R. Co. (1891) 2 N. D. 128, W man in charge of a train to ride on the which it was being connected, the deform at the end. If he is jerked off by instruction that, if plaintiff knew the a sudden stoppage of the train, due to conditions, he was negligent in attempt-the engineer's negligence, it is for the ing to make the coupling, where it was duty, and especially the need of being make way for an expected train. Lawin a position where he could observe the less v. Connecticut River R. Co. (1883) is about to be coupled, and signal to the engineer when occasion required the requests for instructions, the ques-Kansas City, Ft. S. & M. R. Co. v. Murtion of his due care depended to some ray (1895) 55 Kan. 336, 40 Pac. 646.

law, for the engineer of a train, in an emergency, to step out from the engine, which is on a side track, to the main and engine would come so near together track, to get signals. Barry v. Hannibal & St. J. R. Co. (1889) 98 Mo. 62,

11 S. W. 308.

Evidence that an unusual strain to which a brakeman subjected a brake was necessitated by the fact that it was the only one on the train in good working order is admissible to rebut the inference of negligence in the manner of handling the brake. St. Louis, P. & N. R. Co. v. Dorsey (1901) 189 Ill. 251, 59 N. E. 593, Affirming (1899) 89 Ill. App. 555.

A railroad switchman is not negligent, as matter of law, in placing himself in front of a moving car, where his duties may require it. Faine v. Eastern R. Co. (1895) 91 Wis. 340, 64 N. W.

A brakeman is not guilty of contributory negligence in assisting in the making of a "flying switch," which is a highly dangerous operation, where the exigency of the case demanded that the switch should be made in that way. Dooner v. Delaware & H. Canal Co.

(1894) 164 Pa. 17, 30 Atl. 269.

An instruction that if plaintiff, injured while riding on the pilot of an Boyle v. Chicago, R. I. & P. R. Co. (1881) engine, could have ridden on the steps 56 Iowa, 765, 9 N. W. 360. of the engine with more safety, but for his own convenience preferred to ride on the pilot, defendant would not be liable unless its negligence increased the dan-

Where a brakeman was injured while 49 N. W. 655. It is not, as a matter of coupling an engine with a drawbar so law, contributory negligence for a brake- low that it passed under the car with top of a coal car, instead of on the plat- fendant is not entitled to an unqualified jury to say whether he acted prudently, in evidence that it was necessary that taking into consideration the demands of the cars should be moved quickly to cars to which that on which he is riding 136 Mass. 1. The court said: "If the plaintiff had the knowledge supposed in extent upon the view the jury might It is not negligence, as a matter of take of his necessity for immediate action, the distance the bunters would have to pass each other before the car as to injure him, the speed at which the engine was moving, the knowledge he had that the engineer knew the danger, the confidence he was entitled to have that the engineer would so manage the engine as not to injure him, the reliance he was reasonably entitled to place upon his ability to make the connection so as to prevent the bunters passing, and probably other circumstances."

À laborer on a gravel train who was thrown off as a result of the train's beginning to move while he was attempting to mount a car by putting his foot on a drawbar cannot be held negligent, as a matter of law, on the ground that it was necessarily imprudent to do this at a time when orders had been given for the train to start, and he must therefore have known that it might move on at any moment. The quality of his conduct is a question for the jury, to be determined in view of all the circumstances,-such as the haste required in getting aboard the train, the condition of the ground or approaches, and the character of the cars and the absence of any suitable means for mounting them.

Where the evidence clearly shows that there were only two ways of crossing the uncovered gearing which caused the injury, the jury cannot be asked to find ger assumed, is properly refused where whether the plaintiff could not have the evidence shows that the pilot was availed himself of some other way of the necessary and customary place for crossing which would have rendered the a brakeman while making a pilot bar accident impossible. Rodgers v. Hamilcoupling, which plaintiff was doing at ton Cotton Co. (1893) 23 Ont. Rep. 425.

But this doctrine does not inure to the advantage of a servant in any case in which his conduct was intrinsically so rash that no prudent person would have done what he did.4

The necessity contemplated by the law is a reasonable and practical one.5 It is therefore a misdirection to charge a jury in language which will lead them to suppose that negligence is inferable, unless the act in question was absolutely necessary. It is enough for him to show that the act was reasonable under the circumstances.6

358. Act done in an emergency. The fact that, at the time when the injury was received, no emergency existed which demanded unusually prompt action is, like the absence of necessity, often mentioned by the courts as a subsidiary ground for declining to allow the servant to recover. On the other hand the existence of an emergency is sometimes treated as a differentiating or confirmatory element, either absolutely precluding a court from declaring the servant negligent, as a matter of law, or tending to support the conclusion that he was free from negligence.2

In some of the cases which involve this evidential element the

A brakeman was guilty, as a matter of law, of contributory negligence pre-cluding recovery for injuries from fall-ing by which he had kept it in an up-ing from the deadwood of a freight car right position, for the purpose of ob-and being run over by the car in at-tempting to walk along the deadwood, hammer, it was held that if this mode which was about 4 inches wide, while of dealing with the lever was partially the train was in motion, without hav-ing anything to hold on to, even if such fallen, the fact that the servant could action was necessary to the successful not fall as the servant

platform is not relieved from the imputation of contributory negligence by the Woolen Co. (1900) 177 Mass. 128, 58 fact that the goods upon the elevator N. E. 182; Towner v. Missouri P. R. Co. were so arranged that there was not space enough at the edge for his feet to be placed wholly upon the platform, since in such case the position is so manifestly dangerous to a casual obmanifestly dangerous to a casual ob- 2"In determining whether an emserver that he should not have taken it ployee has recklessly exposed himself to at all. Hoehmann v. Moss Engraving Co. (1893) 4 Misc. 160, 23 N. Y. Supp.

downward movement of the hammer of 339, 9 Sup. Ct. Rep. 16. Vol. I. M. & S.—59.

action was necessary to the successful not have earned ordinary wages if he uncoupling of the car from the tender had not so fastened it would not relieve of an engine. Dooner v. Delaware & H. him of the charge of negligence in hav-An employee riding upon a freight clevator and injured by his heel catching under a beam while projecting form. Canal Co. (1895) 171 Pa. 581, 33 Atl. ing operated the press in an improper

<sup>1</sup> See, for example, Kelley v. Calumet (1893) 52 Mo. App. 648; Southern R. Co. v. Arnold (1897) 114 Ala. 183, 21 So. 954; Cook v. Bullion-Beck & C. Min. Co. (1895) 12 Utah, 51, 41 Pac. 557.

peril, or failed to exercise the care for his personal safety that might reasonably be expected, regard must always be <sup>5</sup> British Columbia Mills Co. v. Scott had to the exigencies of his position, in-(1895) 24 Can. S. C. 702. In an action deed to all the circumstances of the for injuries caused by the fact that the particular occasion." Kane v. Northern lever designed to arrest by its fall the C. R. Co. (1888) 128 U. S. 91, 32 L. ed.

emergency is one produced by the necessity of doing a certain piece of work with unusual promptitude.3

In other cases the essence of the situation to be considered is that the servant was confronted by a serious danger; that he had not sufficient time to deliberate upon the comparative safety to the alternative courses of action open to him for the purpose of avoiding injury; and that the alarm or nervous excitement produced by the conjuncture impaired his reasoning faculties to such a degree that it was unjust to gauge the quality of his conduct by the ordinary standards. It is well settled that a servant who is suddenly exposed to great and imminent danger is not expected to act with that degree of prudence which would otherwise be obligatory. Or, as the doctrine is also expressed, a servant is not necessarily chargeable with negligence because he failed to select the best means of escape in an emergency.4

dertook to make a dangerous coupling car, it was held not to be error to refuse the cars had to be moved quickly to to instruct the jury that the defendant the cars had to be moved quickly to to instruct the jury that the defendant make way for an expected train has been would not be liable if the gate was not to disprove negligence. Lawless v. Connecticut River R. Co. (1883) 136 Mass. 1.

In deciding whether a brakeman, injured while attempting to couple cars, used due care and diligence, the jury may consider the fact that he was, on a sudden emergency, required to make the coupling in a hurry. St. Louis, I. M. & W. 181. S. R. Co. v. Higgins (1890) 53 Ark. 458, 14 S. W. 653.

Evidence that a brakeman was injured while coupling a moving to a stationary car at a point on the road where the to arrest trespassers on such train is business of the company required coupling of cars to be frequently made, and determination of the jury; and the fact where the road was defective; that the that his companions made the same ataccident occurred in the night while he tempt under like circumstances indiwas obliged to carry a lantern, and at a cates that the undertaking was not so was obliged to early a lantern, and at a cates that the tindertaking was not so time when it was necessary that he apparently perilous as to make it one should act with promptness; and that which no reasonable man would enter he was not familiar with the condition upon. Chicago, R. I. & P. R. Co. v. of the track at that point,—is sufficient Kinnare (1900) 91 Ill. App. 508, Afto sustain a finding that he was not firmed in (1901) 190 Ill. 1, 60 N. E. 57. chargeable with contributory negligence

See also cases cited in § 440, subd. chargeable with contributory negligence in going between the cars in attempting d, post. to make the coupling. Horan v. Chicago, St. P. M. & O. R. Co. (1893) 89 Iowa, 329, 56 N. W. 507.

In a case where a brakeman slipped on the dangerous surface formed by the accumulation of ice and snow on the end gate of a coal car which was lying at a 92 Ga. 658, 18 S. E. 999; Cowen v. Ray slope of about 30 degrees, and there was (1901) 47 C. C. A. 352, 108 Fed. 320 no evidence that he knew the condition (train hand jumped from engine to esof the gate before the time when he was cape impending collision); McGraw v.

<sup>a</sup>The fact that when a brakeman un- about to step on it from the adjoining mentioned as one of the facts tending defective, and could have been raised and fastened. Whether the brakeman 136 was justified in incurring unusual risk in attempting to pass over it, while it was in the position described, depended upon the haste required in the performance of the duty in which he was then engaged. McDermott v. Iowa Falls & S. C. R. Co. (1892) 85 Iowa, 180, 52 N.

Whether the attempt of a special policeman in the employ of a railroad company to get on a moving train while in the discharge of his duty in endeavoring negligence is a question of fact for the

<sup>4</sup> Baltzer v. Chicago, M. & N. R. Co. (1892) 83 Wis. 459, 53 N. W. 885; Wesley City Coal Co. v. Healer (1876) 84 Ill. 126; Chicago & G. T. R. Co. v. Kinnare (1898) 76 III. App. 394; Simmons v. East Tennessee V. & G. R. Co. (1893)

If the evidence adduced by the plaintiff tends to show that the alarm and confusing circumstances may have been such that a man of

Texas & P.R.Co.(1898) 50 La. Ann. 466, in motion, suddenly came down); Silver 23 So. 461 (similar facts); Louisville & N. R. Co. v. Rains (1893) 15 Ky. L. Rep. 423, 23 S. W. 505 (similar facts); St. Louis, I. M. & S. R. Co. v. Touhey (1899) 67 Ark. 209, 54 S. W. 577 (similar facts); Haney v. Pittsburgh, C. C. & St. L. R. Co. (1893) 38 W. Va. 570, 18 S. E. 748 (section hand jumped off hand car to avoid collision with train); Chicago, R. I. & P. R. Co. v. Dignan (1870) 56 Ill. 487 (trackman hurriedly jumped off a track to escape a train which had come upon him unexpectedly, and in the excitement of the moment stepped onto the ends of the ties of an adjoining track without looking to see whether any cars were approaching); Richmond & D. R. Co. v. Farmer (1892) 97 Ala. 141, 12 So. 86 (section foreman, while intently watching to see how a frog which he had been repairing worked under an engine which was passing over it, was suddenly surprised by another engine, and stepped in the wrong direction); Houston & T. C. R. Co. v. Rodican (1897) 15 Tex. Civ. App. 556, 40 S. W. 535 (section hand jumped on track in front of car when he discovered a train approaching it); Bowen v. Chicago, B. & K. C. R. Co. (1888) 95 Mo. 268, 8 S. W. 230 (tracklayer jumped off a train when bridge gave way); Louisville & N. R. Co. v. Shivell (1892) 13 Ky. L. Rep. 902, 18 S. W. 944 (servant trying to remove driftwood which had lodged against a bridge jumped into the river, when he saw that it was about to carry away the bridge); Richmond & D. R. Co. v. Brown (1893) 89 Va. 749, 17 S. E. 132 (servant took refuge close to a depot platform, when he was suddenly surprised by cars backing down on him); Gumz v. Chicago, St. P. & M. R. Co. (1881) 52 Wis. 672, 10 N. W. 11 (similar facts, the place of refuge being the side of a coal house); Lake Erie & W. R. Co. v. McHenry (1894) 10 Ind. App. 525, 37 N. E. 186 (switchman, while coupling, involuntarily jerked his hand backwards, so that it was caught between the deadwoods, as the approaching car gave a sudden lurch forward); South West Improv. Co. v. Smith (1888) a mine, without a signal, attempted to open the door to prevent the possible consequences to himself of a collision between it and a train of loaded coal cars which, having been accidentally set had not provided any means of taking

Cord Combination Min. Co. v. McDonald (1890) 14 Colo. 191, 23 Pac. 346 (miner, while ascending an incline leading out of a mine, was met unexpectedly by cars and tried to cross the track to get out of their way); Johnson v. Steam Gauge & Lantern Co. (1893) 72 Hun, 535, 25 N. Y. Supp. 689 (servant used

a defective fire escape).

In Cottrill v. Chicago, M. & St. P. R. Co. (1879) 47 Wis. 634, 32 Am. Rep. 796, 3 N. W. 376, the court allowed the action to be maintained where an engineer stayed at his post when a collision was imminent. It was held that, as there was no time for deliberation, and the engineer was not bound to jump off from a mere apprehension of uncertain danger,-there being some slight chance of averting the accident,-a special finding that he could have got off in time to save himself after reversing the lever did not necessarily require the inference that he was negligent.

In Dickson v. Omaha & St. L. R. Co. (1894) 124 Mo. 140, 25 L. R. A. 320, 27 S. W. 476, an engineer was held not to have been negligent, as a matter of law, in remaining on his engine after the front pair of small wheels of his engine was derailed and he had reversed his engine and put on air brakes. See also Knapp v. Sioux City & P. R. Co. (1884) 65 Iowa, 91, 54 Am. Rep. 1, 21 N. W. 198, to a similar effect.

In Gumz v. Chicago, St. P. & M. R. Co. (1881) 52 Wis. 672, 10 N. W. 11, the action was held maintainable, where a section man, thinking a train which was coming up behind the hand car on which he was, might be stopped in time to avoid a collision, remained on the car.

In none of the four cases last cited was the instinctive impulse to save human life treated as a distinct element. Accordingly, although the facts involved are similar to some of the situations discussed in § 360, infra, the decisions seem to be more correctly referred to the general principle now under review, than to the special rule which takes account of that impulse.

A laborer on a work train was not 85 Va. 306, 7 S. E. 365 ("door boy" in negligent, as matter of law, because he left the caboose in severely cold weather. to walk to the nearest village, when he found that the caboose did not afford adequate shelter and that the company ordinary prudence might have acted in the same manner as plaintiff did, the instructions to the jury should advert in appropriate language

Co. (1891) 46 Minn. 39, 12 L. R. A. 257, 48 N. W. 559.

A street-railway employee having his rection by him to have the car backed leg crushed between a bank or wall of is not well judged. White v. Houston & rock and the side of a motor upon which the was riding while being carried home from work with his legality to the side of the sid from work, with his leg slightly prothe right to recover on the ground that he might have saved himself by stepping Denver & B. P. Rapid-Transit Co. v. conductor of a backing train. Roll v. Dwyer (1894) 20 Colo. 132, 36 Pac. Northern C. R. Co. (1878) 15 Hun, 496. 1106, Reversing (1893) 3 Colo. App. 408, 33 Pac. 815.

Failure of a railroad employee to escape from in front of a train of cars after learning of his danger is not such contributory negligence as will bar recovery, where he did not learn of his danger in time to give him a reasonable chance to escape, and his failure to do the sudden approach of the train. Southneer in failing to observe a signal flag placed on a bridge upon which he was working does not depend upon the infallibility of his judgment in selecting the means of escape; and he may recover if he exercised due care in such selection, although it was possible for him to escape from the bridge in safety by different means. *Peoria*, *D. & E. R. Co.* v. *Rice* (1893) 144 Ill. 227, 33 N. E. 951. A servant caught on a bridge by a train is not, as matter of law, guilty of such contributory negligence as will prevent recovery, in starting to run toward ing, instead of getting down between the 39 L. R. A. 834, 39 Atl. 764. ties and climbing upon the timbers tral R. Co. (1878) 47 Iowa, 689.

A railroad employee who has been (1899) 89 Ill. App. 113.

him back to the place from which he caught between a car and a railroad started. Schumaker v. St. Paul & D. R. platform through the negligence of his vice principal cannot be charged with contributory negligence, although a di-

In an action by a repairer employed jecting over the side, is not deprived of by one railroad company, against another railroad company whose freight trains he had a right to stop, he will not be held negligent, as matter of law, beup on the platform, where he realized be held negligent, as matter of law, behis danger so suddenly that it would cause he attempted to remove his hand have required the exercise of practically car from the track, after seeing that his instantaneous action and judgment signal to stop was disregarded by the

Where a foreman and his crew, who were moving some wrecked cars, had grown somewhat nervous over their appearance, and began to be fearful of injury to themselves; and the foreman told one of the crew to move and give him room, as he might have to jump at any time, and the latter said he would get off right away, and in getting to the so was because of fright occasioned by ground he was killed, the jury are justified in finding that he was not negliern R. Co. v. Pugh (1896) 97 Tenn. 624, gent. St. Louis, I. M. & S. R. Co. v. 37 S. W. 555. The right of a railway Touhey (1899) 67 Ark. 209, 54 S. W. section foreman to recover for injuries 577. Compare Gulf, O. & S. F. R. Co. due to the alleged negligence of an engive. Knott (1896) 14 Tex. Civ. App. 158, neer in failing to observe a signal flag 36 S. W. 491 (member of wrecking crew jumped off of derailed car which suddenly turned over while it was being lifted).

A quarryman is not chargeable with contributory negligence because, when confronted with imminent peril from a blast of which he had not been warned in reasonable time to enable him to reach a place of safety, he sought refuge in an engine house, where he was injured, when it is not shown that he would not have been struck had he stayed outside. Belleville Stone Co. v. the end of the bridge which he is right- Mooney (1897) 60 N. J. L. 323, 38 Atl. fully upon, on seeing a train approach- 835, Affirmed in (1898) 61 N. J. L. 253,

An instruction to find for the defendwhich constitute the frame of the bridge ant is erroneous, where it appears that and holding on there while the cars pass the accident happened to the servant above him, which was the only way to owing to his being confused by the sudescape. Olsen v. Andrews (1897) 168 den rush of steam from an exhaust pipe, Mass. 261, 47 N. E. 90. It is not negli- of the existence of which he had no gence to run on a railway track to es- knowledge, and the simultaneous startcape a frightened team. Moore v. Cen- ing of machinery near him. Bennett v. Brown Hoisting & Conveying Mach. Co.

to these elements.<sup>5</sup> If there is no such evidence, it is proper to charge that, in determining whether the servant used such means to extricate himself from his perilous position as a prudent man would have used, the jury are not authorized to take into consideration the question whether his excitement prevented him from thinking of the proper means of extricating himself.6

As the doctrine just stated is not applicable unless the impairment of the servant's mental faculties was excusable under the circumstances, he cannot recover, if he was not in any actual danger; nor

A member of a ship's crew, who jumps cape. Frandsen v. Chicago, R. I. & P. rerboard to escape the dangerous con-R. Co. (1873) 36 Iowa, 377. overboard to escape the dangerous consequences which he apprehends from a collision which has just taken place, is jumping from his engine to escape a not necessarily negligent. The City of collision, it was held error to charge a not necessarily negligent. The City of Norwalk (1893) 55 Fed. 98; Killien v. *Hyde* (1894) 63 Fed. 172.

For other similar decisions as to persons not in the employment of the defendant, see Shearm. & Redf. Neg. § 89.

It is not easy to reconcile the abovea hand car off the track to avoid a comnence of the danger which threatened ing train, who, from excitement, failed him at the time. Central R. & Bkg. Co. to heed a sudden order by the boss to "stand clear and let her go," and continued in his endeavor, was guilty of contributory negligence barring a recovery for injury from collision with the train. International & G. N. R. Co. liability on the ground that the emv. Hester (1888) 72 Tex. 40, 11 S. W. ployee, when in such sudden and imminent peril, lost his presence of mind, and ared itself justified in setting aside a failed to use ordinary care and caution ered itself justified in setting aside a failed to use ordinary care and caution verdict for the plaintiff for the reason to escape, is erroneous in a case where that he had abundance of time, after the order was given, to get out of the way, and that it was his own fault if he did not hear that order. The decision seems to be a clear invasion of the province of the jury, especially as there was evidence that the servant was somewhat deaf. Apparently, none of the cases col-lected in this section were brought to the attention of the court.

In a case of this description it was held proper to refuse an unqualified charge in the following words: "If the plaintiff was notified or had knowledge of the approaching train, and was also notified by the person under whose Bell charge he was working to get out of the 397. way of the approaching train, and plaintiff had time and opportunity to do so and did not, then defendant is not lia- 491; Briggs v. Newport News & M. Valble." It was laid down that, in view of ley Co. (1894) 15 Ky. L. Rep. 618, 24 the testimony, the case could not properly be made to rest upon the three facts a rather strong application of the rule

Where an engineer was killed in jury that he had a right to do so, and "that the fact that he jumped was proof that he thought jumping the safest course." Whether his act was a pru-dent one was declared to be a question for the jury, to be determined with refcited decisions with one in which it was erence to the degree of safety with which held that a section hand, aiding to lift the jump could be made, and the immia hand car off the track to avoid a comnence of the danger which threatened

there is evidence tending to show that the injured servant had been ordered away from the place of danger before the accident occurred, and that he would have escaped if he had obeyed the order with reasonable promptitude. But such a charge is not objectionable, if the jury are also informed that the legal consequence of their inferring from the evidence that it was in the servant's power to have avoided injury by complying with such an order will be that the action cannot be maintained. Dingee v. Unrue (1900) 98 Va. 247, 35 S. E. 794.

<sup>a</sup> Atchison, T. & S. F. R. Co. v. Van Belle (1901; Tex. Civ. App.) 64 S. W.

<sup>7</sup> Gulf, C. & S. F. R. Co. v. Knott (1896) 14 Tex. Civ. App. 158, 36 S. W. S. W. 1069. The latter case is certainly of notice, time, and opportunity to es- in the text, as it was that of a minor

if the danger was one of an ordinary type, not differing appreciably in magnitude from those frequently encountered by the servant in the course of his employment.<sup>8</sup> Nor will the mere fact that the servant was alarmed, and sought to place himself where he might the more readily escape from the apprehended danger, if the necessity should arise, excuse him if he failed to use reasonable care in attempting to reach the desired position.<sup>9</sup>

The doctrine does not inure to the advantage of a servant who had, by his own antecedent negligence, created the emergency which called for sudden and dangerous action.<sup>10</sup> But the mere fact that the course

employee who was injured by jumping from a hand car on the approach of a coming freight train. The court decided the case on the broad ground that if, owing to his weakness of mind and physique, his head was affected by his position on the car, it was unavoidable, or a result which the employer was not

bound to anticipate.

\*In Gaffney v. New York & N. E. R. Co. (1887) 15 R. I. 456, 7 Atl. 284, where a brakeman, while attempting to climb a car, was struck by a pile of lumber, it was urged that the piling of the lumber near the track made an unusual with which was wickeding and confus risk, which was misleading and confusing, and so presented a complication of circumstances which warranted the verdict of the jury in determining the question of the plaintiff's negligence. The court said: "We do not see any such complication. The plaintiff, knowing the lumber pile was near the track, jumped upon a moving train supposing he could escape it, and failed. As much as this could be said in almost every case of pure accident. We do not see that the company did anything to mis-lead or confuse him, or that he could have been misled or confused, except, possibly, that he may have thought the train was not going as fast as it really was going and that he had time to climb its side before reaching the pile. He was not ordered to get upon the train, and his place as head brakeman was on the car next to the engine, and not on the rear car. His getting upon the car, therefore, under the circumstances, was an act of his own choosing."

The mere fact that a brakeman was responding to a signal for brakes is no excuse for his swinging his body so far out from a side ladder that it comes into collision with the side of a bridge. Illick v. Flint & P. M. R. Co. (1888) 67

Mich. 632, 35 N. W. 708.

An experienced railroad laborer, riding in a closed car having an open door on the side, who, becoming alarmed at the rapid speed of the train over a piece of road known to him to be rough and uneven, leaves a safe position to get nearer the door, so as to be able to jump out in case of accident, and in so doing passes between the stove and the open door through a passage of 2 or 3 feet, without support or protection, when he might have gone on the other side of the stove in safety, and is thrown out of the open door by a sudden lurch of the car, and injured,—cannot recover. Taylor v. Richmond & D. R. Co. (1891) 109 N. C. 233, 13 S. E. 736.

<sup>10</sup> A servant who brought himself into the perilous position by his disobedience to a rule (see §§ 366 et seq., infra) cannot recover. Baltzer v. Chicago, M. & N. R. Co. (1892) 83 Wis. 459, 53 N. W.

885.

A brakeman who, after setting the brakes on a car so tight as to cause danger to the train, attempts to mount the car by stepping on the journal box and taking hold of a standard on the side of the car, no other means being provided for getting onto it, cannot recover for injuries caused by the standard's turning round in his hand, inasmuch as the emergency which existed was one of his own creation. Quirouet v. Alabama G. S. R. Co. (1900) 111 Ga. 315, 36 S. E. 599.

Recovery has been denied, where a section hand was injured while attempting to remove a hand car from the track immediately in front of an approaching train, which he would have observed if he had watched for it, as he had been warned to do. Nelling v. Chicago, St. P. & K. C. R. Co. (1896) 98 Iowa, 554, 63 N. W. 568. On the second appeal of this case (98 Iowa, 559, 67 N. W. 404) the court did not lay any stress upon

taken by the servant to preserve himself from injury was adopted in contravention of the express orders of his superior will not prevent his recovering. 11

359. Act done under the influence of bodily pain. - Culpability cannot be predicated, as a matter of law, with respect to an act which was the result of a convulsive movement resulting from severe bodily pain, although such an act would otherwise have been negligent.1

360. Act done in attempting to save the life of another person.-In the United States it is now a well-established doctrine that, as a leading case on the subject succinctly puts it, "the law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons." An essentially similar view has been adopted in England and Scotland.2

When a collision is inevitable, such ac-tionale of the decision was different.

ing. in consequence of an injury to his essary to that end that he remain at his finger, caused by the defective drawhead. post, his widow was entitled to recover;

the failure to keep a lookout, and de-Baltimore & P. R. Co. v. Elliott (1896) cided against the plaintiff on the simple 9 App. D. C. 341. A brakeman who is ground that the time for removing the struck and hurt by a coupling link car was so short that it was clearly which breaks while he is attempting to negligent to attempt to get it off.

make a coupling is not guilty of neglicar was so short that it was clearly negligent to attempt to get it off.

An instruction on the theory of sudden exigency or emergency is properly he throws himself forward upon another refused, where the evidence is that a track upon which he falls fainting, withlineman was sent to ascertain the extent and nature of trouble with telephone wires, caused by a charge of electricity transmitted from the wires of an electric street railway company; that Jonson Engineering & Foundry Co. of his own volition, he ascended the railway company's pole, and was killed by 980, where a servant was working in a scanding the telephone company's pole placing his hand on a rail while a car the same work could have been done by ascending the telephone company's pole placing his hand on a rail while a car 30 feet distant, where he would have avoided contact with the wires of the railway company. Jackson & S. Street & Street

When a collision is inevitable, such action becomes one of reasonable precaution. Georgia R. & Bkg. Co. v. Rhodes (1876) 56 Ga. 645.

'A brakeman is not guilty of contributory negligence, as a matter of law, tion that if an engineer, remaining on precluding recovery for injuries to his his locomotive, when a collision was imfort by being jammed by a defective minent, believed, and had reason to be drawhead, in placing his foot on the lieve, that in the emergency, by sanding drawhead to save himself from falling the track or by otherwise working the from the platform of the car as he let engine, he could prevent the collision go of the ladder by which he was holding in consequence of an injury to his essary to that end that he remain at his

It will be observed that in many of the cases the circumstances involved have been such that a secondary result of success in the effort made by the injured person to save life would necessarily have been the preservation of some part of the master's property. His desire to effect that preservation is sometimes referred to as a distinct addi-

neer could not, with any degree of prob- App. 145, 54 Pac. 960. ability, be of service at his post, before at his post."

torman on an electric car is not negli- protection of his master's property tendgent in remaining at his post, and endeavoring to avert a collision with an-

dertakes to stop a stream of molten iron which has unexpectedly begun to flow recovery. Maryland Steel Co. v. Marney (1898) SS Md. 482, 42 L. R. A. 842, 42 Atl. 60.

The contributory negligence of a quarryman injured by a blast which was upon which another employee was at work, in failing to abandon the latter and seek a place of safety as soon as he a part of his duty to lower his fellow 764.

v. Louisville & N. R. Co. (1901) 22 Ky. and do anything by which they might

but if not so necessary, and he knew it, L. Rep. 1893, 53 L. R. A. 267, 61 S. W. or ought to have known it, then she 997; Linnehan v. Sampson (1879) 126 could not recover, was held proper when Mass. 506, 30 Am. Rep. 692; Donahoe read in connection with the entire v. Walash, 8t. L. & P. R. Co. (1884) 83 charge. "Courts," it was said, "should Mo. 562, 53 Am. Rep. 594; Gibney v. place themselves in the position of the State (1893) 137 N. Y. 1, 19 L. R. A. engineer at the moment of such immi- 365, 33 N. E. 142; Sann v. H. W. Johns nent danger, demanding such instan- Mfg. ('o. (1897) 16 App. Div. 252, 44 taneous decision and action, and should N. Y. Supp. 641; Pennsylvania Co. v. not scan closely the grounds of hope he Langendorf (1891) 48 Ohio St. 316, 13 may have had to save others, though L. R. A. 190, 28 N. E. 172; Peyton v. risking himself in the effort. . . . . Texas & P. R. Co. (1889) 41 La. Ann. We hold, with that court, that it must 862, 6 So. 690; Walters v. Denver Conbe clear from the facts, that the engi-sol. Electric Light Co. (1898) 12 Colo.

<sup>2</sup>In a leading case it was laid down courts should hold it want of common by Lord Esher, arguendo, that evidence care for him to brave danger and stand going to show that the servant was injured in doing an act which was direct-Similarly it has been held that a mo- ed to the preservation of life or to the ed to negative contributory negligence. Thomas v. Quartermaine (1887) L. R. other car. Gamble v. Akron, B. & C. R. 18 Q. B. Div. 685, 690, 56 L. J. Q. B. N. Co. (1900) 63 Ohio St. 352, 59 N. E. 99. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. An employee in a steel works who un- 555, 51 J. P. 516.

A finding by a trial judge that there was no contributory negligence will not through the tap hole of a cupola under be set aside where the evidence was to circumstances when other employees are the effect that the plaintiff's decedent, thereby put in peril is not debarred from an "underviewer" in one part of a coal mine, having reason to suppose that the life of a fellow workman in another part of the mine was in danger from poisonous gases, had gone, without orders, to his rescue; that, although he was alfired while he was operating a derrick most overcome by the gas, while on his way to the place where the other workman was lying, he had persisted in his attempt to save him; and that, after was warned of the anticipated blast, is finding him quite dead, he had tried to for the jury upon evidence that it was carry the body to the shaft, and had succumbed to the poisonous gas. Roeemployee to the ground as soon as the buck v. Norwegian. etc., Titanic Co. (Q. warnings for blasts were given. Belle- B. D.; 1884) 1 Times L. R. 117. The ville Stone Co. v. Mooney (1897) 60 N. grounds of defense were (1) that at the J. L. 323, 38 Atl. 835, Affirmed in (1898) time of his death the "underviewer" 61 N. J. L. 253, 39 L. R. A. 834, 39 Atl. had been a volunteer, and not a servant acting within the scope of his duties, See also cases cited in note 3, infra. and (2) that he had been guilty of con-In the following cases this doctrine tributory negligence. Day, J., was of was applied in an action against a opinion that the defendant's servants stranger: Louisville & N. R. Co. v. Orr had an implied order, in case of danger (1898) 121 Ala. 489, 26 So. 35; Becker to life, to assist as much as possible,

tional motive, the operation of which tends to absolve him from the imputation of negligence.3

think their assistance would be of real may have lost time in endeavoring to use in saving the lives of their fellow save a fellow creature and been thereby workmen. Hawkins, J. (now one of the unable to avoid being hurt. Lord Mac-Lords Justices), admitted that this prin- Donald, Lord Adam, and Lord Trayner ciple would have protected the plaintiff dissented on the ground that the risk if he had not been warned to wait be- was voluntarily incurred. fore going to find the imperiled workman, and finally relied upon the theory 13 Sc. Sess. Cas. 4th series, 1118, as 23 that it was negligence to go on after he Sc. L. Rep. 798, it was held to be always had been nearly overcome by the gas. a question for the jury, whether a per-Leave to appeal, asked for on the ground son is negligent in trying to save the that the case was one upon which there life of another.

was no authority, was refused.

of nobody but himself. when he saw a loaded wagon approach- as stated in § 358, note 4, supra. ing at a high rate of speed. He jumped said: "I do not speak about interposing the engine. Schwartz v. Shull (1898) to save property, although that might 45 W. Va. 405, 31 S. E. 914. raise a question worthy of consideratake account of, and I hold that, if he struck by a hand car as it was thrown cannot be pleaded that he voluntarily ing on the track until the engine was exposed himself to danger in turning close to him, in an effort to remove the back on the spur of the moment to save hand car from the track in order that his companion, and that, instead of do- it might not jeopardize the safety of ing so, he ought to have allowed his the approaching train and the lives of companion to take his chance of being the persons thereon. Dailey v. Burlingkilled." Lord McLaren and Lord Mon- ton & M. River R. Co. (1899) 58 Neb. creiff were for allowing the case to go 396, 78 N. W. 722; Walker v. Shelton to the jury, as, for aught that appeared, (1898) 59 Kan. 774, Appx. 52 Pac. 441; it might be within the scope of the prin- Omaha & R. Valley R. Co. v. Krayenciple that, if a person who is exposed to buhl (1896) 48 Neb. 553, 67 N. W. 447. imminent danger through the fault of himself, he does not lose his right to trestle was guilty of contributory negcompensation because he has not taken ligence in running a race with the train the best possible means, or because he for the next cage, instead of abandoning

In Woods v. Caledonian R. Co. (1886)

'Negligence is not inferable, as mat-It cannot be held, as a matter of law, ter of law, where an engineer stays at that, if a person is exposed to danger by his post and tries to stop the train, the fault of another, he has failed to when he suddenly discovers that it is exercise reasonable care and prudence running onto an open switch. Pennsylfor his own safety merely because he vania Co. v. Roney (1883) 89 Ind. 453, has paid regard to the safety of a fel-46 Am. Rep. 173. Or that there is a low workman as well as his own, and so dangerous obstruction on the track. brought himself into further peril which Atchison, T. & S. F. R. Co. v. Henry he might have escaped if he had thought (1896) 57 Kan. 154, 45 Pac. 576, dis-Wilkinson v. approving of an instruction to the effect Kinneil Cannel & Coking Coal Co. (1897) that, if the engineer could have saved 24 Sc. Sess. Cas. 4th series, 1001. (This his life by jumping off, it was his duty statement of the effect of the decision is to so do. Compare Cottrill v. Chicago, extracted from the opinion of Lord M. & St. P. R. Co. (1879) 47 Wis. 634, Kinnear.) There the injured person was 32 Am. Rep. 796, 3 N. W. 376; Dickson working with a companion on a star-v. Omaha & St. L. R. Co. (1894) 124 tionary wagon at the foot of an incline, Mo. 140, 25 L. R. A. 320, 27 S. W. 476,

A servant is not guilty of contributory off, and, in the hurry and confusion of negligence in attempting to throw from the moment, tried to stop the wagon by the train, in order to protect himself inserting a prop between the spokes of and the property and other employees of a wheel, the result being that he was the employer, a box containing sticks of thrown under the wagon. Lord Young dynamite which has caught fire from

A trackman is not, as matter of law, tion; but to save life or limb I think guilty of contributory negligence pre-there was such a duty as the law will cluding recovery for injuries from being [the plaintiff] performed such a duty, it from the track by an engine, in remain-

It is a question for the jury whether another takes reasonable means to save a watchman overtaken by a train on a

What degree of imprudence constitutes rashness within the meaning of the qualifying clause in the doctrine, as above stated, is a question which it is not easy to determine. But it seems very doubtful whether any court would ever take upon itself to declare that a person who had risked his own life to save that of another had overstepped the permissible limits of venturesome action, unless the evidence was such as to indicate a degree of temerity not distinguishable morally from deliberate self-destruction. The present writer has no hesitation in expressing the opinion that culpability should not, at all events, be inferred, as a matter of law, in any case where it is possible to say upon the facts that there was some chance, however small it might be, of accomplishing the object aimed at without injury to life or limb.4 It has been expressly held that every reasonable allowance should be made for the disturbing mental effects of the excitement induced by such conjunctures as those contemplated by the doctrine. A person should not be held culpable merely for the reason that the risk taken proved to be actually greater than he had anticipated.<sup>5</sup>

The doctrine thus applied does not inure to the benefit of the servant if the dangerous predicament of the person whose life he tried

W. 892.

Where there is no satisfactory evi- not been replaced. dence to show the probable or possible

tributory negligence as would prevent a paramount duty. recovery, by continuing to drive a rail back into position after seeing a train either of these rulings would be apapproaching at the rate of 30 or 40 miles proved in most jurisdictions. an hour, although the train would have

his tricycle and saving himself by get- been wrecked if he had not continued. ting out on one of the water platforms Rawlston v. East Tennessee, V. & G. R. at the side of the trestle, as he might Co. (1894) 94 Ga. 536, 20 S. E. 123. No have done, where there would have been reference was made to the cases cited in some danger to the train in leaving the this section. The court simply decided tricycle on the track, and the possible that the servant could not recover be-rate at which the tricycle could be pro- cause there was nothing to prevent his pelled was nearly equal to that at which seeing the train and getting off the track the train was supposed to run under the sooner than he did, and refused to at-schedule. Louisville & N. R. Co. v. Seitach any controlling importance to the bert (1900) 21 Ky. L. Rep. 1603, 55 S. testimony of a witness, that the train would have been wrecked if the rail had

In another case it was held that an effect of a collision between the hand employee was guilty of such contribucar on which the servant was and the tory negligence as would prevent a reapproaching train which ultimately covery for an injury received in attempt-struck it, or that the train was really ing to remove a railroad tie from the in danger of being wrecked, it is not track immediately in front of a rapidly in danger of being wrecked, it is not track immediately in front of a rapidly error to refuse to give an unqualified moving train, although the engineer on instruction to the effect that exposure such train asked for its removal. Writt of life by an employee to save life is neither wrongful nor negligent, if attempted within the scope of his duty. 496, 65 N. W. 173. There the train was tempted within the scope of his duty. about 80 feet away, while the plaintiff Condiff v. Kansas City, Ft. S. & G. R. was 20 feet from the track when he co. (1891) 45 Kan. 256, 25 Pac. 562 (verdict for defendant upheld).

\*\*In one case it was held that a rail-such manifest and imminent danger, road employee was guilty of such consellations. road employee was guilty of such con- self preservation was an absolute and

But it may fairly be doubted whether

<sup>5</sup> Pennsylvania Co. v. Langendorf

to save was the direct result of an act of antecedent negligence on the part of the servant himself.6

361. Act done in attempting to preserve the employer's property.— The courts have sometimes allowed the action to be maintained upon the theory that, when a servant is suddenly confronted by an emergency in which his master's property is threatened with destruction or serious injury, the fact that he attempted to preserve that property, and in doing so exposed himself to greater risks than would have been encountered by a prudent person who was thinking only of his own safety, will not necessarily render him chargeable with contributory negligence.1

This doctrine, however, does not afford any protection to a servant whose conduct was essentially rash. It does not justify him in going into a place in which he will be exposed to an imminent peril which may at any moment eventuate in disaster.<sup>2</sup> Nor does it serve as an excuse where the damage with which the property was threatened was comparatively slight, when considered with relation to the extremely

As, where a rainfold section boss a wrong course in making a nutricular-took his wife as a passenger upon a tempt to preserve the machinery, it was hand car in violation of the rules of held proper to refuse a charge to the the company, and was injured while eneffect that, if the plaintiff conceived it deavoring to save her upon a collision to be his duty to save his machine from of such car with an engine. Mischke v. damage, and in so doing caused the in-Chicago, B. & Q. R. Co. (1894) 56 Ill. jury, his mistaken conception of duty App. 472. Or where an employee was did not relieve him from the conselided while attempting to rescue any quences of his contributory pegligence. killed, while attempting to rescue an quences of his contributory negligence other employee who was assisting him in doing an act which aggravated the from a dangerous position in which he danger of the situation. from a dangerous position in which he danger of the situation. had been placed because of a defective A complaint in an action for injuries belt, and the evidence showed that the injury would not have happened but is not demurrable where it alleges that for the negligence of such employees in it was the duty of the deceased to take attempting to place the belt on a pulley without instructions and without its besieng in the line of their duty. Sann v. in such yard approaching another ear, so that it would collide with the latter pulses it was a greeted the deceased in the deceased the Div. 252, 44 N. Y. Supp. 641.

matter of law, where a section man, who of the approaching car by an outside is helping to remove a hand car from ladder thereon; and that, while he was the track when a train is approaching, so climbing, the two cars collided, causis injured through miscalculating the ing the injury. Kelley v. Chicago, M. time necessary to complete the process. & St. P. R. Co. (1880) 50 Wis. 381, 7 Winczewski v. Winona & W. R. Co. N. W. 291. (1900) 80 Minn. 245, 83 N. W. 159; See also cases cited in § 360, notes 2, Pennsylvania Co. v. McCaffrey (1894) 139 Ind. 430, 29 L. R. A. 104, 38 N. E.

(1891) 48 Ohio St. 316, 13 L. R. A. 190, engine ran away, and the plaintiff was 28 N. E. 172. 28 N. E. 172. injured in consequence of his adopting As, where a railroad section boss a wrong course in making a hurried at-

unless it was arrested, the deceased, in Compare cases cited in § 358, note 10, order to prevent such collision, and pra. "without fault or negligence on his Culpability is not predicable, as a part," undertook to climb upon the top

3, supra.

<sup>2</sup> Malthie v. Belden (1901) 167 N. Y. 307, 54 L. R. A. 52, 60 N. E. 645, Re-In Schall v. Cole (1884) 107 Pa. 1, versing (1899) 45 App. Div. 384, 60 where a governor belt broke and the N. Y. Supp. 824, where the servant took dangerous nature of the course of action pursued with a view to saving It is also conceded that less indulgence should be shown to a servant whose dangerous course of action was prompted merely by a desire to preserve his master's property, than to a servant whose impelling motive was his solicitude for the safety of human beings.4

## D. Commission of acts specifically forbidden.

362. Unlawful acts.—There can be no question that, where a servant's injury was proximately caused by the fact that he was violating a statute or municipal ordinance, the meaning and effect of which are perfectly clear, he cannot recover damages. This doctrine is applied regardless of the fact that the employer may have directed his servants to violate the law,2 or may have sanctioned the growth and continuance of a custom which amounts to a contravention of the law.<sup>3</sup>

a railroad company for an injury received in falling from a flat car, loaded land L. J. 147. ceived in falling from a flat car, loaded land L. J. 147.

with coal, while attempting to stop the car from running down a side track and act of 1884) required that "drivers" as possibly off the end of it, by jumping well as their employers should see that under the brake beam at the forward vehicles were provided with available end of the car and pressing it down with brakes and efficient breeching, it was his feet, holding himself to the car with held that a driver could not recover for one hand and pulling up the brake chain an injury caused by the absence of these with the other, the excuse for the act safeguards. Patterson v. Stevens (1890) being that the brake staff was so bent 11 New So. Wales L. R. (L.) 83. that it could not be operated—there being no rule of the company or direction giver who was voluntarily engaged. Atl. 735.

\*Condiff v. Kansas City, Ft. S. & G. R. Co. (1891) 45 Kan. 256, 25 Pac. 562. <sup>1</sup> This rule has been applied where the two railroad lines intersect each other fendentis" applies. Wallace v. Cannon on the same level. Chicago & N. W. R. (1868) 38 Ga. 199, 95 Am. Dec. 385. on the same level. Chicago & N. W. R. (1868) 38 Ga. 199, 95 Am. Dec. 385.

Co. v. Snyder (1886) 117 Ill. 376. Or
Under a statute declaring it to be a statutory provision which prohibited the duty of the "owner, agent, or opminers from carrying a drill with them erator" of a mine, to put catches on the miners from carrying a drill with them erator" of a mine, to put catches on the on the hoisting cage. Illinois Fuel Co. cage at the top of a shaft, the failure v. Parsons (1890) 38 Ill. App. 182. Or of the "pit boss" to see that such catches an ordinance prohibiting trains from were put on was held to be such conrunning at more than a certain speed. tributory negligence as would bar a reclave Shore & M. S. R. Co. v. Parker covery for his death, caused thereby. (1890) 131 Ill. 557, 23 N. E. 237; Illi-Beaucoup Coal Co. v. Cooper (1883) 12 nois C. R. Co. v. Murphy (1893) 52 Ill. App. 373.

111. App. 65. Or where a miner used an "Missouri, K. & T. R. Co. v. Roberts"

a path which led him past a burning iron rod for tamping charges of blasting powder, knowing that it was dangerous 3 A yard brakeman cannot recover of to do so. Shanahan v. Taranganba Proprietary Gold Min. Co. (1889) 3 Queens-

ing no rule of the company or direction gineer who was voluntarily engaged from any of its officers, requiring such in the transportation of Confederate a service of the brakeman. Judkins v. troops, for the purpose of making war Main C. R. Co. (1888) 80 Mc. 417, 14 on the government of the United States, cannot recover for injuries caused by the carelessness of other employees engaged in the same illegal employment. The court said that it is only where servant was violating a statutory pro- both parties have been engaged in the vision requiring all trains to stop at a same illegal transaction that the maxim certain distance from a crossing where "In pari delicto potior est conditio de-

This rule is perhaps subject to a qualification in the servant's favor, where the act which he was ordered to do was one which was not obviously, and to his own knowledge, within the statutory prohibition. Under such circumstances it has been held that he may recover, although his compliance with the orders given may have rendered him, as a matter of fact, a participant in the breach of the statute.4

As to the right of action for injuries received on Sundays, see § 326, notes 2, 3, supra.

363. Acts done in contravention of orders.—(See also § 342.)—According to nearly all the decisions, contributory negligence should be inferred, as a matter of law, whenever the injury resulted from the servant's noncompliance with a specific order given by the master or his representative, even though such an inference might not be a necessary one if the order were not a factor in the case. This doctrine is applicable whether the order related to the position which the servant was to take at a given time or place,1 or to the manner in

the work for which the servant was enhowever, seems to be insufficient to overgaged could not be lawfully executed come the effect of the general presumpunless a license was first granted by the tion entertained with regard to a servunless a license was first granted by the proper authorities, and the servant's employer had failed to procure such a license. Banks v. Highland Street R. Co. (1884) 136 Mass. 485, holding that twhere an employee of a telegraph company, to which a municipality has not issued any license to run its wires customed manner); Rome & D. R. Co. through the streets, is injured by a v. Chasteen (1889) 88 Ala. 591, 7 So. street car running against a wire which 94 (brakeman attempted to couple cerhe was stretching, he cannot maintain tain cars in violation of conductor's or he was stretching, he cannot maintain tain cars in violation of conductor's oran action against the railway company, der); Mendota Light & Heat Co. v. Laf-

he was working); Voshejskey v. Hill- at pump, while the men at the windlass side Coal & I. Co. (1897) 21 App. Div. were raising and lowering buckets above 168, 47 N. Y. Supp. 386 (miner trans- him). gressed statute prohibiting all persons from riding on loaded cars).

(1898; Tex. Civ. App.) 46 S. W. 270 clause of the English explosive act of (ordinance fixing the rate at which trains were to be run).

It may be mentioned in this connection that, in an action against a third knew nothing about the clause in quesperson, recovery has been denied where tion. The consideration thus relied on, heaven according to the result of the sevent was an experienced to the sevent was a seve

unless the driver was guilty of wanton ferty (1900) 92 Ill. App. 74 (workman recklessness. asphyxiated by reason of his having rerecklessness.

a Coal & Min. Co. v. Clay (1894) 51

Ohio St. 542, sub nom. Consolidated
Coal & Min. Co. v. Floyd, 25 L. R. A. be made); Knickerbocker Ice Co. v. De
848, 38 N. E. 610 (holding it error to
instruct a jury that a miner could recover, although he had transgressed a vicious horse); Lendberg v. Brotherton
statute imposing upon miners the duty
of propping the roof of the drift where
N. W. 846 (employee in mine worked
he was working): Voshelskey v. Hillat pump. while the men at the windlass

Where defendant's conductor, before removing new cars from the yard where \*\*Campbell v. Calderbank Steel & Coal manufactured, examined the cars and Co. (1898) 25 Sc. Sess. Cas. 4th series, found no person about them, and the 753. There the servant had violated a proper signal was then given, the railwhich an act incident to his duties was to be done, or to the work

for the purpose of completing some re-R. Co. (1887) 66 Mich. 448, 33 N. W. 541.

A brakeman who at the time of his employment knows that he will be required to couple cars provided with a Miller hook to those provided with a common drawhead, and is instructed not to stand between the cars while making is to be of that kind, is guilty of such contributory negligence as will prevent a recovery for his death, where he stands between the cars while making the coupling. Coffman v. Chicago, R. I. & P. R. Co. (1894) 90 Iowa, 462, 57 N. W. 955.

For a servant to take a position on

the platform of a car in violation of orders is negligence. Smithwick v. Hall & U. Co. (1890) 59 Conn. 261, 12 L. R. A. 279, 21 Atl. 924. A track repairer who rides on the pilot of an engine instead of in the box car provided for his transportation is negligent. Lelagh Lehrgh Valley R. Co. v. Greiner (1886) 113 Pa. 600, 6 Atl. 246.

A brakeman killed in a collision when another train ran into the rear of that on which he was stationed, while it was awaiting orders at a junction, is guilty of contributory negligence, where the decaboose, and not at the rear end or on the track behind the train where his duties as a flagman required him to be. Wabash R. Co. v. Zerwick (1897) 74 III. App. 670.

A brakeman who, of his own accord cases cited in § 337, supra. and in disobedience of orders, leaves the brake which he is told to operate, and 512, 13 N. E. 339 (servant was repair-

of which a red light was placed because C. & S. F. R. Co. (1889) 73 Tex. 2, 11 of a crack in the embankment due to a S. W. 125 (fireman mounted moving heavy rain, who stops a train, and in tender at the end approaching him); response to an inquiry says the track is Richmond & D. R. Co. v. Risdon (1891) and without invitation gets on the en- tempted to uncouple cars from a moving

road company is not liable for the death gine and rides until it plunges down a of an employee of the car company, who chasm where a washout occurred, wherehad crawled under one of the new cars by he is killed,-is the author of his own misfortune, where he had opporpairs, in violation of a direction of the tunity to pass the place in pursuance of employer. Coops v. Lake Shore & M. S. his orders several times before the accident occurred. Shenandoah Valley R. Co. v. Lucado (1889) 86 Va. 390, 10 S. E. 422.

An indemnity which, under an accident allowance scheme of a railway company, is to be paid "in the case of the death of the insured from any accident in the discharge of duties in the such coupling, and is warned just before company's service," is not payable where attempting to make a coupling that it the insured was killed while crossing a yard, in direct contravention of the company's orders, for the purpose of reaching the office where he was to receive the check which it was necessary to obtain before his hours of work be-Vickery v. Great Eastern R. Co. gan. (1896) 14 Times L. R. 562 (per Hawkins, J., sitting alone).

A servant who has reported a dangerous spot in the roof of a mine while at work, and, contrary to orders, continued working without waiting for the props, which soon came, cannot recover for injuries caused by the fall of slate. Knight v. Cooper (1892) 36 W. Va. 232, 14 S. E. 999. A servant in a mine, who disobeys a prohibition as to following the hoisting bucket up an incline, and is injured by the breaking of the rope, cannot recover. Patnode v. Harter (1889) 20 Nev. 303, 21 Pac. 679. A ceased was on the front platform of the servant who fails to follow his instructions to stand at one side instead of in front of an emery wheel, and is injured in consequence of such failure when the wheel burst, cannot recover. Smith v. Foster (1900) 93 Ill. App. 138. See also

attempts to reach another one by passing ing a belt while the machinery was in over a coal car, is guilty of negligence motion); Marnin v. Kitson Mach. Co. which will prevent his recovering dam- (1893) 159 Mass. 156, 34 N. E. 89 ages if he is thrown off that car by a (servant did not wait to procure assist-sudden jolt. Louisville & N. R. Co. v. ance in putting a heavy piece of ma-Woods (1894) 105 Ala. 561, 17 So. 41. chinery on an elevator); Gardner v. A track hand ordered to walk with a Michigan C. R. Co. (1886) 58 Mich. 584, red light backwards and forwards over 26 N. W. 301 (switchman tried to unthe track between certain points, at one couple cars in motion); Murray v. Gulf, all right until the red light is reached, 87 Va. 335, 12 S. E. 786 (brakeman atwhich he was or was not to undertake,3 or to the purpose for which an appliance was to be used, 4 or to the precautions to be adopted while the work was going on.<sup>5</sup>

Minors, as well as adults, are within the scope of this doctrine.

train, and caught his foot in a frog); 1127. Negligence is inferred where a Robinson v. West Virginia & P. R. Co. (1895) 40 W. Va. 583, 21 S. E. 727 (train was run at excessive speed over his employment. Indiana Natural & Ila certain curve, and was derailed); Lonzer v. Lehigh Valley R. Co. (1900) 196 Pa. 610, 46 Atl. 937 (derailment caused by running an engine in excess of the by the fall of a ladder insecurely placed, speed prescribed by a special notice on cannot recover where he has been told the bulletin board informing engineers not to use it. The Privateer (1883) 14 speed prescribed by a special notice on the bulletin board informing engineers that a certain piece of track was dangerous); Primeau v. Merchants' Cotton Co. (1900) Rap. Jud. Quebec, 19 C. S. 62 (employee, while shoveling coal from Ill. App. 122 (omission to put on goggles a pile, the top of which was frozen, permitted the frozen crust to remain); Georgia P. R. Co. v. Mapp (1888) 80 servant, departing from his instructions, Ga. 631, 6 S. E. 24 (servant engaged in undertakes, in conjunction with a counloading cars on a siding started cars with a crowbar). A railroad company of the handles of a derrick, the result is not liable where a brakeman started being that the one operated by the coto make a switch without orders, when servant came off and threw the whole his duties required him to do it only when ordered, and was killed by the starting of the cars before he was ready. Kentucky C. R. Co. v. Jameison (1892) 14 Ky. L. Rep. 345, 20 S. W. 258, Rehearing Denied in (1892) 14 Ky. L. Rep. 347.

Negligence is inferable where the evidence is that an engineer ran his train onto a siding, with orders to allow three sections of train running in the opposite direction to pass; that he went to but which the indicator on the caboose showed to be the third; that the passing section whistled and also carried lights to indicate that another section was foland that the conductor of the stationary train, seeing the indicator on the caboose and assuming it to give correct tion of his contributory negligence information, ordered the engineer to proceed, which he did. Under such circumstances the engineer was guilty both N. E. 141, Reversing (1898) 35 App. of a breach of specific orders from the Div. 155, 55 N. Y. Supp. 64. train dispatcher, and of a violation of

(1894) 1 Marv. (Del.) 273, 40 Atl. ployed to keep culm in motion down a

servant, in disobedience of orders, undertakes work outside the proper scope of luminating Gas Co. v. Marshall (1898) 22 Ind. App. 121, 52 N. E. 232.

A workman injured in leaving a ship, Fed. 872. Compare the more general

principle stated in § 342, supra.

<sup>6</sup> Munn v. Wolff Mfg. Co. (1900) 94 while working with an emery wheel).

No action can be maintained where a servant, to lower a heavy stone by means weight on that operated by the plaintiff, jerking it out of his hand and causing it to revolve rapidly and strike him. Lehman v. Bagley (1898) 82 Ill. App.

A car repairer cannot recover for injuries caused by his failure to comply with the instructions he had received with regard to setting out signal flags. Chicago, B. & Q. R. Co. v. McGraw (1896) 22 Colo. 363, 45 Pac. 383.

Where, in an action by an employee sleep and was awakened by a train against his employer for injuries resultwhich proved to be the second section, ing from his being knocked off a bench or path on the face of a cliff where he was at work, and falling 75 feet to the bank below, it is claimed that he was guilty of contributory negligence in not lowing; that the engineer whistled, thus following the instructions of the foreshowing that he understood the signal; man to have a rope tied around him to prevent falling, and he denies that such instructions were given him, the quesshould be submitted to the jury. Di Vito v. Crage (1901) 165 N. Y. 378, 59

<sup>6</sup> Card v. Wilkins (1898) 61 N. J. L. his duty to keep a proper lookout and 296, 39 Atl. 676 (boy of twelve years make sure that the track was clear, of age was explicitly forbidden to do a Galveston, H. & S. A. R. Co. v. Brown particular act in connection with a ma-(1901; Tex.) 63 S. W. 305, Reversing chine on which he was working); Penn-(1900; Tex. Civ. App.) 59 S. W. 930. sylvania Coal Co. v. Nee (1888; Pa.) 1900; Tex. Civ. App.) 59 S. W. 930. *sylvania Coal Co.* v. Nee (1888; Pa.) \* Chielinsky v. Hoopes & T. Co. 12 Cent. Rep. 524, 13 Atl. 841 (boy emBut presumably cases may arise in which a child's mental incapacity to understand an order, or the danger involved in disobeying it, or his physical incapacity to carry it out, would be material in this connection.

The mere fact that the servant was not warned that the prohibited act was dangerous does not render the doing of that act any the less culpable.7

If the evidence is conflicting as to whether the servant actually did disobey an order the meaning of which is not open to dispute, the case must be submitted to the jury.8 But if the question of the servant's disobedience depends simply upon whether the order bears one or other of two meanings, its proper scope is for the court to determine.9

In cases where the essence of the negligence imputed to the servant is that he was in a position where he should not have been, his conduct is often viewed rather as an act of omission that of commission, and the inability to recover is put upon the ground that his presence at

chute in a coal breaker did not enter the train conductor, of orders given, the chute at the place prescribed); Mc-which, taken in connection with the gen-Mellen v. Union News Co. (1891) 144 eral rules well known to both, were Pa. 332, 22 Atl. 706 (newsboy attempted plain, and not misleading. Harris v. to get off moving train); Robertson v. Norfolk & W. R. Co. (1892) 88 Va. 560, Cornelson (1888) 34 Fed. 716, and the 14 S. E. 535. case cited in the next note.

employed in the fourth story of a faccontributory negligence relieving the owner of the building, who had charge of the elevator, from liability for a defect in the hook on which the chain was

The state of the signal was a brakeman, to ride on top of the signal was given to cease work, and while the signal was a brakeman, to ride on top of the signal was a brakeman. given to cease work, and, while she was stooping to pick up her comb, her hair caught in an unguarded shaft).

the death of an engineer in a collision occasioned by the misconstruction and consequent disobedience, by himself and

The designation "middle brakeman," An errand boy twelve years of age and the general location implied thereand of more than ordinary intelligence, in, are not construed as confining such in, are not construed as confining such a brakeman exclusively to one particular tory, who, when sent down on an erpart of the train. Hence, the mere fact rand not relating to freight, leans upon that he was not in the middle part of a chain which hangs across the entrance the train at the time of the accident to the shaft of the freight elevator to will not prevent the maintenance of an look for the elevator, upon which he has action for his death resulting from a colno right to ride, and is injured by the lision. Au v. New York, L. E. & W. R. giving away of the chain,—is guilty of Co. (1886) 29 Fed. 72 (jury directed to find for plaintiff on this point).

An engineer is not prohibited from running at a greater rate of speed than 25 miles an hour by an order to make 25 miles an hour on the whole trip, infastened. Knox v. Hall Steam Power 25 miles an hour on the whole trip, in-Co. (1893) 69 Hun, 231, 23 N. Y. Supp. cluding stops. Houston & T. C. R. Co.

to give his assistance in going down hill, does not make the brakeman disobedient in going upon the engine at a place <sup>8</sup> Stringham v. Stewart (1885) 100 where there are no hills to be descended, N. Y. 516, 3 N. E. 575. so as to prevent a recovery for his death a railroad company is not liable for caused by the derailment of the train. so as to prevent a recovery for his death caused by the derailment of the train. Tewas & P. R. Co. v. Magrill (1897) 15 Tex. Civ. App. 353, 40 S. W. 188. the place where the accident occurred is a circumstance which necessarily implies that he was absent from his post of duty, and therefore culpable.10 Compare § 337, supra.

The fact that an order forbidding the act which caused the injury was given at some antecedent time will, of course, cease to be a controlling element, if it appears that, before the accident occurred, the servant had received permission, express or implied, to do that act. 11 Compare § 366, subd. (9), in/ra.

In one case the position has been taken that the mere fact that a servant who is ordered by his master to do something does not do it in the particular manner specified will not exonerate the master from liability for an injury to the servant, received in the performance of the act commanded. The question in this case, as in those in which no direct order is given, is declared to be simply whether the way selected by the servant was more dangerous than one which might have been adopted. 12 This suggested qualification of the rule seems to be devoid of any rational foundation, as it is certainly opposed to the weight of authority.

The fact that the act which was the immediate cause of the injury was done in violation of an order given by one superior employee, at some time anterior to the accident, does not necessarily show that the servant was negligent, if it is also proved that the act was done in compliance with the directions of another superior employee under whose control he was working at the time when the accident occurred.13 On the other hand a servant whose injury resulted from

to go between the rails to uncouple cars, the real significance, in either aspect, the company is not entitled to an in-would lie in its effect upon the question struction that a brakeman is negligent whether the plaintiff did or did not use who comples cars in this manner, after due care; but in the present case the Vol. I. M. & S.-60.

10 Daniel v. Chesapeake & O. R. Co. (1892) 36 W. Va. 397, 16 L. R. A. 383, 15 S. E. 162; Phillips v. Chicago, M. & so, as it was unsafe, where it is in evidence that some brakeman coupled from St. P. R. Co. (1885) 64 Wis. 475, 25 N. W. 544; Conners v. Burlington, C. R. & M. R. Co. (1887) 71 Iowa, 490, 60 Am. Rep. 814, 32 N. W. 465.

11 Chiclinsky v. Hoopes & T. Co. (1894) 1 Marv. (Del.) 273, 40 Atl. 1127 (servant was trying, when injured, to put a belt on a shafting).

12 Citizens' Gaslight & Heating Co. v. Corbinator (1886) 118 Ill. 174, 8 N. E. 310, disapproving an instruction which left the jury to infer that the failure of the servant to follow the precise directions of his master was negligence, as a matter of law.

13 Where there is no general rule of a ing more than a caution addressed by <sup>13</sup> Where there is no general rule of a ing more than a caution addressed by railroad company forbidding employees one fellow servant to another. Perhaps

his doing an act which had not only been forbidden by his master's representative, but which he himself also knew to be essentially dangerous, cannot recover on the theory that the act was done in compliance with a subsequent order given by another employee to whose directions he was bound to conform.14

364. Doing acts against which the servant has been warned .--A considerable number of cases have been decided upon the theory that the injured servant's disregard of a warning received from his employer or his employer's representative rendered him chargeable with contributory negligence, as a matter of law. In all these cases the warning is viewed as an expression of the employer's opinion that the course of conduct to which it related was not a proper one. Logically, therefore, it is equivalent to an implied direction not to pursue that course of conduct, whether it amounts, as in some instances, merely to a caution regarding the danger involved in such conduct,1

28 N. E. 682.

error lay in assuming what was not been of this description in decisions deshown to exist, -namely, that the plain-nying recovery where a brakeman, who tiff was bound to obey the directions of had been warned that some of the overthe yardmaster. Further, if we assume head bridges on his employer's line were that the plaintiff was bound to obey the too low to admit of his standing upright directions of the yard master, and that on the top of the cars, remained seated what was said by the yard master to the on the top of a brake, where he was at his part of the property was a direction at the cars. plaintiff was a direction not to go be- a higher elevation than if he was standtween the rails in removing the coupling ing. Devitt v. Pacific R. Co. (1872) 50 pin, still there was no evidence of any Mo. 302. Or where an engineer leans rules established by the defendant road out of his cab, although he knows that forbidding it, and the plaintiff was afterwards told by Campbell, the conear the track, and he has been warned ductor of the train which the plaintiff to keep his face of the Ref. (1801) 7 was helping to make up, and under frich v. Ogden City R. Co. (1891) 7 whose immediate control he was at the Utah, 186, 26 Pac. 295. Or where an time, that he wanted the cars cut off in employee, when directed to clean the between; and the plaintiff may well have windows of a factory, selected the hazunderstood that, even if what was said ardous method of suspending himself by Campbell was not an order to go in by rope and tackle on the outside of the between the cars, he was authorized to building, at a high elevation, without cut them apart by going in between direction from his employer and after them, in such mode as appeared to him, warning of the danger, and was killed by in the exercise of ordinary care, to be the breaking of the rope. Erskine v. necessary." Hannah v. Connecticut Chino Valley Beet-Sugar Co. (1895) 71 River R. Co. (1891) 154 Mass. 529, 534, Fed. 270. Or where a brakeman undertook to couple moving cars. Muldowney <sup>14</sup> An employee in a lumber mill who v. Illinois C. R. Co. (1874) 39 Iowa, riles lumber on a dock when he knows 615. Or where an employee, instead of it is unsafe, from his own observation, riding in the gondola prepared for carryand after he has been told by the vice ing the workmen, scated himself on the principal of his employer not to work rear end of the tender, with his feet at such place, assumes the risk of an dangling over the side, and thereby was injury by the falling of the dock, alinjured. Lehigh Valley R. Co. v. though he is directed to work there by Grainer (1886) 113 Pa. 600, 6 Atl. 246. a foreman who is a vice principal in Or where an employee sat on a platform giving the direction. Soderstrom v. Holand-Emery Lumber Co. (1897) 114 within the sides of the car, with his legs Mich. 83, 72 N. W. 13.

1 The warning was be said to have ich. 83, 72 N. W. 13.

hanging over the side, and had his leg
The warning may be said to have injured by coming in contact with a cator, as in other instances, to something scarcely, if at all, distinguishable from an actual prohibition.<sup>2</sup>

an employee was injured by the derailment of a truck which was being pushed his home from work. Reese v. Wheeling ant, after being warned against doing 26 S. E. 204.

A fireman is, as matter of law, guilty of contributory negligence in remaining 20 Colo. 292, 38 Pac. 367. Or where an on the side of an engine which is run-employee in a brickyard, while operatning upon a track partly laid on made ing a car drawn by a cable used to haul ground, precluding recovery for his clay out of a clay pit, was injured by death due to the giving way of such the cable tearing up a board from the ground and the falling of the engine track, while he was riding on the front upon him, where he was present when of the car, facing to the rear, with his the superintendent directing the con-back to the cable, though cautioned by struction of the track warned the crew the foreman to turn around, and mind to be careful, as he did not know the cable. Youngbluth v. Stephens whether an engine had been over the (1899) 104 Wis. 343, 80 N. W. 443. Or track; and the engineer told him to re- where an employee in a papermill was

he was warned that the position under of the shaft, and had been warned not the scaffold was a dangerous place to be to leave the bar out. Freeman v. Glens in, and in spite thereof took the position Falls Paper Mill Co. (1893) 70 Hun, wherein he was hurt, is properly refused, 530, 24 N. Y. Supp. 403. Or where an for the reason that it fails to state that employee was injured while standing in the warning had reference to the place the hold of a vessel under an open hatch-Coates v. Chapman (1900) of injury.

195 Pa. 109, 45 Atl. 676.

in decisions where an employee for whom a caboose was provided, took his seat v. Lehigh Valley Transp. Co. (1892) 48 upon the side of a flat car with his legs Minn. 533, 51 N. W. 480; Miller v. hanging over, although his superiors Navassa Guano Co. (1899) 125 N. C. car at all. St. Louis & S. E. R. Co. v. disregarded a warning against allowing Schumacher (1894) 152 U. S. 77, 38 L. the wires which he was handling to come ed. 361, 14 Sup. Ct. Rep. 479. Or where into contact with one which was carrya brakeman was injured in attempting ing a current of electricity. Tri-City R. to make a coupling with a straight link, Co. v. Killeen (1900) 92 Ill. App. 57. against the use of which he had been Or where a servant who knew the danger warned, instead of a crooked link, which of applying fire to powder, voluntarily was furnished to him for the purpose. and knowingly lighted a fire in proxim-St. Louis, I. M. & S. R. Co. v. Higgins ity to powder, over the protest and warn-(1884) 44 Ark. 293. Or where a tracking of his employer. Downey v. Pence man went into a cut before the passage (1895) 98 Ky. 261, 32 S. W. 737. of a given train, contrary to a warning of his superior, and was injured ligence precluding recovery for his death 1084, 24 S. E. 740. Or where a sec- effect and cautioned to leave, and knows

tle guard. St. Louis & S. F. R. Co. v. tion hand failed to look out for a train Marker (1883) 41 Ark. 542. Or where after he had been warned to do so. Nelling v. Chicago, St. P. & K. C. R. Co. (1895) 98 Iowa, 554, 63 N. W. 568, 67 forward by the engine of a construction N. W. 404 (see further, as to this case, train on which he was being carried to § 358, note 10, supra. Or where a serv-& E. G. R. Co. (1896) 42 W. Va. 333, so, rode on an elevator used for hoisting the materials for a building under construction. McGonigle v. Kane (1894) main on the other side of the engine. killed by the falling of an oil barrel Niles v. Minneapolis, St. P. & Ste. M. R. upon him through an elevator shaft, by Co. (1895) 107 Mich. 238, 65 N. W. 103. reason of his leaving out of place a bar A request for a charge that plaintiff to the entrance of the shaft, although he was guilty of contributory negligence, if knew that the barrel was near the mouth way, through which freight was being lowered or lifted, after having been <sup>2</sup> Warnings of this kind are illustrated warned by an officer of the vessel against had warned him not to ride on a flat 323, 34 S. E. 497. Or where a lineman

by the loose dirt at the side of the cut from smoke, which could have been giving way when he stepped thereon, to avoided if the fan had been kept in opavoid the approaching train. Styles v. eration, if he voluntarily remains in the Richmond & D. R. Co. (1896) 118 N. C. mine, where he has been warned of the

The fact that a fellow workman had warned the injured servant as to the danger which caused the injury is manifestly a circumstance which it is proper to consider, as bearing upon the question of his negligence in exposing himself to that danger.3 But the conception of disobedience to an implied command proceeding from a person authorized to control the servant's actions is necessarily lacking in cases which involve this situation. Accordingly, evidence that such a warning was disregarded does not require the peremptory conclusion that the injured servant was negligent.4

Where the servant, at the time of the accident, was not only doing something which he had been warned not to do, but also failed to exercise proper vigilance while engaged in the work, his action is plainly barred on two distinct grounds.5

365. Negligence usually inferred, as matter of law, where violation of a rule is proved.—The accepted doctrine is that, if the evidence clearly shows that the injury complained of was caused by the servant's violation of a rule promulgated for the protection of the class of employees to which he belonged, under such circumstances as those attending the accident, a court is justified in declaring him to have been, as a matter of law, guilty of contributory negligence, provided that the rule in question was valid and reasonable; that its observance under the given circumstances was possible without infringing another rule or duty of paramount obligation; that its contents were known to him, either actually or constructively; that it had been neither abrogated, nor suspended, nor waived at the time when the injury was received; and that he was chargeable with notice of the fact that the conditions which the rule was framed to meet existed at the time when the injury was received.

The duty of the servant to comply with the rules which the master has published for his guidance may be referred to the broad principle that the rules, if reasonable, may be assumed to indicate the methods of work which experience has shown to be calculated to furnish the best chance of safety, under the circumstances, both to the servant himself and to his fellow employees; and that a breach of those rules

that those in charge of the fan may not know the location of the fire, and may act under a misapprehension. Hughes v. Oregon Improv. Co. (1898) 20 Wash. 294, 55 Pac. 119.

A jury is correctly instructed that a servant cannot recover if he used an appliance, without necessity, in a manner <sup>6</sup> Barstow v. Old Colony R. Co. (1887) against which he had been directly 143 Mass. 535, 10 N. E. 255 (employee, warned by the master. Carlson v. Mars- while walking on track, did not look out ton (1897) 68 Minn. 400, 71 N. W. 398. for train).

See Southern P. Co. v. Seley (1894)
152 U. S. 156, 38 L. ed. 396, 14 Sup. Ct. Rep. 530; Moeller v. Brewster (1892) 131 N. Y. 606, 30 N. E. 124. \*Hannah v. Connecticut River R. Co.

(1891) 154 Mass. 529, 28 N. E. 682. See § 363, note 13, supra.

must, by consequence, charge him with that culpability which the law infers from the doing of a certain act in an unnecessarily dangerous manner. But the duty may be, and more commonly is, referred to the conception that an agreement on his part to obey the rules may be implied from his having entered or remained in the employment with a knowledge of their provisions.2

In cases where a rule is alleged to have been violated the evidence will sometimes show that, even if the rule be left out of account, the servant's conduct was negligent. The action may then be successfully defended, although the rule was waived or was for some other reason not binding on the servant.<sup>3</sup> But the master's position is necessarily less advantageous, for if the rule is not an element, the question of the servant's contributory negligence must usually be left to the jury, while disobedience to a known rule, conceded to be reasonable and

Such is possibly the conception unmond & D. R. Co. v. Rush (1894) 71 derlying statements like these: "Where Miss. 987, 15 So. 133, to the effect that a servant wilfully encounters dangers "for injury sustained through its viowhich have been pointed out to him, and lation an employee who knew the rule regulations which the master has pro- not recover." vided to avoid and avert such danger, been uniformly ruled." Francis v. Kanhad read the same and would be governed series of displaying ruled." Francis v. Kanhad read the same and would be governed thereby. See, for example, 110 Mo. 387, 19 S. W. 935. "If the employee knowingly and intentionally disobeys a reasonable rule or regulation established for his safety, unless he does ounder the influence of fear produced 374; Spaulding v. Chicago, St. P. & K. by the appearance of sudden danger, and C. R. Co. (1896) 98 Iowa, 205, 67 N. W. the act of disobaldings is the proximate 227. Louisville & N. R. Co. v. Hillmore

83. S. W. 2, but the reversal does not af-<sup>2</sup> See Pennsylvania Co. v. Whitcomb fect the decision, as an authority for the (1887) 111 Ind. 212, 12 N. E. 380. statement in the text). Compare also the language used in Rich-

does not avail himself of the rules and and contracted with reference to it can-

The implied contract to obey the rules the master is not responsible for an in- is frequently converted into an express jury occasioned thereby." Davis v. Nutone by exacting from the servant a promtallshirg Coal & Coke Co. (1890) 34 W. ise to obey the rules. See, for example,
Va. 500, 12 S. E. 539. "It would be most Richmond & D. R. Co. v. Finley (1894)
unreasonable and unjust, after imposing upon the master the duty of promulgating a rule for securing the safety of O. R. Co. (1893) 89 Iowa, 420, 56 N. W. his servant, to permit the servant to re- 519; Chicago & A. R. Co. v. Stevens cover from the master damages for in- (1901) 189 Ill. 226, 59 N. E. 577; Sherjuries which the observance of the rule idan v. Long Island R. Co. (1899) 40 would have prevented. As the master is App. Div. 381, 57 N. Y. Supp. 1075; bound at his peril to make the rules, the Lehigh Valley R. Co. v. Snyder (1893) servant should be equally bound at his 56 N. J. L. 326, 28 Atl. 376; Chicago peril to obey them. In such case the dis- & A. R. Co. v. Myers (1900) 95 Ill. App. aster is brought upon the servant by his 578. Such a contract is often evidenced own voluntary act, and he, and not the by a written instrument, in which the master who has discharged his duty, servant had acknowledged the receipt of should bear the consequences. So it has a copy of the rules, and stated that he been uniformly ruled." Francis v. Kan- had read the same and would be gov-

the act of disobedience is the proximate 227; Louisville & N. R. Co. v. Hiltner cause of the injury complained of, he (1900) 21 Ky. L. Rep. 1826, 56 S. W. cannot recover." Gulf, W. T. & P. R. 654 (this judgment was reversed on re-Co. v. Ryan (1888) 69 Tex. 665, 7 S. W. hearing (1900) 22 Ky. L. Rep. 1141, 60 83.

S. W. 2, but the reversal does not af-

expressed in definite terms, is, as already stated, negligence, as a matter of law.4 Proof having been given of the servant's knowledge of a valid and existing rule, and of its violation by him, the only question left open for submission to the jury is whether or not such negligence was the proximate cause of the injury, or concurred with the negligence of the master in producing the injury.5 This principle is, however, subject to a necessary modification in cases where the rule alleged to be violated is couched in terms which require that the quality of the plaintiff's acts should be tested by the standard of the general law of negligence;6 or where the rule is subject to a certain qualification, under circumstances the existence of which must be determined as a question of fact.<sup>7</sup>

dicted except by witnesses who contradicted themselves, shows that the injury was caused by the plaintiff's violation of

of a servant is negligence as being a vio-couple cars moving at about 4 miles an lation of rules is a question of fact hour; that it was dark, and he ran where the rules relied upon do not com- along on the track between the cars

\*Georgia P. R. Co. v. Propst (1887) mand the doing or not doing of a par83 Ala. 518, 3 So. 764; Gleason v. Deticular act or acts, but simply impose
troit, G. H. & M. R. Co. (1896) 19 C. upon him in general terms duties callG. A. 636, 43 U. S. App. 89, 73 Fed. ing for the exercise of judgment, skill,
647; and cases cited passim in the ensuing notes.

\*Lake Brie & W. R. Co. v. Craig
N. E. 237, Affirming (1889) 33 Ill. 557, 23

\*Lake Brie & W. R. Co. v. Craig
N. E. 237, Affirming (1889) 33 Ill. App.
(1897) 25 C. C. A. 585, 47 U. S. App.
405. Where a rule simply forbids the
647, 80 Fed. 488, disapproving an instruction which proceeded on the theory
that the contract to observe the rule
say whether the rule was violated under that the contract to observe the rule say whether the rule was violated under did not make the case different from the circumstances in evidence. Denver, what it would be if treated as controlled T. & Ft. W. R. Co. v. Smock (1897) 23 by general principles, unaffected by con- Colo. 456, 48 Pac. 681. A locomotive entract. Where a rule peremptorily regineer of a freight train is not, as mat-quires that brakemen before making a ter of law, guilty of such contributory coupling shall know that their signals negligence as will preclude a recovery are understood and obeyed by the en- for injuries sustained by the washout of gineer, a brakeman who is injured by a a culvert, on the ground that he violated sudden and unexpected increase in the the rules of the company, requiring conspeed of the engine cannot excuse his ductors and engineers, when overtaken speed of the engine cannot excuse his ductors and engineers, when overtaken violation of the rule on the ground that, between stations by storms or indicate the time he prepared to make the tions of high water which will cause coupling, the speed was not such as to damage, to proceed with great caution, endanger a person who used ordinary and to stop to examine bridges and culcare. Deeds v. Chicago, R. I. & P. R. verts or other places liable to be dam-Co. (1888) 74 Iowa, 154, 37 N. W. 124. aged by high water, unless the engineer It is not necessary that a plea setting knew that the storm was so severe or up the defense that a servant caused his unusual as to call for the exercise of the injury by dischaying a rule should aver injury by disobeying a rule should aver precaution demanded by such rule. that he "negligently" violated the rule. Crouse v. Chicago & N. W. R. Co. Louisville & N. R. Co. v. Mothershed (1899) 102 Wis. 196, 78 N. W. 446, (1895) 110 Ala. 143, 20 So. 67.

A verdict for the plaintiff should be set aside where evidence, not contrastication of a rule forbidding employees disted event by mitraces who contrast to other heaven government.

to enter between cars in motion to couple, except under favorable conditions, is a question for the jury where a rule. Southern P. Co. v. Ryan (1895; the evidence is that he was an experi-rex. Civ. App.) 29 S. W. 527. the evidence is that he was an experi-enced brakeman, familiar with defendenced brakeman, familiar with defend-Whether certain conduct on the part ant's track; that he attempted to un-

The fact that a fellow employee who had the right to control the plaintiff observed, prior to the time when the act which caused the injury was done, that the plaintiff was not provided with the necessary appliances for doing that act in the manner prescribed by a rule, and nevertheless suffered him to proceed without those appliances, is no excuse for a violation of that rule.8

Where a rule is reasonable and susceptible of two constructions, a servant who in good faith attaches a certain meaning to it, and receives an injury in consequence, is not precluded from recovery, as a matter of law.9

The breach of a rule will preclude a minor from maintaining an action, where he may be presumed to have the capacity for comprehending the meaning of the rule and the danger resulting from his disobedience.10 See § 348, supra.

The rule alleged to have been violated is admissible in evidence, without first proving that the employee had knowledge thereof, since such knowledge may be shown after its admission. 11 But where there is an entire absence of evidence on the question whether the plaintiff violated a certain rule, it is proper to exclude testimony as to the contents of that rule.12

Wherever the evidence tends to show that the injured servant violated a rule, the master is entitled to have the jury instructed that there can be no recovery if they find that the accident would not have happened if the rule had been observed.<sup>13</sup> Under such circumstances, it is not sufficient merely to tell the jury not to find for plaintiff if

while doing the uncoupling; that, as he (1894) 95 Ga. 292, 22 S. E. 833, where started to go from between the cars, he a conductor failed to stop a brakeman that (according to plaintiff's witnesses) the hole was outside of the rail, and some distance from a certain switch, and 88 Tex. 604, 32 S. W. 515. had been excavated by sectionmen who been working there; and that (ac- (1897) 25 C. C. A. 220, 51 U. S. App. cording to defendant's witnesses) the 74, 79 Fed. 900 (where a boy of fifteen

Where a rule forbids employees to jump from engines moving at a high rate of speed, it is a question whether the speed at which it was actually moving (here about 5 miles an hour) was within the purview of the rule, so as to charge the plaintiff with negligence. Colf v. Chicago, St. P. M. & O. R. Co. (1894) 87 Wis. 273, 58 N. W. 408.

\*Port Royal & W. C. R. Co. v. Davis

stepped into a hole, and was injured; who, to his knowledge, was attempting to couple cars without a stick.

\* Texas & P. R. Co. v. Leighty (1895)

hole was a necessary excavation, to en- was denied a remedy for an injury reable the switch to work properly, and ceived in consequence of his disobedience had existed for a long time. Jarvis v. of a rule forbidding the cleaning of ma-flint & P. M. R. Co. (1901) 128 Mich. chinery while it was in motion); Cullen 61, 87 N. W. 136.

v. National Sheet Metal Register Co. v. National Sheet Metal Roofing Co. (1889) 114 N. Y. 45, 20 N. E. 831 (where a boy of seventeen had his hand crushed in consequence of his disobeying a rule forbidding him to put it between

"Hard of the stamping-press).

"Binion v. Georgia Southern & F. R.
Co. (1900) 111 Ga. 878, 36 S. E. 938.

"Lake Erie & W. R. Co. v. Mugg (1892) 132 Ind. 168, 31 N. E. 564.

<sup>13</sup> McCreery v. Ohio River R. Co.

they believed he could have escaped injury by the use of ordinary care.14

Where a complaint alleges that a railroad company was guilty of a breach of duty in failing to provide cars that could be coupled by hand, an answer that the contract between the employee and the company embraced a rule that the company would not assume any liability on account of injuries received in coupling by hand presents at least a prima facie defense which demands a replication from the plaintiff.15

It is not necessary to plead rules of the company or any usage as to the manner of the performance of duty in order to authorize their introduction in evidence. These rules and usages are mere evidence bearing upon the question of negligence of the defendant or its employees, and the care and diligence of the plaintiff.16

A special finding that the plaintiff used proper care to avoid injury to himself is inconsistent with other findings to the effect that he injured himself while doing his work in a manner forbidden by a rule.<sup>17</sup>

The question of contributory negligence, so far as it is dependent on the construction and meaning of the rules alleged to have been violated, is discussed in § 215, ante.

That the violation of a rule is no bar to an action, unless the injury was proximately caused by such violation, see §§ 323, 324, supra.

365a. Decisions illustrative of this principle.— In accordance with the general principle enunciated in the preceding section the servant has been held guilty of contributory negligence on the ground that the cause of the injury complained of was his violation of rules relating to the various acts and situations indicated in the following paragraphs. In the notes, it will be merely necessary to specify the particular rule infringed, the implication, in the absence of any statement to the contrary, being that the action was declared not maintainable.

## (1) Rules regulating the operation of trains.

(1900) 22 Ky. L. Rep. 1141, 60 S. W. 2, but not on this point. Whitcomb

15 Pennsylvania Co. v.

(1887) 111 Ind. 212, 12 N. E. 380.

10 Henry v. Siouw City & P. R. Co.
(1885) 66 Iowa, 52, 23 N. W. 260; Al-16 S. W. 229.

<sup>17</sup> Lake Shore & M. S. R. Co. v. Mc-

(1901) 49 W. Va. 301, 38 S. E. 534; "Lake Shore & M. S. R. Bonner v. Moore (1893) 3 Tex. Civ. Cormick (1881) 74 Ind. 440.

App. 416, 22 S. W. 272.

14 Louisville & N. R. Co. v. Hiltner (1900) 21 Ky. L. Rep. 1826, 56 S. W. Wescott v. New York & N. 654, Judgment Reversed on Rehearing in (1891) 153 Mass. 460, 27 (1900) 22 Ky. L. Rep. 1441 60 S. W. Correig R. L. Rep. 4 Rep. (1900) 23 Ky. L. Rep. 1441 60 S. W. Correig R. L. Rep. 4 Rep. (1900) 23 Ky. L. Rep. 1441 60 S. W. Correig R. L. Rep. (1900) 24 Ky. L. Rep. 1441 60 S. W. Correig R. L. Rep. (1900) 25 Ky. L. Rep. 1441 60 S. W. Correig R. L. Rep. (1900) 26 Ky. L. Rep. 1441 60 S. W. Correig R. L. Rep. (1900) 27 Ky. L. Rep. 1441 60 S. W. Correig R. L. Rep. (1900) 27 Ky. L. Rep. 1441 60 S. W. Correig R. L. Rep. (1900) 28 Ky. L. Rep. 1441 60 S. W. Correig R. L. Rep. (1900) 29 Ky. L. Rep. 1441 60 S. W. Correig R. L. Rep. (1900) 20 Ky. L. Rep. 1441 60 S. W. Correig R. L. Rep. (1900) 20 Ky. L. Rep. 1441 60 S. W. Correig R. L. Rep. (1900) 20 Ky. L. Rep. 1441 60 S. W. Correig R. L. Rep. (1900) 20 Ky. L. Rep. 1441 60 S. W. Correig R. L. Rep. (1900) 20 Ky. L. Rep. 1441 60 S. W. Correig R. L. Rep. (1900) 20 Ky. L. Rep. 1441 60 S. W. Correig R. L. Rep. (1900) 20 Ky. L. Rep. 1441 60 S. W. Correig R. L. Rep. (1900) 20 Ky. L. Rep. 1441 60 S. W. Correig R. L. Rep. (1900) 20 Ky. L. Rep. (1900 1 Rule requiring trainmen to observe schedule time in starting their trains. Wescott v. New York & N. E. R. Co. (1891) 153 Mass. 460, 27 N. E. 10; Georgia R. & Bkg. Co. v. McDade (1877) 59 Ga. 73.

A railroad engineer who knows that the conductor of his train has received a notice that there are no further orders for his train, and that the rules of corn v. Chicago & A. R. Co. (1891; Mo.) the company require the train to remain at the station where it is until the ar-

rival of a train from the opposite direc- solutely what trains had passed at a tion, and that there will probably be a certain station. Fritz v. Missouri, K. collision if he starts his train, is guilty & T. R. Co. (1895; Tex. Civ. App.) 30 of such contributory negligence as will S. W. 85 (result of disobedience was a prevent a recovery for his death, by premature starting of the train and a obeying a signal of the conductor to collision). start the train, where one of the rules provides that the conductor shall have engine by a fireman unless the engineer charge and control of all persons employed on the train except where his R. Co. (1888) 98 Mo. 62, 11 S. W. 308. directions conflict with the rules, or involve risk or hazard, in which case the to approach stations with great care, engineer will be held equally account- and is not entitled to notice that a preengineer will be held equally accountable. York v. Chicago, M. & St. P. R. Co. (1896) 98 Iowa, 544, 67 N. W. 574.

Rule requiring trainmen to run in strict accordance with their written orders. Louisville, N. A. & C. R. Co. v. Heck (1898) 151 Ind. 292, 50 N. E. 988.

Rule specifying the distance at which one train should follow another. Louisville & N. R. Co. v. Hiltner (1900) 22 Ky. L. Rep. 1141, 60 S. W. 2, Reversing on Rehearing (1900) 21 Ky. L. Rep. 1826, 56 S. W. 654.

Rule regulating the operation of trains where a double track was exchanged for a single one. Wert v. Keim (1888; Pa.) 12 Cent. Rep. 381, 13 Atl.

Rule fixing the maximum rate of speed at which trains may be run between stations. Sutherland v. Troy & B. R. Co. (1891) 125 N. Y. 737, 26 N. E. 609, second appeal before supreme court (1893) 74 Hun, 162, 26 N. Y. Supp. (collision caused through train's reaching a point where it would not have been if the proper speed had been kept); Conger v. Flint & P. M. R. Co. (1891) 86 Mich. 76, 48 N. W. 695; Lyon v. Detroit, L. & L. M. R. Co. (1875) 31 Mich. 429; Gulf, C. & S. F. R. Co. v. John (1895) 9 Tex. Civ. App. 342, 29 S. W. 558.

Rule prescribing the speed at which trains shall approach bridges. Nortolk & W. R. Co. v. Williams (1892) 89 Va. 165, 15 S. E. 522.

Rule prescribing slackened speed in running trains over bridge. Rittenhouse v. Wilmington Street R. Co. (1897) 120 N. C. 544, 26 S. E. 922.

Rule requiring engineer to approach stations at a certain speed. Louisville & N. R. Co. v. Scanlon (1901) 22 Ky. L. Rep. 1400, 60 S. W. 643.

Rule requiring engineers to have their trains under control when approaching stations. Merritt v. Great Northern R. Co. (1900) 81 Minn. 496, 84 N. W. 321 (injured engineer ran train at 25 miles an hour).

Rule forbidding the operation of an is on it. Barry v. Hannibal & St. J.

Rule by which an engineer is required ceding train is late. Illinois C. R. Co. v. Neer (1887) 26 Ill. App. 356.

Rule requiring engineer to keep his train under control and prepared to stop in case the track is obstructed. Dickson v. Omaha & St. L. R. Co. (1894) 124Mo. 140, 25 L. R. A. 320, 27 S. W. 476.

Rule requiring engineers to run at a slower rate of speed than that specified by the time card if the track was not in good repair. Illinois C. R. Co. v. Patterson (1879) 93 Ill. 290.

Rule requiring engineer to stand, instead of sitting, while his engine is passing "close places." Louisville & N. R. Co. v. Stutts (1894) 105 Ala. 368, 17 So. 29.

Rule requiring engineers to slacken speed when approaching switches. Memphis & C. R. Co. v. Thomas (1875) 51 Miss. 637; East Tennessee, V. & G. R. Co. v. Kane (1893) 92 Ga. 187, 22 L. R. A. 315, 18 S. E. 18; Savannah, F. & W. R. Co. v. Folks (1886) 76 Ga. 527.

Rule requiring that, in case a train stops, the following train should be flagged. Smith v. New York C. & H. R. R. Co. (1895) 88 Hun, 468, 34 N. Y. Supp. 881.

Rule prescribing that, in case of a train stopping between stations, the flagman shall go back 1 mile, and that the conductor shall require this to be done. Frounfelker v. Delaware, L. & W. R. Co. (1900) 48 App. Div. 206, 62 N. Y. Supp. 840 (error to refuse instruction that if conductor failed to see that flagman went back the proper distance, and this caused the collision with a following train, by which he was killed, there could be no recovery).

Rule requiring the sounding of a whistle and a certain rate of speed when a train is running round a curve in an obscure place. Southern P. Co. v. Ryan (1895); Tex. Civ. App.) 29 S. W. 527.

Rule prescribing that, when a train stops between stations, the engineer shall blow the whistle as a signal to the brakeman to take position, so as Rule requiring engineers to know ab- to prevent collision with another train.

- (2) Rules regulating the manner in which switching is to be done.2
- (3) Rules regulating the operation of coupling cars.<sup>3</sup>

ure to look out led to a collision with the second section of a train).

of signal shall be regarded as a danger signal. Chicago & W. I. R. Co. v. Flynn (1895) 154 III. 448, 40 N. E. 332.

tain more than a specified head of steam. Illinois C. R. Co. v. Houck (1874) 72

Rule prescribing that the yard masters shall direct the movements of all trains and engines while at their stations. Galveston, H. & S. A. R. Co. v. Adams (1900) 94 Tex. 100, 58 S. W. 831, Affirming (1900; Tex. Civ. App.) 55 S. W. 803. There, however, the question whether the action of the servant was negligent was held to be for the jury, as it appeared that defendant's train had not reached the station, and had not been placed in charge of the yard mas-

Rule forbidding the use of a stick to set up brakes. Leahy v. Southern P. R. Co. (1884) 65 Cal. 150, 3 Pac. 622 (in this case the defendant failed to prove its allegation that a stick had been used).

Rule forbidding flying switches.
 Pilkinton v. Gulf, C. & S. F. R. Co. (1888) 70 Tex. 226, 7 S. W. 805.

Rule requiring that trains running in one particular direction shall be run onto sidings at the end where they are approached. West v. Southern P. Co. (1898) 29 C. C. A. 219, 56 U. S. App. 323, 85 Fed. 392 (brakeman fell into an open culvert while a train was being backed into a siding).

Rule prohibiting the shifting of cars down grade without the control of the engine. Richmond & D. R. Co. v. Dud-

ley (1893) 90 Va. 304, 18 S. E. 274.

Rule requiring the use of coupling stick. Norfolk & W. R. Co. v. Briggs (1892; Va.) 14 S. E. 753; Richmond & D. R. Co. v. Rush (1894) 71 Miss. 987, 15 So. 133; Richmond & D. R. Co. v. Finley (1894) 12 C. C. A. 595, 25 U. S. Finley (1894) 12 C. C. A. 595, 25 U. S. & W. R. Co. (1896) 35 Ohio L. J. 15, App. 16, 63 Fed. 228; Sloan v. Georgia Reversed in Lake Erie & W. R. Co. v. P. R. Co. (1890) 86 Ga. 15, 12 S. E. Croig (1896) 19 C. C. A. 631, 37 U. S. 179: Richmond & D. R. Co. v. Pannill App. 654, 73 Fed. 642; Fluhrer v. Lake (1893) 89 Va. 552, 16 S. E. 748; Horan Shore & M. S. R. Co. (1899) 121 Mich.

Culpepper v. International & G. N. R. v. Chicago, St. P. M. & O. R. Co. (1893) Co. (1897) 90 Tex. 627, 40 S. W. 386. 89 Iowa, 328, 56 N. W. 507; Richmond Rule requiring employees to keep a & D. R. Co. v. Free (1893) 97 Ala. 231, constant lookout for signal lights on 12 So. 294; Central R. & Bkg. Co. v. trains. Ward v. Chesapeake & O. R. Co. Maltsby (1892) 90 Ga. 630, 16 S. E. (1894) 39 W. Va. 46, 19 S. E. 389 (fail- 953; Zumwalt v. Chicago & A. R. Co. (1889) 35 Mo. App. 667; Bird v. Sparks Rule that imperfect display or absence Nichols v. Chicago & W. M. R. Co. isignal shall be regarded as a danger (1900) 125 Mich. 394, 84 N. W. 470; gnal. Chicago & W. I. R. Co. v. Flynn White v. Louisville, N. O. & T. R. Co. (1895) 154 Ill. 448, 40 N. E. 332.

Rule forbidding engineers to mainun more than a specified head of steam stick in making couplings and to apply the second sec

stick in making couplings, and to avoid going between the cars. Hodges v. Kimball (1900) 44 C. C. A. 193, 104 Fed.

Rule prohibiting coupling by hand, when it is practicable to use a stick or pin for guiding the link. Gleason v. Detroit, G. H. & M. R. Co. (1896) 19 C. C. A. 636, 43 U. S. App. 89, 73 Fed. 647.

Rule prohibiting the coupling or uncoupling of cars when in motion. Baltzer v. Chicago, M. & N. R. Co. (1892) 83 Wis. 459, 53 N. W. 885; East Tennessee, V. & G. R. Co. v. Smith (1890) 89 Tenn. 114, 14 S. W. 1077; Darracott v. Chesapeake & O. R. Co. (1887) 83 Va. 288, 2 S. E. 511; Schaub v. Hannibal & St. J. R. Co. (1891) 106 Mo. 74, 16 S. W. 924; Richmond & D. R. Co. v. Thomason (1892) 99 Ala. 471, 12 So. 273; Alabama G. S. R. Co. v. Ritchie (1895) 111 Ala. 297, 20 So. 49; Johnson v. Chesapeake & O. R. Co. (1893) 38 W. Va. 206, 18 S. E. 573; Lockwood v. Chicago & N. W. R. Co. (1882) 55 Wis. 50, 12 N. W. 401; Gleason v. Detroit, G. H. & M. R. Co. (1896) 19 C. C. A. 636, 43 U. S. App. 89, 73 Fed. 647 (in this case the act of the plaintiff was especially culpable, as he had had an opportunity of uncoupling the cars while they were at rest): Louisville & N. R. Co. v. Reagan (1896) 96 Tenn. 128, 33 S. W. 1050; Grand v. Michigan C. R. Co. (1890) 83 Mich. 564, 11 L. R. A. 402, 47 N. W. 837 (recovery denied although the accident was directly caused by the brakeman's foot catching in an unblocked switch, and there was a statute requiring the blocking of switching); Craig v. Lake Erie

- (4) Rules regulating the operation of hand cars.<sup>4</sup>
- (5) Rules regulating the setting of signal flags by employees working on railway tracks.5

212, 80 N. W. 23; Sanders v. McGhee places himself in a position of danger (1897) 114 Ala. 373, 21 So. 1006; Sedg-relying upon such obedience. Strong v. wick v. Illinois C. R. Co. (1888) 76 Iowa C. R. Co. (1895) 94 Iowa, 380, 62 Iowa, 340, 41 N. W. 35; Ford v. Chi- N. W. 799; Deeds v. Chicago, R. I. & cago, R. I. & P. R. Co. (1894) 91 Iowa, P. R. Co. (1888) 74 Iowa, 154, 37 N. W. 179, 24 L. R. A. 657, 59 N. W. 5; Lake 124. Shore & M. S. R. Co. v. McCormick R. Co. (1898) 121 Ala. 158, 25 So. 853; Chicago & A. R. Co. v. Myers (1901) 95 Ill. App. 578.

A rule of a railroad company prohibiting employees from "entering between cars in motion" is not violated by an 23, 70 Fed. 24 (held to be a clear case employee's entering between cars while of "special danger" requiring compliat rest for the purpose of uncoupling ance with a rule prescribing the use of them, and remaining between them for a flag where such danger existed, the a short distance after they are put in collision between the hand car and the motion. Galveston, H. & S. A. R. Co. v. train having occurred at a place where Pitts (1897; Tex. Civ. App.) 42 S. W. there was a sharp curve lined with tim-

Rule forbidding employees to go between cars except when they are moving account of a strong wind which was slowly. Missouri, K. & T. R. Co. v.

Rule forbidding employees to go between cars when a locomotive is attached 95, 22 Atl. 927. Failure of trackmen to them. Richmond & D. R. Co. v. Rush (1894) 71 Miss. 987, 15 So. 133; Richmond & D. R. Co. v. Finley (1894) 12 C. C. A. 595, 25 U. S. App. 16, 63 Fed. 228; Richmond & D. R. Co. v. Pannill (1893) 89 Va. 552, 16 S. E. 748.

Rule forbidding an employee to go on the track in front of a moving car for up grades." Southern P. Co. v. Ryan the purpose of coupling it to another. Pryor v. Louisville & N. R. Co. (1889)

90 Ala. 32, 8 So. 55.

Rule requiring brakemen, before entering upon the track in front of a moving train, to look and see that the track is clear. Loranger v. Lake Shore & M. S. R. Co. (1895) 104 Mich. 80, 62 N. W. 137 (brakeman, while walking sideways, and attempting to reverse a crooked link, stumbles against a pile of ashes lately dumped on the track).

Rule requiring employees coupling a car with a projecting load to stoop below the body of the car. Northern C. R. Co. v. Husson (1882) 101 Pa. 1, 47

Am. Rep. 690.

Rule requiring an employee when coupling cars to know that the signal which he has given to the engineer has been understood and obeyed before he working. Bruen v. Uhlmann (1899) 44

<sup>4</sup> Rules requiring section men to guard (1881) 74 Ind. 440; Shorter v. Southern their hand cars by flags or other precautions against the approach of special and wild trains. Louisville & N. R. Co. v. Markee (1893) 103 Ala. 160, 15 So. 511; Kansas & A. Valley R. Co. v. Dye (1895) 16 C. C. A. 604, 36 U. S. App. ber which obscured the view, and on a heavy downward grade, and where, on blowing towards the train, the sound of Wood (1896; Tex. Civ. App.) 35 S. W. an engine whistle could not be heard at any great distance); McGrath v. New York & N. E. R. Co. (1885) 15 R. I. running a hand car around a curve, to follow oral instructions and a general custom to flag all curves regardless of the grade is in law equivalent to a disobedience of the rules of the company, although the printed rule merely requires them to flag all curves in "going (1895; Tex. Civ. App.) 29 S. W. 527.

Rule forbidding anyone but employees to ride on hand cars. Mischke v. Chicago, B. & Q. R. Co. (1894) 56 Ill. App. 472 (section foreman allowed his wife to

ride upon his car).

<sup>5</sup> Rule requiring car repairers or car inspectors to put out signal flags while at work. Alabama G. S. R. Co. v. Roach (1895) 110 Ala. 266, 20 So. 132; Central R. & Bkg. Co. v. Kitchens (1889) 83 Ga. 83, 9 S. E. 827; Illinois C. R. Co. v. Winslow (1894) 56 Ill. App. 462; Moeller v. Delaware, L. & W. R. Co. (1900) 55 App. Div. 636, 66 N. Y. Supp. 882; Hulien v. Chicago & N. W. R. Co. (1900) 107 Wis. 122, 82 N. W. 710.

Rule requiring track repairers to place a green flag at a reasonable distance from the point where they are

- (6) Rules regulating the manner of getting onto or off of railway
- (7) Rules prescribing the particular places in which servants should or should not be.7

ing Rehearing of (1898) 30 App. Div.

453, 51 N. Y. Supp. 958.

went to repair a car without a flag, and both were required to do the work, they should call for a third man. Renfro v. Chicago, R. I. & P. R. Co. (1885) 86 Mo.

Rule requiring employees to display a blue flag upon a car before placing themselves in a position of danger under it. Sheridan v. Long Island R. Co. (1899) 40 App. Div. 381, 57 N. Y. Supp. 1075.

<sup>6</sup> Rule prohibiting employees from getting on or off cars or trains while in motion. San Antonio & A. P. R. Co. v. Wallace (1890) 76 Tex. 636, 13 S. W. 565; Gulf, W. T. & P. R. Co. v. Ryan (1888) 69 Tex. 665, 7 S. W. 83; Francis v. Kansas City, St. J. & C. B. R. Co. (1892) 110 Mo. 387, 19 S. W. 935; Elgin, J. & E. R. Co. v. Docherty (1895) 66 Ill. App. 17; Overby v. Chesapeake & O. R. Co. (1893) 37 W. Va. 524, 16 S. E. 813. And from hanging upon or leaning out beyond the sides of moving cars. Mohr v. Lehigh Valley R. Co. (1900) 55 App. Div. 176, 66 N. Y. Supp. 899.

Rule forbidding employees to step on the front of approaching engines or cars. Gleason v. Detroit, G. H. & M. R. Co. (1896) 19 C. C. A. 636, 43 U. S. App. 89, 73 Fed. 647; Elgin, J. & E. R. Co. v. Docherty (1895) 66 Ill. App. 17.

Rule forbidding employees to jump on or off trains or engines while moving at a high speed. Gleason v. Detroit, G. H. & M. R. Co. (1896) 19 C. C. A. 636, 43 U. S. App. 89, 73 Fed. 647.

'Rule forbidding trainmen to be on the pilot of a moving locomotive. Louis-ville & N. R. Co. v. Wilson (1890) 88 Tenn. 316, 12 S. W. 720.

Rule forbidding any employees except those specified to travel on the engine. Abend v. Terre Haute & I. R. Co. (1884) v. Wabash R. Co. (1895) 130 Mo. 657, 31 S. W. 1051; O'Neill v. Keokuk & D. M. R. Co. (1877) 45 Iowa, 546; Chattral R. Co. v. Mitchell (1879) 63 Ga. lated his duty by being in the caboose, cado (1889) 86 Va. 390, 10 S. E. 422; the conductor, when the train was start-

App. Div. 620, 60 N. Y. Supp. 222, Deny- Martin v. Kansas City, M. & B. R. Co. (1900) 77 Miss. 720, 27 So. 646.

There can be no recovery for the death Rule prescribing that, when two men of an engine hostler who rides on the engine while going to a place to which he is sent by the company, in violation of a rule of this tenor, and is killed by a collision in which none of the cars of the train are overturned or thrown off the track, although while on the engine he is shown how the injector works, at the direction of the engineer. McGucken v. Western New York & P. R. Co. (1894) 77 Hun, 69, 28 N. Y. Supp. 298.

Rule requiring brakemen to be at their posts while their train is running. Sprong v. Boston & A. R. Co. (1874) 58

N. Y. 56, (1871) 60 Barb. 30.

Rule requiring trainmen to be on the top of the car while the train is in motion. Central Trust Co. v. East Tennessce, V. & G. R. Co. (1888) 69 Fed. 353 (plaintiff injured by striking against coal chute while on the side of a car).

Rule requiring a conductor to take a position on the front of the leading car in a train which is being backed. Creery v. Ohio River R. Co. (1901) 49

W. Va. 301, 38 S. E. 534.

Evidence that it was customary for a conductor, and sometimes his duty, to be on top of a box car, will not excuse him for violating a rule which prohibited him from taking such a position on a train which was passing through a truss bridge, where it is also in evidence that his duty only required him to be in that position when it became necessary to assist in braking, coupling, and signaling, or in making switches at stations. San Antonio & A. P. R. Co. v. Wallace (1890) 76 Tex. 636, 13 S. W. 565. Where the rules of a railroad company provided that brakemen should be under the direction of the conductor at all times when on duty, and should remain at their post of duty at all times unless excused by the conductor, and further provided that conductors on freight trains should require their brakemen to be on top of the cars when ascending or lanooga Southern R. Co. v. Myers descending grades, it cannot be held, as (1900) 112 Ga. 237, 37 S. E. 439; Cen- a matter of law, that a brakeman vio-173; Shenandoah Valley R. Co. v. Lu- with the knowledge and acquiescence of

- (8) Rules requiring that appliances shall be inspected or tested The validity and effect of rules requiring a servant by employees.8 to inspect appliances is discussed in § 230 ante, § 416, post.)
- (9) Rules requiring employees to report the existence of dangerous conditions.9
- (10) Rules regulating the conduct of employees in establishments where dangerous machinery is used. 10
  - (11) Rules regulating work in mines.<sup>11</sup>

W. R. Co. (1901) 44 C. C. A. 597, 105 Fed. 554.

Rule requiring brakeman to be on the ground as a flagman while a portion of ground as a hagman while a portion of the train is backing to couple on to a detached portion. Terre Haute & I. R. Co. v. Mansberger (1895) 12 C. C. A. 574, 24 U. S. App. 551, 65 Fed. 196, Rehearing Denied in (1895) 14 C. C. A. 306, 24 U. S. App. 687, 67 Fed. 67.

Rule forbidding employees to walk between the rails. Chicago, B. & Q. R. Co. v. Maney (1894) 55 Ill. App. 588.

Rule directing fireman not to stand

between the apron of the chute and the cab while his engine was taking coal. Illinois C. R. Co. v. Zerwick (1899) 88 Ill. App. 651.

8 Rule requiring brakemen, before a train starts, to test the hand brakes and see that they are in good condition. LaCroy v. New York, L. E. & W. R. Co. (1892) 132 N. Y. 570, 30 N. E. 391, Reversing (1890) 57 Hun, 67, 10 N. Y. Supp. 382.

Rule requiring brakemen to frequently examine the brakes and coupling and running gear of cars, and to know that they are in good order. Louisville, E. & St. L. Consol. R. Co. v. Utz (1892) 133 Ind. 265, 32 N. E. 881 (here, however, the servant's knowledge of the rule was not shown).

Rule requiring brakemen to inspect coupling apparatus. Louisville & N. R. Co. v. Reagan (1896) 96 Tenn. 128, 33 S. W. 1050; Alabama G. S. R. Co. v. Carroll (1898) 28 C. C. A. 207, 52 U. S. App. 442, 84 Fed. 772.

Rule requiring a brakeman to examine the cars and satisfy himself as far as he reasonably can that they are in good order. Karrer v. Detroit, G. H. & M. R. Co. (1889) 76 Mich. 400, 43 N. W. 370 (case of defective drawhead which the plaintiff could have at once observed if

ing up a grade. Tullis v. Lake Erie & he had taken the trouble to look at the car when it was approaching).

Rule prohibiting going between cars to make a coupling "unless the drawhead and other coupling appliances are known to be in good order." St. Louis, I. M. & S. R. Co. v. Rice (1888) 51 Ark. 467, 4 L. R. A. 173, 11 S. W. 699.

If, by the rules of a railroad company, the duty of inspecting foreign care is

the duty of inspecting foreign cars is thrown upon the conductor, he cannot recover for injuries caused by a failure to make such an inspection. Ft. Wayne, C. & L. R. Co. v. Gruff (1892) 132 Ind. 13, 31 N. E. 460.

See also next note.

<sup>6</sup> Rule requiring brakemen to test brakes and either report the defects found therein or themselves make the proper repairs. Beall v. Pittsburgh, C. & St. L. R. Co. (1893) 38 W. Va. 525, 18 S. E. 729.

Rule requiring miners to report dangerous places in tunnels. Davis v. Nuttallsburg Coal & Coke Co. (1890) 34 W. Va. 500, 12 S. E. 539.

<sup>10</sup> Rule forbidding servants to wipe machinery while it is in motion. Shanny v. Androscoggin Mills (1876) 66 Me. 429: E. S. Higgins Carpet Co. v. O'Keefe (1897) 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900.

Rule requiring cotton loom to be fanned for cleansing purposes while it is in motion. Gideon v. Enoree Mfg. Co. (1894) 44 S. C. 442, 22 S. E. 598.

Rule forbidding employees working a stamping press to place their hands be-tween the dies. Cullen v. National Sheet Metal Roofing Co. (1889) 114 N. Y. 45, 20 N. E. 831.

Rule forbidding factory employees to make their toilet before the closing hour, or near the machines. Tooke v. Bcrgeron (1897) 27 Can. S. C. 567 (girl's hair caught in shafting).

" Rule forbidding miners to remain in

(12) Rules regulating personal habits of servants. 12

366. Limits of the doctrine that a servant violating a rule cannot recover.— The fact that the injured servant, at or before the time of the accident, violated a rule, will not prevent recovery, as a matter of law, unless all the evidential elements adverted to in the statement of the doctrine set forth at the beginning of § 362, supra, are established. That is to say, the rule, as such, becomes an indecisive factor in the following predicaments:

(1) Where the notification addressed to the servant was not, in the proper sense of the word, a rule.1

(2) Where there was no actual violation of the rule.2

(3) Where the violation of the rule was not the efficient cause of the injury.3

(4) Where the rule violated was unreasonable, and therefore not binding upon him.4

for props. Heaney v. Glasgow Iron & Steel Co. (1898) 25 Sc. Sess. Cass. 4th series, 903.

See also note 9, supra.

Where a special rule framed by a mine owner under the power conferred by 35 & 36 Vict. chap. 76, forbade persons "employed in or about the works" to go up or down the pit contrary to the direction of the banksman or hooker-on, it was held that the prohibition was applicable to miners for a reasonable time after they had discharged themselves, as they had a right to do in the given instance, at a moment's notice. were, therefore, declared to be guilty of a violation of the rule in having quitted the pit without permission an hour after they had determined their contract, and three hours before the end of the shift in which they were employed. Higham v. Wright (1877) L. R. 2 C. P.

Div. 397, 46 L. J. M. C. 223, 37 L. T. N. S. 187, 10 Mining Rep. 24.

12 Rules forbidding the use of intoxicating liquors. Gulf, W. T. & P. R. Co. v. Ryan (1888) 69 Tex. 665, 7 S. W. 83; Western & A. R. Co. v. Bussey (1804) 95 Co. 584 225 E. 267. (1894) 95 Ga. 584, 23 S. E. 207.

See also note 10, supra.

of a railroad company printed on a time-

their working places when they are un- Co. (1894) 91 Iowa, 179, 24 L. R. A. able to find a sufficient supply of timber 657, 59 N. W. 5. A direction was held binding on a servant who had signed a receipt, stating that he had received, understood, and would obey, the circular in which such direction was contained. Illinois C. R. Co. v. Zerwick (1900) 88

Ill. App. 651. <sup>2</sup> If a servant does everything which he reasonably can, under the circumstances, in order to carry out the rule, he cannot be held negligent. The action, for example, is not barred because an engineer failed to have his train under control at a point where it was provided by the rules of the company he should have it under control, if he had repeatedly signaled the brakemen to apply the brakes, and they did not respond. Louisville & N. R. Co. v. Mothershed (1898) 121 Ala. 650, 26 So. 10; First Appeal (1895) 110 Ala. 143, 20

<sup>3</sup> See §§ 323, 324, supra.

4 See § 228, ante.

In Louisville & N. R. Co. v. Foley (1893) 94 Ky. 220, 21 S. W. 866, it was said, arguendo, that a written agreement by which the plaintiff stipulated that he would observe a rule requiring him to use a coupling stick was not binding on him, unless such an implement was in 1 It was urged in one case that a rule fact indispensable, or at least clearly necessary for security of brakemen table, warning employees against certain against the danger incident to coupling risks, with a notice that they will have cars, since the defendant had otherwise no claim for injuries received in consen or right to require the plaintiff to use quence of taking such risks, was merely the stick, or to make habitual use of it advising. But the contention was reacondition of his right to maintain an jected, Ford v. Chicago, R. I. & P. R. action for personal injury received while

- (5) Where the rule could not have been observed without violating another rule or duty of paramount obligation.5
- (6) Where the rule violated was not applicable to an employee of the class to which the injured servant belonged, or to such circumstances as those which accompanied the accident.6

applied for and received orders three ern R. Co. v. Barr (1900) 21 Ky. L. quarters of an hour before leaving the Rep. 1615, 55 S. W. 900. station and acted upon such orders without making further application, is a a few moments at a watering staquestion for the jury, where he had tion need not comply with a rule found by calculation, after getting his of the company admonishing such orders to pass a passenger train between conductors not to take any chances in certain stations, that he would not have supposing that nothing is following time to reach the only point at which he them, where the trainmen, without obcould pass the other train and at the jection from the officers of the company, same time comply with a standing rule have construed such rule as not applying requiring freight trains to reach passing in such a case, but only in case of a points ten minutes before passenger break-down or accident necessitating trains were due. Baltimore & O. R. Co. considerable delay. Texas & P. R. Co. v. Camp (1900) 44 C. C. A. 451, 105

train, so as to be able to command the crew and regulate the speed on descending grades, it was held that, while reasonable observance of such a rule was obligatory, he had a general duty as well, and a certain discretion to exercise in an emergency. The court accordingly refused to say, as a matter of law, that he was negligent in going forward to the engine cab to warn the engineer that there was a possibility of meeting at a certain point the engines of an iron company which were sometimes outside their proper limits. Somerset & C. R. Co. v. Galbraith (1885) 109 Pa. 32, 1 Atl. 371.

In an action by a foreman in railroad yards to recover for an injury received while attempting to release a set brake on a freight car being switched, by reason of a defect in the brake, a rule of the company for the government of "freight brakemen," requiring them to examine the brakes for themselves before against such casualties as that in which using them, is irrelevant, New Orleans deceased lost mis life; or, second, to show

he was engaged in coupling cars. In & N. E. R. Co. v. Clements (1900) 40 C. Horan v. Chicago, St. P. M. & O. R. Co. C. A. 465, 100 Fed. 415. Where at (1893) 89 Iowa, 328, 56 N. W. 507, the freight train had parted, and in backing court expressed a doubt whether, in view the engine to find the lost cars a brakeof the ordinary practice of coupling by man riding on the engine was injured in hand, a rule requiring coupling sticks to a collision with the cars, the fact that be used ought to be held obligatory. no flagman was sent back as required by Whether the engineer of a freight a rule of the company does not prevent train complied with a rule of the com- the brakeman from recovering, as the pany requiring him to apply for and to duty of sending the flagman rested on get orders or a clearance card before the engineer, who was then the superior leaving a particular station, where he officer in charge of the engine. South-

A freight conductor stopping for v. Johnson (1896; Tex. Civ. App.) 34 S. Fed. 212. W. 186, Rehearing Denied in (1896) 14
Where a conductor was required by Tex. Civ. App. 566, 37 S. W. 973, Which
the rules to remain in the middle of his has Writ of Error Denied in (1897) 90 Tex. 304, 38 S. W. 520.

A rule having reference to the switching of cars on grades is inadmissible in evidence where the accident occurred on a level track. Henry v. Sioux City & P. R. Co. (1885) 66 Iowa, 52, 23 N. W.

In Texas & N. O. R. Co. v. Tatman (1895) 10 Tex. Civ. App. 434, 31 S. W. 333, the admission of certain rules was objected to by appellant on the ground that they had no application to such work as was being done at the time deceased was killed. Most of them, from their own terms, appeared to have no such application; and all of the witnesses testified that none of them had reference to the work in which the injury was received. The court said: purpose in thus introducing the rules may have been: First, to show the absence, as alleged, of any provision such as ought to have been made to guard

(7) Where the servant was not chargeable with notice of the contents of the rule.7

that one or more of the rules did apply, and had been violated by the servants of appellant, and that they were thus guilthat, if none of the rules applied spesimilar, which, by proper care and foreto such states of fact as that in ques-Tatman as the company, in the exercise (action for wrongful discharge). of ordinary care, should have made, the On the other hand, in Brown v direct and simpler mode of showing the absence of a rule is usually found in the testimony of those acquainted with the subject. On the other hand, if, when the rules were in evidence, any of them appeared to relate to such a situation as that under investigation, it was compe-And if, by any of the rules, safe-guards were provided against the dangers arising from conditions similar to those existing when Tatman was killed, which could have been extended so as to apply to the latter, this was a fact for the jury to consider in determining what could and what should have been done by the company to protect its employees, when engaged as Tatman was when We think, therefore, it was proper to inquire into all of the rules which bore upon the issues, as suggested, but in the trial below many of them were dwelt upon which seem to us to throw no light upon the questions under investigation."

See §§ 226, 227, ante; and the following cases: Louisville, E. & St. L. Consol. R. Co. v. Utz (1892) 133 Ind. 265, 32 N. E. 881; Memphis & C. R. Co. v. Graham (1891) 94 Ala. 545, 10 So. 283; Conners v. Burlington, C. R. & N. R. Co. (1893) 87 Iowa, 147, 53 N. W. 1092; Gulf, C. & S. F. R. Co. v. Kizziah (1993) 4 Tex. Civ. App. 356, 22 S. W. 110, 26 S. W. 242 (no attention had been paid to servant's repeated requests for a copy of the rules).

bound by his master's rules cannot recover for an injury caused by a violation of one of them, irrespective of whether ty of negligence; or, third, to develop he actually knew of that rule or not. Sheridan v. Long Island R. Co. (1899) cifically to the situation existing when 40 App. Div. 381, 57 N. Y. Supp. 1075, Tatman was killed, still provision was citing a Massachusetts case to the effect made for others, wherein the risk was that an employee in a theatrical company, who signs a contract stipulating sight, ought to have been made to apply that she will conform to all the rules of the company, accepts its rules whether tion. If none of the rules made such she knows of them or not. Violette v. provision against the risk imposed upon Rice (1899) 173 Mass. 82, 53 N. E. 144

On the other hand, in Brown v. Louisomission could be made to appear by ville & N. R. Co. (1896) 111 Ala. 275, production of the rules, though the more 19 So. 1001, it was held that a plea charging contributory negligence in respect of the violation of a rule is not sufficient unless it avers that the servant had actual knowledge of it. The court took the position that his negligence in not pursuing an inquiry after having notice of the fact that rules had tent for either party to show that in fact been promulgated is merely a remote it did not so apply, or that it was adecause of any injury which he may requate or inadequate for the purpose. ceive by reason of his violating one of those rules while its contents were still unknown to him. But this position can scarcely be correct. It is irreconcilable with the general principle which, for juridical purposes, assimilates knowledge which has been actually acquired and knowledge which ought to have been acquired. So, it has been laid down that a written contract by which a servant stipulates to obey not only the rules of which a copy is furnished him when the contract is signed, but also such reasonable regulations as the employer's superintendence should make, is not binding as to any new regulations unless they are brought to his notice. Lehigh Valley R. Co. v. Snyder (1893) 56 N. J. L. 326, 28 Atl. 376 (action for wrongful discharge).

It has been held that a nonsuit should have been granted where the evidence was that the car repairer injured was a foreigner, slightly acquainted with the English language; that he had been in defendant's service two years, and was informed of the rule violated; that his fellow servant was familiar with the rule; and that the company had printed its rules on the backs of its time-tables, In New York it has been held that an which were kept for distribution, and employee who has expressly agreed in a were furnished to a large number of its written application for work to be employees. Moeller v. Delaware, L. &

- (8) Where the circumstances were such as to estop the employer from asserting that the rule violated was still in force,—as, where the appliances themselves were of such a character or in such a condition that it was impossible to do the work properly, and at the same time comply with the rule;8 or where the rule had been habitually disregarded, and that disregard was known to and acquiesced in by him.9
  - (9) Where the act in question was done in obedience to the order

stopping between stations, that the flagman go back 1 mile, and that the conwithout them. Frounfelker v. Delaware, L. & W. R. Co. (1900) 48 App. Div. 206, 62 N. Y. Supp. 840.

are such that a coupling could not be made without going between the cars.

Memphis & C. R. Co. v. Graham (1891) 94 Ala. 545, 10 So. 283. There, howthat the fact that, ordinarily, freight or box cars having no platform cannot be uncoupled without going between them to use a platform. A brakeman is not men on the defendant's trains. guilty of negligence in coupling cars the cars and coupling are in such a posibe useless. Berrigan v. New York, L. is error to direct a verdict for the de-E. & W. R. Co. (1891) 37 N. Y. S. R. fendant. Binion v. Georgia Southern & 414, 14 N. Y. Supp. 26, Reversed in F. R. Co. (1900) 111 Ga. 878, 36 S. E. (1892) 131 N. Y. 582, 30 N. E. 57, but 938. not as to this point.

In Holmes v. Southern P. Co. (1898) 120 Cal. 357, 52 Pac. 652, the court approved the refusal of an instruction, to the effect that the fact that a rule may be impracticable, and not observed, does not excuse an employee who is injured to the engine, that it was customary for

ing cases: Wright v. Southern P. Co. to show that the company had waived (1896) 14 Utah, 383, 46 Pac. 374; New- the rule, since such evidence did not esport News & M. Valley Co. v. Campbell tablish a custom for brakemen to jump (1894) 15 Ky. L. Rep. 714, 25 S. W. on cars attached to and controlled by an Vol. I. M. & S.—61.

 W. R. Co. (1900) 55 App. Div. 636, 66 267; Galveston, H. & S. A. R. Co. v.
 N. Y. Supp. 882.
 Slinkard (1897) 17 Tex. Civ. App. 585, A rule requiring, in case of a train 44 S. W. 35; Chicago & A. R. Co. v. My-

ers (1901) 95 III. App. 578.

The mere fact that the officials of a ductor require this to be done, will be company knew that employees were in presumed to be known by the conductor, the habit of violating a rule is no excuse where it has been printed on the back for its violation by one of them. See of the time-tables, and provision has Chattanooga Southern R. Co. v. Myers been made for distributing time-tables, (1900) 112 Ga. 237, 37 S. E. 439, where when issued, to all conductors, and it is it was held that a railway servant who impossible for them to safely run trains rode on an ergine was exercising a mere permissive privilege, which he enjoyed with all the concomitant perils.

But in Louisville & N. R. Co. v. Foley 8 A rule requiring the use of coupling (1893) 94 Ky. 220, 21 S. W. 866, one of sticks to couple cars is no protection to the circumstances commented upon as the master, where the sticks furnished tending to negative contributory negligence was that, although a coupling stick was delivered to the plaintiff at the time be signed an undertaking to use it, the conductor who delivered it ever, the principle was also affirmed told him that the written undertaking was required as a mere form. It was also proved that the coupling stick had been generally discarded by railway emis no defense to an employee who failed ployees, and not used at all by brake-

Where there is a conflict in the eviwithout using a stick, although the rules dence as to whether the nonobservance of the railroad company require it, when of the rule violated was so general as to raise the presumption that such nonobtion and condition that the stick would servance was known to the company, it

Where a rule of a railroad company forbade employees jumping on or off moving trains, the fact that there was evidence, in an action for injuries to a brakeman who jumped on a car being backed onto another track and attached owing to his not having complied with brakemen to jump on detached cars in it. of See §§ 232, 233, ante, and the follow-collision with other cars, was insufficient of a superior employee, whose authority in the premises was of such an extent that the effect of the order was to supersede the rule ad hanc vicem. Whether the order in any particular instance was an excuse for infringing the rule depends partly upon the subjectmatter of the rule and partly upon the views held by the court with regard to the doctrine of vice principalship.

The accepted doctrine in the majority of the American courts is that the mere possession of that authority to manage a train, with which conductors, and sometimes engineers, are invested, does not imply the possession of authority to make or unmake rules for the control of employees.<sup>10</sup> Sometimes, however, a rule conferring a

(1900) 55 App. Div. 176, 66 N. Y. Supp.

An unqualified instruction that if there was a custom on defendant's road to do the work in question as plaintiff did, and it was in conflict with plain-tiff's agreement, it was a waiver by defendant of plaintiff's agreement not to couple cars in that manner, was erroneous, since the custom was not such waiver, unless it was so universal and notorious that the defendant must be presumed to have known and assented thereto. Nichols v. Chicago & W. M. R. Co. (1900) 125 Mich. 394, 84 N. W.

The question as to whether a rule of an employer respecting the conduct of employees has been waived by the master is primarily for the jury. Tullis v. Lake Erie & W. R. Co. (1901) 44 C. C. A. 597, 105 Fed. 554.

<sup>10</sup> Overby v. Chesapeake & O. R. Co. (1893) 37 W. Va. 524, 16 S. E. 813.

In Russell v. Richmond & D. R. Co. (1891) 47 Fed. 204, the court declined to say that the disregard of their duty by conductors could render obsolete a regulation of the company, or that a conductor so far represents the com-pany as to be authorized to rescind rules made by the corporation for his guidance, and for that of the train hands. In Atchison, T. & S. F. R. Co. v. Reesman (1894) 23 L. R. A. 768, 9 C. C. A. 20, 19 U. S. App. 596, 60 Fed. 370, the court refused to concur with the doctrine that, "if the plaintiff [a brakeman] disobeyed the rules of the company, and such disobedience contributed directly to the injury, he may nevertheless recover, and cannot be held guilty of contributory negligence providing that such disobedience was with the revoke all rules, and govern himself and knowledge and consent of the conductor control his train at his own will, and at

engine. Mohr v. Lehigh Valley R. Co. of the train; or, in other words, that, if the conductor failed to enforce the rules of the company, the employee may knowingly disregard them, and yet in no manner be barred from recovering for injuries which would not have resulted but for such disobedience."

> In Richmond & D. R. Co. v. Finley (1894) 12 C. C. A. 595, 25 U. S. App. 16, 63 Fed. 228, an instruction implying that an engineer in temporary control of a train, in the absence of a temporary conductor, had power to waive a rule forbidding couplings to be made without coupling sticks, was held erroneous, the court saying: "There is too great a tendency to clothe subordinate employees with the power and duty of vice princi-pals, and then to conclude that they represent the master in every respect, and as fully as if he were present. . . . Be this as it may, whatever may be the authority of a person, himself an employee on a train over other coemployees on the same train, he and they are bound to respect and obey the general rules and regulations of their common master, whose orders press equally upon each of them, coming with the highest sanction, and each of them must know that the other cannot rescind them. The learned judge has invested the substitute of a substituted conductor with all the powers held by the highest officer of the railroad system. If this engineer, accidentally and temporarily in charge of a train, could rescind or waive or suspend a fixed rule of the company, a rule impressed in the most formal way upon a very large class of employees,the class engaged, or likely to be called upon to engage, in coupling cars,-as a part of the contract and a condition precedent to their employment, he could

special power upon a conductor may reasonably be construed as conferring by implication a power to relax another rule dealing with the same subject-matter as the former.11

That rules requiring trainmen to run trains in strict accordance with schedule time may be superseded by special orders from a train despatcher, which change the times for starting from the stations, specify altered meeting places, etc., is a doctrine necessarily implied in all the cases which treat train despatchers as vice principals in regard to the operation of trains. See chapter xxxi., post. 12

the risk and responsibility of his em- ductor had directed plaintiff on this ocent to and as a condition for his emerce to directions of the conductor. ployment. When the plaintiff in the ac-Hurlbut v. Wabash R. Co. (1895) 130 tion below followed the suggestion of Mo. 657, 31 S. W. 1051. the engineer, he knew the risk he was taking, knew that he had contracted not ling cars in violation of a rule requiring duct under all circumstances."

was that the plaintiff (a brakeman) had naled the engineer to move, thus causviolated a rule forbidding him to ride on ing injury. an engine, it appeared that a rule instructed conductors of freight trains to train not running on schedule time does "require all of their brakemen to be on not justify an inference that the contop of the train . . . while descend-ductor is relieved from the rules regulating or ascending grades." The evidence ing the running of trains, and is under showed that the night was intensely the control of some agent or despatcher cold, and tended to prove that the con- of the company. Northern P. R. Co. v.

ployer. Granting that, within the scope casion to ride in the cab of the engine. of his agency, he represents his em- It was held that, under the rule, the ployer, it can scarcely be supposed that conductor had authority to direct the it is within the scope of the agency of an plaintiff in respect to his duties in being engineer, or even of a conductor, to re- on top of the train, and that plaintiff scind the standing rules of the company, could not be charged with contributory or to cancel a contract made by his em-negligence for riding in the engine de-ployer with one of his servants anteced-scending a grade, if he did so in obcdi-

to take it under any circumstances, the use of a coupling stick was acting knew that the engineer could not make under the order of the conductor, who him take it, and he assumed the risk had "the right to control or direct his himself. . . . In consideration that services," within the meaning of Miss. the company would employ and would Const. 1890, § 193, will not enable him continue to employ him, he bound him-to recover, since he was under no obligation. self to obey this rule, and assumed all tion to obey an order to violate a rule results, not only of disobedience, but albinding on all employees, including the so of the infraction of the rule. When, conductor. Richmond & D. R. Co. v. therefore, the engineer on the engine at- Rush (1894) 71 Miss. 987, 15 So. 133. tached to the train suggested to him to The court accordingly held that it was go between the cars to couple, he knew error either to instruct the jury that the that under no circumstances, even an company was hable, notwithstanding the order from a superior,—could this be existence of the rule, if the conductor done without an assumption of risk by knew of and acquiesced in plaintiff's vio-himself; and ne knew, also, that he had lation thereof and occasioned the injury waived in advance any liability of the by negligently signaling the train to company for this infraction of the rule. start, since, even if the conductor is the He had dealt with his master immediate- superior officer of the brakeman, he ly, and had from him his instructions in could not dispense with any general writing. He had no right to permit the rule; or to instruct them that the comsuggestion of a subordinate to reverse or pany was liable if the conductor ordered annul his master's express direction, a plaintiff to go between the cars to undirection for the government of his concouple, having first taken from him his coupling stick, and, without knowing "Thus, in a case where the defense that he had come out, negligently sig-

12 The mere fact that a train is a "wild"

An unqualified direction issued by such a functionary is binding upon trainmen whose conduct is regulated by a rule requiring them to run in strict accordance with their written instructions, and will justify running their train as directed, notwithstanding a verbal statement made by a telegraph operator, which, if true, indicates that a compliance with those instructions is not unlikely to lead to an accident.<sup>13</sup> But an order issued by him does not supersede any standing rules which trainmen can observe without disregarding his instruc-Nor can the right to rely implicitly upon the propriety of a special order for a train despatcher be extended to cases in which the circumstances are such that a prudent man would feel bound to seek some further information as to the reason why the regular routine of the business has been in this instance departed from. 15

A superintendent, being of still higher rank than a traindespatcher, necessarily has power to regulate the movements of all rolling stock upon the road under his management.16

train that there was a work train on the track over which he was about to run, as directed by the despatcher, it was held that the engineer was not negligent the track was clear. It was accordingly held that the company could not absolve

instructions to make certain time does quences, that it was manifestly neglinot relieve him from the obligation to gent to act upon it without inquiring obey a standing rule as to the care to be the reason for it. observed in approaching stations. Illi- 16 In an action under the Alabama nois C. R. Co. v. Ncer (1887) 26 Ill. statute (see chapter XXXVII., post) to App. 356. In a case where one train recover for the death of a section foreran against another which was standing man on a railroad, who was killed by a at a station, and killed the conductor train, which struck and derailed the

Poirier (1897) 167 U. S. 48, 42 L. ed. order by a train despatcher to run be-72, 17 Sup. Ct. Rep. 741. tween two stations does not relieve the <sup>13</sup> In a case where an operator had engineer of a freight train from the told the engineer of an extra freight duty of observing, at any intermediate stations he may have to pass, a general rule requiring that all such trains shall "approach all stations under full control." Enright v. Toledo, A. A. & N. M. in proceeding on the assumption that R. Co. (1892) 93 Mich. 409, 53 N. W.

<sup>15</sup> In Westcott v. New York & N. E. R. itself from the charge of having failed Co. (1891) 153 Mass. 460, 27 N. E. 10, to notify the crew of the freight train as the conductor of a train was held to be to the presence of the work train on the negligent in starting the train, when he track by the plea that the employees in knew that, under the rules, he had no control of the latter train were the par- right to do so until the arrival of a certies whose negligence was responsible for tain train, without inquiring of the dea subsequent collision between the two spatcher on that section of the road a subsequent collision between the two spatcher on that section of the road trains,—especially when there was another rule of such a tenor that those emformation which would make it safe to ployees were justified in supposing that leave the station. The court said that, an order had previously been sent to the even supposing that it was ordinarily freight train to report at some designation of the road that the place for instructions. Louisville, spatcher, even if they were in violation N. A. & C. R. Co. v. Heck (1898) 151 of the rules of the road, this particular order was so obviously wrong, and was likely to investe such dreadful corporate. d. 292, 50 N. E. 988. order was so obviously wrong, and was <sup>14</sup> The fact that an engineer is under likely to involve such dreadful conse-

of the latter train, and the question was hand car upon which he was riding with whether the engineer of the former train his men before daylight on a dark and was negligent, it was held that a special rainy morning, it was shown that a rule

In Illinois the position was recently taken that the order of a yard master superseded a rule which declared that inferior class trains must run carefully through a certain yard, expecting to find the main track occupied.<sup>17</sup> It seems safe to say that this ruling would not be treated as good law in any states except those which, like Illinois itself, have adopted the doctrine that all superior servants are vice principals in regard to the exercise of their functions of control. See chapter xxvIII., post.

The question whether a servant's violation of a rule is or is not contributory negligence, as a matter of law, where he relied upon a coemployee to protect him against that particular peril which the rule violated was intended to avert has evoked a conflict of opinion.<sup>18</sup>

of the company prohibited the running of a hand car after dark without special permission. But the evidence left it in doubt whether the deceased had knowledge of such rule. It was also shown that deceased usually went to work with his men about daylight, and that the evening before he received a televening before he received a televening him to take his men in the morning to work at a particular place, to a rule required that the promoved in the superintendent, directing him to take his men in the morning to work at a particular place, to a rule required. Moore v. Wabash, reach which with the hand car required a where the court said: "It being contained that no car will be sent back on the track on which stands the train which he is inspecting. Canon v. Chicago, M. & St. P. R. Co. (1897) 101 Iowa, 613, 70 N. W. 755.

In another, it was held that the promise of a foreman of car repairers to protect a car repairer binds the company, and precludes it from taking advantage of the latter's failure to set out a flag about 1 hour and 20 minutes. Under where the court said: "It being contained that no car will be sent back on the track on which stands the train which he is inspecting. Canon v. Chicago, M. & St. P. R. Co. (1897) 101 Iowa, 613, 70 N. W. 755.

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to his injury by disobeying the rule, protection ordinarily sufficient, when the since the fact that he had disobeyed it person in charge of the work knows that, might be accounted for by the fact that in the particular case, it is not a suffi-

conclusion would have been arrived at a given case, have been insufficient as a under the doctrines of the common law. Warning, can it be possible that the fore
"Plaintiff, an engineer of such train, man would be restricted to the use of was told by the yard master, who had the red flags? Or if, in such case, he authority to discharge him, and whom had had the red flag set up, and one of he was bound to obey, to "hurry up" the men was injured, in consequence of through the yard, and in obeying this its insufficiency to give the warning, order he was injured by a collision. It that the company would not be liable to was held that it could not be said, as a the injured party? Has it discharged matter of law, that plaintiff contributed its duty by simply adopting a means of to his injury by disobeying the rule, protection ordinarily sufficient, when the might be accounted for by the fact that the master gave other and different commands. Norris v. Illinois C. R. Co. (1900) 88 Ill. App. 614.

18 In one case it has been laid down that a car inspector is not, as matter of law, guilty of contributory negligence in going under a car without putting up a signal required by a rule of the company, where the yard foreman, who has control of the movement of cars, has in the particular case, it is not a sufficient warning? If the foreman has authority results from his general authority to perform the duty of the company in protecting the employees under his control in the performance of a dangerous work for the company, and he was authorized to make the promise to the plaintiff for the company, and undertook control of the movement of cars, has But in view of the fact that the duty of a servant to obey a rule may always be referred either to an express or an implied contract (see § 362, supra), it is difficult to see on what ground the servant can ever be exculpated under such circumstances, except in those cases where the coemployee was invested with authority to suspend the obligation of the rule. See preceding paragraph.

Considered as a statement of an absolute duty, a rule is binding only as between the master and the servant themselves. Hence, the failure of a servant to observe a rule of his master is not necessarily contributory negligence, as a matter of law, where the servant is injured by the act of a stranger.19

367. Doctrine that violation of a rule does not imply negligence, as matter of law.— In New York and Texas, views have been expressed which are more or less at variance with the doctrine that culpability is a legal inference when the servant's act is once proved to have constituted an infraction of a valid rule of which he had notice.1

out the flag, or setting the watch."

taken that a car repairer who goes under a car standing upon the track to repair it, without displaying signals rerelying upon another employee to proof negligence which will defeat recovery for injuries sustained. Illinois C. R. Co. v. Winslow (1894) 56 Ill. App. 462. not excused by the fact that the car repairer agreed with a conductor that the latter should not permit any of the cars in the train to come upon the repair track. Johnson v. Cleveland, L. & W.

R. Co. (1896) 11 Ohio C. C. 553.

\*\*San Antonio & A. P. R. Co. v. Way
(1894) 9 Tex. Civ. App. 214, 29 S. W.

R. Co. (1896) 11 Ohio C. C. 553.

which, in effect, included the proposition that it was negligence per se to run a (1894) 9 Tex. Civ. App. 214, 29 S. W. train at a greater speed than that permeter and the proposition that it was negligence per se to run a train at a greater speed than that permeter and the proposition that it was negligence per se to run a train at a greater speed than that permeter and the company. Ft. Worth & D. C. R. Co. v. Thompson (1893) 2 Tex. Civ. App. 170, 21 S. W. 137, Citing Missouri P. R. Co. v. Lee preme court laid it down that the doctrine finally settled in that state is that the failure to perform a duty imposed by statute or by rule may be shown, but that such failure is not conclusive evidence of negligence. It was therefore held that the nonobservance by an enperfect and in violation of the rule and when running backwards was not con- the jury. clusive evidence of his contributory neg-ligence, requiring a nonsuit in an action ams (1900) 94 Tex. 100, 58 S. W. 831,

or to adopt any other means necessary to by him for injuries from the presence of secure the safety of the men, thereby abanother locomotive on the track at a solving them from the duty of setting point where he had a right, under the the flag, or setting the watch." rules of the company, to assume the track would be clear. Gross v. Penn-ken that a car repairer who goes unsupport to the company to assume the track would be clear. Gross v. Penn-sylvania, P. & B. R. Co. (1891) 42 N. Y. S. R. 808, 16 N. Y. Supp. 616.

The authority cited was Knupfle v. quired by the rules of the company, and Knickerbocker Ice Co. (1881) 84 N. Y. 488, where a municipal ordinance was tect him from moving engines, is guilty infringed,—a case which has frequently been followed in later decisions. See, generally, Shearm. & Redf. Neg. § 13.

In Texas the position has been taken And that the violation of such a rule is that, in the absence of a statutory declaration, a trial court is forbidden to charge the jury that any particular act or omission constitutes negligence; and this principle has been declared to justify a refusal to give an instruction which, in effect, included the proposition

held that the nonobservance by an en- perfect and in violation of the rule and gineer of a rule of the railroad company custom of the defendant company, was requiring a headlight upon the tender held to have been properly submitted to

It can scarcely be doubted, however, that, even if the numerous authorities on the other side are left out of account, these views are erroneous. The decisive consideration which is altogether ignored in the decisions cited is that every breach of a rule represents a breach of a contractual obligation which has either been expressly assumed by the servant, or is implied from the fact of his having accepted or continued in the given employment with notice of the existence of the rule so violated. Whether the infraction of a statutory duty is or is not negligence per se is a question which this consideration renders wholly immaterial.2 The servant's agreement is that, whatever may have been, apart from the rule, the standard of proper care under the circumstances, the rule itself is to define that standard, as between the servant and his master, as long as the former remains at work. That this is really the prevailing view even in the two states above mentioned is abundantly evident from numerous decisions in which recovery has been denied, as a matter of law, for the reason that the injury was caused by the violation of a rule.3

or action under statutes and ordinances 13 S. W. 309; International & G. N. K. creating duties in general terms, and Co. v. Moore (1893) 3 Tex. Civ. App. had no reference to cases in which an 416, 22 S. W. 272; Southern P. Co. v. obligation was expressly imposed upon Ryan (1895; Tex. Civ. App.) 29 S. W. one person for the benefit of another. 527: Fritz v. Missouri, K. & T. R. Co. The position that it is necessary to take (1895; Tex. Civ. App.) 30 S. W. 85.

it was held to be for the jury to say the opinion of a jury as to the proper whether negligence was predicable of the inference to be drawn from a breach of

whether negligence was predicable of the action of a conductor who, at a point on the latter kind of obligation is, to say the line where, under the company's rules, a yard master had control of the train, took upon himself to ask an engineer employed by another company to assist him to getting the train up a grade on which it was stalled. In the court of appeals (1900) 55 S. W. 803, (1894) 77 Hun, 69, 28 N. Y. Supp. 298; the case was said to be for the jury because it was an open question whether the yard master had really assumed control of the train.

That the violation of a rule by an employee is not negligence per se has also been laid down in Galveston, H. & S. A. Supp. 890; Gulf, W. T. & P. R. Co. v. Sweeney (1896) 14 Tex. Civ. Ryan (1888) 69 Tex. 665, 7 S. W. 83; Texas & P. R. Co. v. Leighty (1895) 88

'In this connection a fact should be reported the train of a trule by an employee is not negligence per se has also been laid down in Galveston, H. & S. A. Supp. 890; Gulf, W. T. & P. R. Co. v. Sweeney (1896) 14 Tex. Civ. Ryan (1888) 69 Tex. 665, 7 S. W. 83; Texas & P. R. Co. v. Leighty (1895) 88

Texas & P. R. Co. v. Leighty (1895) 88

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Texas & P. R. Co. v. Leighty (1895) 88 R. Co. v. Sweeney (1896) 14 Tex. Civ. Ryan (1888) 69 Tex. 665, 7 S. W. 83; App. 216, 36 S. W. 800.

Texas & P. R. Co. v. Leighty (1895) 88

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Texas & P. R. Co. V. Leighty (1895) 88

Texas & P. R. Co. (1897) 90

Tex. 627, 40 S. W. 386; Pilkinton v. New York in the decision cited in note Gulf, C. & S. F. R. Co. (1888) 70 Tex. 1,—viz., that the principle relied upon 226, 7 S. W. 805; San Antonio & A. P. was enunciated with regard to the right R. Co. v. Wallace (1890) 76 Tex. 639, of action under statutes and ordinances 13 S. W. 565; International & G. N. R. conting duties in general terms and Co. v. Macre (1893) 2 Tex Civ. App.

### CHAPTER XX.

#### VOLENTI NON FIT INJURIA.

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  - 377. Doctrine that voluntary action is not inferable, as matter of law, when appreciation of an extraordinary risk is proved.
    - a. United Kingdom and British Colonies.
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  - 385. Length of time which elapsed between the discovery of the risk and the occurrence of the accident.
  - 386. Act rendered necessary by the arrangement of the plant.

As to the availability of the maxim as a defense to an action for breach of a statutory duty, see chapter xxxv., post.

368. Introductory.— It is well settled that, independently of the relation of master and servant, there may be a voluntary assumption of the risk of a known danger, which will debar one from recovering compensation in case of injury to person and property therefrom, even though he was in the exercise of due care.¹ Wherever there is no contractual relation between the plaintiff and defendant, it is evident that this defense must rest upon the general principle expressed in the maxim, Volenti non fit injuria, and cannot be founded upon the theory of an implied agreement, to which it has been usually referred in suits by a servant against his own employer. The absence of privity of contract necessarily entails the consequence that, as has been held in one case, there is no presumption that the servant of one person accepts, as an implied term of his contract, the hazards arising from the negligence of a stranger.²

Most of the cases in which the maxim has been discussed in connection with the kind of accidents to which workmen are liable have been actions in which the defendant was the plaintiff's master. But a more adequate conception of its meaning will be obtained by also utilizing the discussions in those cases where the person sued was a stranger. The citation of both lines of authorities indifferently is amply justified by the fact that, as the maxim is of universal application, the determination of the question whether it is or is not available cannot be affected by the mere fact that the relations of the parties to the action were for some purposes defined by a contract.<sup>3</sup>

# A. MEANING AND EFFECT OF THE MAXIM.

369. Generally.— In the course of the judgment delivered by him in a leading English case, Lord Watson remarked: "The maxim, Volenti non fit injuria, originally borrowed from the civil law, has lost much of its literal significance. A free citizen of Rome who, in concert with another, permitted himself to be sold as a slave in order that he might share in the price, suffered a serious injury, but he was, in the strictest sense of the term, volens. The same can hardly be

a railway company).

<sup>&</sup>lt;sup>1</sup> Miner v. Connecticut River R. Co. (1891) 153 Mass. 398, 26 N. E. 994. Thomas v. Quartermaine (1887) L. R. <sup>2</sup> Brewer v. New York, L. E. & W. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. Co. (1891) 124 N. Y. 59, 11 L. R. A. 340, 57 L. T. N. S. 537, 35 Week. Rep. 483, 26 N. E. 324 (said of an express messenger who had brought suit against

said of a slater who is injured by a fall from the roof of a house; although he, too, may be volens in the sense of English law."

The modification of meaning thus adverted to by this distinguished jurist is not the result of any change of opinion as to the true import of the Latin words. These must always have borne virtually the same significance as that indicated by the various translations and paraphrases collected in the note below.<sup>2</sup> The nature and extent of the alteration which the scope of the maxim has undergone in modern times seems rather to consist essentially in this,—that, whereas it was originally applied in cases where the person against whom it was invoked had deliberately become a consenting party to some transaction which restricted or took away substantive or remedial rights already existing or accrued, and had either actually expressed his intention to accept the consequences of that transaction, or had joined in some formal proceeding which created an equally binding obligation, it is now construed in such a sense that it may operate as a bar to an action in many instances in which the consent and the intention of the person concerned are alike a mere matter of implication, more or less forced, from a certain course of conduct, and in which the rights affected are inchoate and dependent for their genesis upon future events of an essentially contingent description.<sup>3</sup> The doctrine

<sup>1</sup> Smith v. Baker (1891) A. C. 325, gerald v. Connecticut River Paper Co. 355, 60 L. J. Q. B. N. S. 683, 65 L. T. N. (1891) 155 Mass. 155, 29 N. E. 464. S. 467, 55 J. P. 660, 40 Week. Rep. 392. "No one can maintain an action for a

under the French law as administered in tributed to the act of which he comthe Province of Quebec. Richelieu & O. plains." Curtis, J., in Byam v. Bullard Nav. Co. v. St. Jean (1883) 28 L. C. J. (1852) 1 Curt. C. C. 100, Fed. Cas. No. (Q. B.) 91, citing Larombiere on Obli- 2,262. gations.

an act being done towards him cannot, an act being done towards nim cannot, when he suffers from it, complain of it as a wrong." Lord Herschell in Smith v. Baker (1891) A. C. 325. 360, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392.

"One man cannot sue another in research of advances on sight not uploatful

spect of a danger or risk, not unlawful spect of a danger or risk, not unlawful in itself, that was visible, apparent, and voluntarily encountered by the injured person." Bowen, L. J., in *Thomas* v. Quartermaine (1887) L. R. 18 Q. B. Div. 685, 699, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516.

"One who knows of a danger from the a civil injury which was consented to. gligence of another, and understands . . [A man] is not injured by a negligence of another, and understands cluded from recovering for an injury \*163, p. 187.
which results from the exposure." Fitz-

"No one can maintain an action for a The maxim is available as a defense wrong, where he has consented or con-

No one can maintain an action for a <sup>2</sup> "One who has invited or assented to wrong, where he has consented or contributed to the act which occasioned it. Mad River & L. E. R. Co. v. Barber (1856) 5 Ohio St. 541, 67 Am. Dec. 312.

No one can maintain an action for a wrong where he has consented to the act which occasions his loss. Broom, Legal

Maxims, p. 265.
"That to which a person assents is not esteemed in law an injury." Broom, Legal Maxims, 268.

"He who consents to an act is not wronged by it." Cal. Civil Code, §

"Consent is generally a full and perfect shield when that is complained of as

and appreciates the risk therefrom, and negligence which is partly chargeable to voluntarily exposes himself to it, is pre- his own fault." Cooley, Torts, 2d ed.

that the maxim is admissible as a defense in cases of the latter description seems to be of comparatively recent growth, even in common-law jurisdictions.4

Not the least important result of this extension of the domain in which the maxim may become a controlling factor is that it is now frequently necessary to determine the applicability of the maxim with reference to a question of fact, the solution of which is usually beset with embarrassing difficulties. That question the earlier decisions, as will be seen in the course of this chapter, evaded in a large measure by the simple expedient of entertaining the rigid presumption that consent should be always implied under certain circumstances. there has recently been a revolt, in England more especially (see

account the cases relating to actions for liability cases: "It is sufficient for a personal injuries, all the decisions cited party generally to say, 'There are spring by Mr. Broom to illustrate the maxim guns in this wood,' and if another then deal with conditions of the kind to takes upon himself to go into the wood, which alone it seems to have been orig- knowing that he is in the hazard of inally applicable. It is stated to be a meeting with the injury which the guns

for criminal conversation that the hus- act. The maxim of law, Volenti non fit

otherwise have been asserted.

edge of the facts had voluntarily paid has been distinctly apprised of his danmoney which was not legally due.

der illegal compulsion.

which the conception of an implied inditions was distinctly relied upon seems this case. to be the so-called 'Spring Gun Case;' close resemblance to that which has evidence did not show that the risk was since become so familiar in employers' appreciated.

bar to actions in the following predica-ments: are calculated to produce, it seems to ments that he does it at his own peril, and (1) Where it was proved in an action must take the consequences of his own band had consented to his wife's adul- injuria, applies, for he voluntarily extery. (2) Where the plaintiff had express- happened. He is told that if he goes inly agreed to give up rights which might to the wood he will run a particular risk, for that in those grounds there are (3) Where the party aggrieved by the spring guns. Notwithstanding that resolution of a board of local commis- caution he says, 'I will go into the wood, sioners had concurred in that resolution. and I will run the risk of all consequen-(4) Where a person with full knowl- ces.' Has he, then, any right, after he oney which was not legally due. ger, to bring an action against the owner (5) Where money had been paid un- of the soil for the consequences of his own imprudent and unlawful act? I (6) Where money had been paid un- think not, for he had no right to enter der pressure of legal process. the wood, and in so doing, h

The earliest reported decision in trespasser and a wrongdoer." the wood, and in so doing, he became a

Readers of Sidney Smith's Essays will tention to accept the contingent risk of recollect his amusing criticism upon the injury from the existence of certain con-doctrines propounded by the judges in

A recent American decision which is Ilott v. Wilkes (1820) 3 Barn. & Ald. scarcely less interesting and which in-304. The language of the opinions is volves an almost equally preposterous, decidedly interesting in the present con- if strictly logical, conclusion, is Scanlon nection, as it indicates the views held by v. Wedger (1892) 156 Mass. 462, 465, 16 English judges not long before the doctrine of assumption of risks was intro-untary spectator, present for the purduced in the law of master and servant pose of witnessing a display of fireworks by Priestley v. Fowler (1837) 3 Mees. & in a public highway, was held to have W. 1, Murph. & H. 305, 1 Jur. 987. The consented to take the risk of injury from phraseology of such a passage as this an explosion. Morton and Knowlton, (from the opinion of Bayley, J.) bears a JJ., dissented on the ground that the

§ 277, ante), against this arbitrary method of determining a plaintiff's rights, and at the present time the law of the subject is in a transitional stage of its development. In some jurisdictions the position of the courts has, by dint of repeated adjudications, been defined with tolerable clearness. But in those in which the effect of the maxim has not been discussed at all, or has only been discussed in a cursory manner, it is at best a matter of mere conjecture which of the main opposing theories on the subject will be adopted when a categorical decision is called for. Such being the situation, it would be a futile and hopeless task to attempt to construct a consistent and symmetrical body of principles from the materials furnished by the reports. All that can be done is to exhibit the effect of the authorities in such a way as show the grounds upon which the opposing theories are rested by their respective advocates, and the results of those theories when applied to various groups of facts.

370. Relation of the maxim to the doctrine of a contractual assumption of risks.— According to many of the authorities, both the earlier and the more recent, the maxim is to be regarded as the embodiment of a comprehensive principle, of which the servant's contractual assumption of known risks is one special application. In a strictly

ald v. Connecticut River Paper Co. untarily and rashly exposed himself to (1891) 155 Mass. 155, 29 N. E. 464; injury, but whether he agreed that if in-Creswell v. Wilmington & N. R. Co. jury should befall him the risk was to (1899) 2 Penn. (Del.) 210, 43 Atl. 629; be his, and not his master's." Smith v. and the cases cited in § 376, note 4, in-Baker (1891) A. C. 325, 60 L. J. Q. B.

"Before the employer's liability act there was this condition in the contract of hiring, that, if there was a defect in

<sup>1</sup>Skipp v. Eastern Counties R. Co. the employer and the employed, the max (1853) 9 Exch. 223, 3 C. L. Rep. 185, 23 im, as now used, generally imports that L. J. Exch. N. S. 23; Gibson v. Pacific the workman had, either expressly or by R. Co. (1870) 46 Mo. 163, 2 Am. Rep. implication, agreed to take upon himself 497; Louisville, N. O. & T. R. Co. v. Conthe risks attendant upon the particular roy (1886) 63 Miss. 562, 56 Am. Rep. work which he was engaged to perform 835; Devitt v. Pacific R. Co. (1872) 50 and from which has suffered injury. Mo. 302; Mundle v. Hill Mfg. Co. The question which has most frequently (1894) 86 Me. 400, 30 Atl. 16; Fitzgerto be considered is not whether he volable v. Connecticut River Paner Co. untarily and rashly exposed himself to Baker (1891) A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392, per Lord Watson (p. 355 of Law Reports).

"The doctrine of assumption of the the premises or machinery, which was risk of his employment by an employee open and palpable, whether the servant has usually been considered from the actually knew it or not, he accepted the point of view of a contract, express or employment subject to the risk. That implied; but as applied to actions of is the doctrine which is embodied in the tort for negligence against an employer, is the doctrine which is embodied in the tort for negligence against an employer, maxim, Volenti non fit injuria." Yar- it leads up to the broader principle exmouth v. France (1887) L. R. 19 Q. B. pressed by the maxim, Volenti non fit Div. 647, 57 L. J. Q. B. N. S. 7, 36 injuria." O'Maley v. South Boston Gas-Week. Rep. 283, per Lord Esher (p. 651 light Co. (1893) 158 Mass. 135, 47 L. of Law Reports). See, however, note 2, R. A. 161, 32 N. E. 1119. In a later infra, for some language used by this passage of the same judgment we also judge with which it seems difficult to find it laid down that, if a servant "contracts" to take the obvious risks of danreconcile this remark.

"In its application to questions between ger from defective machinery, "his emlogical point of view, however, the more exact conception of the relation between the two defenses seems to be rather that which was explained by Bowen, L. J., viz., that the principle expressed by the maxim is quite distinct from the principle which is denoted by the statement that the servant had impliedly agreed to assume the risk in question, but that the former principle is no less applicable than the latter to cases in which the servant is suing his master for personal injuries, and will, under some circumstances, lead to precisely the same consequences.2

such risks, and, if he is hurt from a a defense, and may in many cases be sufcause included in the contract, the de- ficient; but there is another way of statfect is not within the terms of the stating it, and another principle wholly ute [i. e., employers' liability], the independent of contract on which a simimaxim, Volenti non fit injuria, applies, lar defense arises. The law is full of and he cannot recover."

for a master sued under the act to rely point necessary, and renders it impor-upon the theory of an implied contract tant to remember that, quite apart from to assume the risk, thus proceeded to the relation of master and servant, and discuss the two available defenses which independent altogether of it, one man were independent of contract. These cannot sue another in respect of a danger two defenses, that which rests on the or risk not unlawful in itself, that was doctrine, Volenti non fit injuria, and visible, apparent, and voluntarily enthat which is popularly described as countered by the injured person." contributory negligence, are quite differ- A similar point of view is indicated ent, and both, in my opinion, are left by Lord Esher's remarks in a later case: open to an employer if sued under the "Under the old law it would have been employers' liability act of 1880. Neither said: 'You (the servant) have entered of these is a defense that merely arises into or continued in this employment by implication out of the workman's where this thing of which you complain contract of service. A confusion in ap- is open and palpable, and therefore it is plying the first of these two broad prin- an implied condition of your contract of ciples to the special case of master and service that you take upon yourself the scryant has at times arisen out of the risk of accidents therefrom, and consefact that by the contract of service the quently you have no remedy against your workman was deemed to have taken up- employer.' As between master and servon himself the ordinary risk of a busi- and that was the way the immunity from ness lawfully carried on upon his mas- liability was always stated. The maxim, ter's premises, and it has been assumed Volenti non fit injuria, was not wanted as an a fortiori case that he took upon as between master and servant. It was himself such risks as were visible or only wanted, if at all, where no such

ployer owes him no duty in respect to known. This is one way of putting such instances where duties assume a double In many decisions, owing to the fact aspect, and may be viewed concurrently that the phraseology appropriate to the as arising by implication out of a condiscussion of a contractual acceptance of tract, or as created by some wider prinrisks must be essentially the same as ciple of law which happens to take effect that employed where the acceptance is and to receive apt illustration in the discussed independently of a contract, it particular instance of some particular is often impossible to say with any con- contract. It is in most cases a barren fidence whether the court intended to and metaphysical inquiry to discuss rely on the maxim or an implied con- whether such duties are best treated as arising by implication from the contract, <sup>2</sup> Thomas v. Quartermaine (1887) L. or from the general law outside; and R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. down to the employers' liability act, 340, 57 L. T. N. S. 537, 35 Week. Rep. 1880, it may have been less important, 555, 51 J. P. 516. The learned judge, in the case of visible and apparent risks, after pointing out that the terms in which explanation of the master's implied the carelovers' liability act. which the employers' liability act of munity was given. The employers' lia-1880 was couched rendered it impossible bility act of 1880 makes precision on this

As the phrase, "assumption of risks," has by force of universal usage acquired a meaning suggestive of the notion of an implied contract, it would seem to be advisable, in referring to the juridical situation which exists when the maxim is applied, to describe it by language which bears a less specialized significance,—as, that the servant "took upon himself," or "accepted," or "voluntarily undertook," or "voluntarily incurred," or "voluntarily encountered," the risk to which the injury was due; or that he waived the right of action which he had acquired by that injury.8

## 371. Relation of the maxim to the defense of contributory negligence.

-The older authorities construe the maxim as covering the defense of contributory negligence, as well as that of a contractual assumption of risks. On the other hand, Lord Justice Bowen has expressed the

relation as that of master and servant existed." Yarmouth v. France (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283 (p. 651 of Law Reports).

In Knisley v. Pratt (1896) 148 N. Y. 372, 32 L. R. A. 367, 42 N. E. 986, the court distinguishes between the conception of an "implied contract" and "an independent act of waiver," the latter phrase, as the context shows, being intended to express the effect of the maxim. So also in Mad River & L. E. R. Co. v. Barber (1856) 5 Ohio St. 541, 67 Am. Dec. 312, it is laid down that "if the agent or employee of the company waive the omission of duty on the part of the company, he takes the risk upon himself, and if damaged, he must abide by the maxim, Volenti non fit injuria."

There is a somewhat singular confuwilliams v. Birmingham Battery & Metal Co. [1899] 2 Q. B. 338, 68 L. J. Q. B. N. S. 918, where Smith, L. J., after stating that the defendant's counsel purposely abstained from raising the defense that the injured servant had "contracted, or consented or undertaken" to run the risk in question, in order that they might raise the defense given by the maxim, put the question in a subsequent part of his opinion, where he was commenting on the finding of the jury that the servant knew of the danger: "How does that prove that he either contracted, or consented, or undertook to accept the risk?" The word italicised seems especially in-appropriate, considering the basis on which the case was argued and decided.

<sup>4</sup>Lord Watson in Smith v. Baker [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392 (p. 354 of Law Reports).

<sup>3</sup> Lord Watson in Smith v. Baker [1891] A. C. 325, (p. 354 of Law Reports), 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep.

<sup>6</sup> Bowen, L. J., in Membery v. Great Western R. Co. (1889) 4 Times L. R. 504; Lindley, L. J., in Yarmouth v. France (1887) L. R. 19 Q. B. Div. 647 (p. 661, of Law Reports), 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283.

Bowen, L. J., in *Thomas v. Quartermaine* (1887) L. R. 18 Q. B. Div. 685

(p. 699 of Law Reports), 56 L. J. Q. B. DIV. 085 (p. 699 of Law Reports), 56 L. J. Q. B. N. S. 340, 57 L. J. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516.

\* Mad River & L. E. R. Co. v. Barber (1856) 5 Ohio St. 541, 67 Am. Dec. 312; Knisley v. Pratt (1896) 148 N. Y. 372, 32 L. R. A. 367, 42 N. E. 986.

<sup>1</sup> Griffiths v. Gidlow (1858) 3 Hurlst. & N. 648, 27 L. J. Exch. N. S. 404; Senior v. Ward (1859) 1 El. & El. 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. So. 172, 7 Week. Rep. 261; Caswell v. Worth (1856) 5 El. & Bl. 849, 25 L. J. Q. B. N. S. 121, 2 Jur. N. S. 116; Byam. v. Bullard (1852) 1 Curt. C. C. 100, Fed. Cas. No. 2,262. See also Broom, Legal Maxims, \*268.

The same view seems to have been adopted by Lord Watson in the passage

quoted in § 370, note 1, supra. In Britton v. Great Western Cotton Co. (1872) L. R. 7 Exch. 130, 41 L. J. \*Romer, J., in Williams v. Birming-Exch. N. S. 99, 27 L. T. N. S. 125, 20 ham Battery & Metal Co. [1899] 2 Q. Weck. Rep. 525, Channell. B. denied that B. 338, 68 L. J. Q. B. N. S. 918.

opinion that the principle embodied by the maxim is outside the principle of contributory negligence altogether.2

Of these two theories the former is conceived by the present writer to be the correct one. The reasoning by which the latter was sustained is far from being satisfactory or convincing. In the first place, it presupposes the soundness of the doctrine that any evidence which suffices to show that the servant was volens necessarily involves the conclusion that there had not been any antecedent breach of duty on the master's part. This doctrine is not conceded by all the authorities to be correct. See § 374, infra. But even if its correctness be conceded, there is still a serious flaw in Lord Justice Bowen's exposition of principles. The finding of the jury with reference to which his theory was propounded merely negatived contributory negligence as regards the act which was the immediate cause of the injury. But manifestly this is not the only description of contributory negligence which constitutes a possible factor in the determination of the right of parties to such actions. Want of care may be shown, not only by a failure to observe the precautions appropriate to be taken at the moment when the injury was received, but by the fact that the plaintiff remained in a situation in which there was a probability of his being, sooner or later, injured, owing to the existence of a certain

pothesi there has been none. It rests choice, and the Latin maxim often apupon the view that though the defendant plies when there has been no carelesshas in fact been negligent, yet the plainness at all. A confusion of ideas has tiff has by his own carelessness severed frequently been created in accident cases the causal connection between the defendant's negligence and the accident many who are ignorant may be propulated in accident as negligence, accordingly, is not one individual who knows and runs the true proximate cause of the injury risk and by dealing with the accident with the cause of the injury risk and by dealing with the accident when there has been no carelessness at all. A confusion of ideas has tiff has by his own carelessness severed frequently been created in accident cases the causal connection between the dealing with the causal of the injury risk and by dealing with the causal carelessness severed frequently been created in accident cases the causal connection between the dealing accident cases of the causal connection between the deal of the causal connection between the causal connection between the causal connection that the deal of the causal connection between the causal connection that the causal conne the true proximate cause of the injury. risk, and by dealing with the case as if It is for this reason that, under the old it turned only on a subsequent investiform of pleading, the defense of contrib- gation into contributory negligence." utory negligence was raised in actions

being guilty of contributory negligence" based on negligence under the plea of (as reported in the Law Journal only). 'not guilty.' It was said, and said Compare also the statement that it is rightly, in Weblin v. Ballard (1886) L. a fundamental principle in this branch R. 17 Q. B. Div. 122, 55 L. J. Q. B. N. S. of jurisprudence, that one who voluntarily incurs a known and immediate 455, 50 J. P. 597, that in an inquiry danger is guilty of contributory negligence. Indianapolis & St. L. R. Co. v. contributory negligence the plaintiff's Watson (1887) 114 Ind. 20, 14 N. E. knowledge of the danger is not conclusive. Obviously such knowledge may 721, 15 N. E. 824.

2 Thomas v. Quartermaine (1887) L. have even led him to exercise extraordiR. 18 Q. B. Div. 685, 697, 56 L. J. Q.
B. N. S. 340, 57 L. T. N. S. 537, 35 Week. non fit injuria stands outside the defense
Rep. 555, 51 J. P. 516. His position is of contributory negligence, and is in no
explained at length in the following pas
"Contributory negligence arises stanges the two ideas sometimes seem to sage: "Contributory negligence arises stances the two ideas sometimes seem to when there has been a breach of duty on cover the same ground, but carelessness the defendant's part, not where ex hy- is not the same thing as intelligent

known peril, although he might be in the exercise of due care at the moment when an immediate necessity for avoiding that peril arose. See chapter xvIII., ante. If the probability of being thus injured was so great that a prudent man would have declined to expose himself to the danger, the supposed case is evidently one in which the injured person would be guilty of contributory negligence and chargeable with the legal consequences of that kind of culpability. Here we have voluntary and deliberate action,—"intelligent choice," in fact, to use the very words of Lord Justice Bowen,-and no sound reason can be suggested why the maxim should not be held applicable under such circumstances. With all deference, therefore, it is submitted that this distinguished judge has fallen into an error, and that his error is probably accounted for by his having failed to take into account one of the possible aspects under which the evidence before him might have been viewed.3

creise of due care. In other words, it tion, failed to take account of that type may be consistent with due care to incur of contributory negligence which implies a known danger voluntarily and deliberation.

erately; and this may be so when the deliberation.

In his work on Negligence (§ 132), Wharton lays it down that "negligence hended neglect or carelessness of others."

Miner v. Connecticut River R. Co. of mind which is capable either of de(1891) 153 Mass. 398, 26 N. E. 994. signing an injury to another or of There the action was to recover damages agrecing that an injury should be refor the death of a horse which was ceived from another." As to the former frightened by a moving locomotive while of the alternatives here presented it is ciated the danger which caused the injury complained of, it is error to refuse a ruling that, if the jury should find, independently of any question of contributory negligence, that the plaintiff's what he considers to be the surest employee with full knowledge voluntaringly assumed the risk, or intentionally took it upon himself, the verdiet should be for the defendant. "The principle," and if he can establish a specific agreement by the defendant, it will clearly be a gratuitous piece of folly to desert this vantage ground and allow the controbarred from a recovery when he voluntarily assumes the risk is not identical with the principle on which the doctrine available for determining whether an of contributory negligence rests, and in proper cases this ought to be explained

<sup>3</sup>Other eminent authorities seem to to the jury. One may, with his eyes have made a similar mistake. Thus, in open, undertake to do a thing which he a Massachusetts case we find the law lail knows is attended with more or less down as follows: "Independently of any peril; and he may, both in entering upon relation of master and servant, there the undertaking and in carrying it out, may be a voluntary assumption of the use all the care he is capable of. But risk of a known danger, which will debar whether or not he thereby assumes the one from recovering compensation in risk may depend on other circumcase of injury to person or property stances." Here it is apparent that the therefrom, even though he was in the excourt, in considering the logical situacrise of due care. In other words, it tion, failed to take account of that type

for the death of a horse which was ceived from another." As to the former frightened by a moving locomotive while of the alternatives here presented, it is standing in a railway yard, and backed submitted that the learned author misitself and a wagon over the edge of an conceives the situation. The true the-unprotected embankment. The court ory, we take it, is that, in cases where held that where there is evidence that a design can be proved, the question plaintiff's employee knew and appre-whether the actor was imprudent or not ciated the danger which caused the in- is wholly immaterial and does not approximate of it is great to refuse the same and apprent in the problem.

The theory which separates the defense given by the maxim from that of contributory negligence clearly finds no warrant in the words of the maxim themselves, for the idea underlying them is simply that of voluntary action which incapacitates the actor from maintaining a suit for damages in a court of law against some person who would otherwise be amenable to such suit. No other quality is predicated of the disabling action than that it should have followed an unconstrained exercise of the actor's will. Nor can such a theory be made to harmonize with any juristic concept of negligence; for a want of care, although it may, merely as a matter of abstract metaphysics, be predicated of an action induced by coercion, cannot, without doing violence to one of the fundamental doctrines of all systems of law, be recognized as a factor in the practical determination of legal rights, unless the negligent person was a free agent.

The conception entertained by Lord Justice Bowen and the other authorities just referred to seems to be that the maxim is applicable only in those cases in which deliberation precedes action, while contributory negligence implies action without deliberation.4 little consideration, however, will show that the defenses cannot be differentiated upon this footing. A man may bestow the most anxious thought upon the solution of the question whether he will encounter a certain risk, and yet if his ultimate action in electing to expose himself to that risk would be pronounced imprudent by the average sense of the community, the law certainly charges him with the guilt of negligence.

The present writer ventures to think that the rationale of these two defenses, so far as the maxim is concerned, is simply this,—that, where the maxim is relied on, the plaintiff's mental condition prior to the adoption of the course of conduct which proved hurtful to him is the particular matter upon which his right of recovery is made to depend, while the plea of contributory negligence brings into the foreground the more special consideration that the course of conduct so adopted, or some particular act done after the plaintiff had committed himself to that course of conduct, was of such a character as to show that he was wanting in due care, and that this carelessness was the true proximate cause of the accident. In other words, the maxim

This conception seems to be the beyond the operation of the rule on the basis of the following ruling: A plainsubject of contributory negligence, and tiff who not only carelessly seeks and comes within the scope of the maxim. The remains in a place of danger, but remains there in disobedience to directions given him and despite of warnings (a case of a passenger riding on top of which he received, consents to any interpretations.) jury he may receive. Such a case goes

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stops with the preliminary question whether the plaintiff's will was exercised freely and without constraint, while the defense of contributory negligence concerns itself rather with the subsequent question, whether it was prudent for him to exercise his will in a certain manner. As, however, the law takes no account of a mental attitude, except in so far as it may express itself in overt acts, it is evident that, although the freedom of the will is the point emphasized by the maxim, the inquiry whether it is applicable in the premises really projects the view forward to the same circumstances as those which suggest the farther inquiry whether the plaintiff was negligent. Add to this the fact already alluded to, that, in the practical administration of justice, negligence can only be predicated of a voluntary agent, and it will be apparent that, for the purpose of gauging the servant's rights, the defense that his action was voluntary, and the defense that it was negligent, should rather be regarded as the expression of two conceptions which are both comprehended under the maxim, than referred to two distinct ideas, one of which does, and the other of which does not, lie within its scope. A circumstance which goes very strongly to support this view of its effect is that any state of facts which suggests its availability as a defense will usually be such that the pleader may rely either upon a general acceptance of the risks of the situation, or upon the theory that the plaintiff, in continuing to expose himself to those risks, or in doing that particular thing from which his injury resulted, was guilty of contributory negligence.

372. Maxim not a defense unless the injured servant comprehended the risk.— That a master who seeks to escape liability to his servant on the ground that he assumed the risk as a part of his contract must lay a foundation for the defense by proving that he was not only aware of the conditions which caused his injury, but also understood the risk created by those conditions, is a familiar principle. 271, ante. The same rule prevails where the plaintiff's assumption of the risk is referred directly to the maxim.1

"When, as is commonly the case, his defective machinery," it must be shown the workman cannot reasonably be held risk. *Ibid.*, per Lord Morris, p. 369 of to have undertaken it, unless he knew of its existence and appreciated, or had "There may be a perception of the exto have undertaken it, unless he knew of its existence and appreciated, or had the means of appreciating, its danger." "There may be a perception of the existence of the danger, without compresent to the means of appreciating, its danger." "Stence of the danger, without compresent to the compresent to the danger of the risk." Thomas v. Quartoname (1887) L. R. 18 Q. B. Div. 685 def, 55 J. P. 660, 40 Week. Rep. 392, per Lord Watson.

Before the servant can be charged with having voluntarily undertaken a dangerous business "plus the risk from 19 Q. B. Div. 647, 57 L. J. Q. B. N. S.

[the servant's] acceptance or nonaccept-that there was an assent to undertake ance of the risk is left to implication, the work, with full appreciation of the

Where direct proof of the servant's knowledge is not obtainable, the problem for solution is whether the circumstances are such that constructive notice of the danger must be imputed to him. Primarily, of course, this question is one for the jury. The point to be determined is whether the servant ought, as a reasonably careful man, to have ascertained the nature and extent of the perils to which he was exposed. The circumstances to be considered as bearing upon this

7, 36 Week. Rep. 283, this sentence was objected to by Lord Esher on the ground a technical point of procedure,—Cave, that it implied that a dull man might recover where a man of intelligence ion that he doubted whether the maxim might not, as both would know of the danger, but one would be imperfectly informed as to its nature and extent. Caused his injury. In view of the cases This criticism seems to be unjust. The proper question under such circumstances must surely be, not merely whether the servant appreciated the crisk, but whether he ought to have appreciated it, and this can be determined only by assuming a certain normal.

N. S. 472,—an appeal which turned on a technical point of procedure,—Cave, J., remarked in the course of his opin was applicable simply because the plaintiff could see the defect which hesitating expression of opinion might stances must surely be, not merely with perfect propriety have been exchanged for a categorical denial of the circumstances supposed.

A judgment for the plaintiff should only by assuming a certain normal A judgment for the plaintiff should standard of intelligence amongst employees of the class to which the plainworked "voluntarily" with a knowledge tiff belongs. Individual cases of defective understanding must be disregarded that he had not full knowledge of the except where it is due to special causes, danger he was incurring, but only that such as youth or inexperience, and even an accident might happen, and the question of fact to be anytion has not been put to them whether

risk. . . The chief practical diffi-culty in applying it is in determining employer required, unless it is shown when the risk is assumed voluntarily. that those rules were brought to his no-In the first place, one does not volun-tice. Baddeley v. Granville (1887) L. tarily assume a risk who merely knows that there is some danger, without ap-preciating the danger. On the other Rep. 63, 51 J. P. 822. hand, he does not necessarily fail to ap-Tor other explicit affirmations of the preciate the risk because he hopes and same doctrine, see Brooke v. Ramsden expects to encounter it without injury. (1890) 63 L. T. N. S. 287, 55 J. P. 262; If he comprehends the nature and the Britton v. Great Western Cotton Co. degree of the danger, and voluntarily (1872) L. R. 7 Exch. 132, 41 L. J. takes his chance, he must abide the con-Exch. N. S. 99, 27 L. T. N. S. 125, 20 sequences, whether he is fortunate or Week. Rep. 525; Medway v. Greenwich

then the question of fact to be antion has not been put to them whether swered, though it covers a more limited he knew the particular risk he was in-

swered, though it covers a more limited he knew the particular risk he was inarea, should still be couched in a general form, viz.: Would a person of average intelligence, at the same age and with the same experience as the plaintiff, have appreciated the given risk?

"Times L. R. 324.

A miner who was injured while he was being hoisted from a shaft cannot be debarred from recovering on the ground that there was no banksman plaintiff has voluntarily assumed the stationed at the pit mouth during the risk.

The chief practical diffiactory is applying it is in determining employer required, unless it is shown

sequences, whether he is fortunate or unfortunate in the result of his venture. Inland Linoleum Co. (1898) 14 Times Sometimes the circumstances may show, L. R. 291 (applicability of maxim held as matter of law, that the risk is understood and appreciated; and often they plaintiff did not appreciate the risk); may present in that particular a question of fact for the jury." Fitzgerald v. (1889) 18 Ont. Rep. 55; Haight v. Connecticut River Paper Co. (1891) Wortman & W. Mfg. Co. (1893) 24 Ont. 155 Mass. 159, 29 N. E. 464. Rep. 618; Fitzgerald v. Connecticut In Pritchett v. Poole (1897) 76 L. T. River Paper Co. (1891) 155 Mass. 155,

point are the natural intelligence and acquired information and experience of the servant, the simple or recondite character of the facts to which the inquiry relates, and the opportunities which a person in his position would have had for exercising his faculties of observation. All these elements, having been discussed by the courts most elaborately in relation to cases in which the defense of a contractual assumption of the risk was relied upon, will be treated at length in the following chapter.2

373. Maxim not a defense unless the injured servant voluntarily undertook the risk.— That the ultimate question to the solution of which evidence of the servant's knowledge of the risk is directed is whether he was a voluntary agent in exposing himself to it is a necessary deduction from the meaning of the operative word in the maxim. let in the maxim as a defense, it must be shown, not only that the servant was "a volunteer in the sense that he went into a place of danger when he might have stopped away, but that he went voluntarily, with a full knowledge and understanding of the risk."1

In § 289, ante, some particular instances are mentioned in which it is considered that the existence of the element of voluntary action, which must be established in order to support the defense of a contractual assumption of a risk, cannot be inferred, as a matter of law, from the mere fact that the risk was known to the servant. conclusions would doubtless be entertained if similar circumstances were presented in cases where the maxim was directly relied upon. But with regard to cases which do not involve any such special features as those which are discussed in the passage referred to, there is a conflict of opinion which it seems hardly possible to adjust with-

the plaintiff knew the animal's temper, infra). and was therefore well aware of and wilfully assumed the risk he incurred (1872) L. R. 7 Exch. 130, 41 L. J. Exch. in entering the stall to tie it up. Fraser N. S. 99, 27 L. T. N. S. 125, 20 Week. v. Hood (1887) 15 Sc. Sess. Cas. 4th Rep. 525, per Bramwell, B. (p. 137 of series, 178. But this case would certainly not be followed in all jurisdic-

29 N. E. 464; Illingsworth v. Boston El-tions. It seems clear that it was for the cctric Light Co. (1894) 161 Mass. 583, jury to say whether the servant really 25 L. R. A. 552, 37 N. E. 778; Perham v. did know, or ought to have known, the Portland General Electric Co. (1897) animal's temper. It was surely not a 33 Or. 451, 40 L. R. A. 799, 53 Pac. 14 conclusive presumption that the occurthese two last-named cases were actions against a stranger).

That the question whether the plain-<sup>2</sup> In an action by a stableman for in-juries received from the bite of a vicious tiff's act was voluntary should also horse, allegations that the horse was a have been left to the jury can scarcely dangerous animal, and on several pre- be disputed, since the decision in Smith vious occasions had attacked, bitten, v. Baker (1891) A. C. 325, 60 L. J. Q. and severely injured those who had B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. charge of it have been held to show that 660, 40 Week. Rep. 392 (see § 377,

<sup>1</sup> Britton v. Great Western Cotton Co.

out the interference of the legislature, inasmuch as it really reflects the two essentially different points of view from which it is possible to regard the social and economic relations between the parties to a contract of service. See §§ 376, 377, 382, 383. infra.

374. Logical significance of the servant's knowledge of the risk .-The doctrine that, where the implied terms of the contract of service are the measure of the rights and liabilities of the parties thereto, the master is to be regarded as being free from culpability or negligence, according as the servant was or was not chargeable with a comprehension of the risk to which the injury was due, has been discussed in chapter vII., ante. A similar point of view is traceable in the decisions relating to the effect of the maxim, Volenti non fit injura. The position taken is that the effect of evidence which shows that the servant appreciated the risk which caused his injury, and that this appreciation was attended by circumstances which make a proper case for the application of the maxim, is to demonstrate that the master was not guilty of any breach of duty in exposing the servant to the risk in question.<sup>1</sup>

On the other hand, judges of the highest eminence have taken the

¹ Of this doctrine the late Lord Bowen Sic utere two ut alienum non lædas, has given the following admirably lucid In the absence of any further act of has given the following admirably lucid and forcible explanation: "The common law imposes on the occupier of of the premises or his servants, or of premises no abstract obligation at all as to the state in which he is to keep them, provided that he carries on no unlawful business and is guilty of no nuisance. In the case of premises that person who, knowing and appreciating contain an element of danger, a duty the danger and risk, elects voluntarily arises as soon as there is a probability to encounter them? I employ a builder that people will go upon them; but it to mend the broken slates upon my roof, is a duty only towards such people as actually do go. It is not a duty in the air, but a duty towards particular people. The occupier is bound to use all reasonable care to prevent such persons that fore us the negligence relied on by the from being hurt. It is obvious that fore us the negligence relied on by the this duty must vary according to the plaintiff is that a vat in the room in character of the danger and the circum-which he worked was left without a stances under which the premises are railing. Let us suppose that the deto be visited. It differs in the case of fendant, impressed with the danger, had thidden dangers and the case of dangers actually sent for a builder to put one that are palpable and visible; it may up, and the builder had fallen in while vary according to the age and comprehension of the visitor; in the case of ant have been guilty of a breach of duty bare licensees and of those who come toward the builder?" Thomas v. Quarbare licensees and of those who come toward the builder?" Thomas v. Quarupon the premises on the occupier's termaine (1887) L. R. 18 Q. B. Div. business and at his invitation. The 685, 695, 56 L. J. Q. B. N. S. 349, 57 only obligation on the occupier is to L. T. N. S. 537, 35 Week. Rep. 555, 51 take such precautions as are reasonable J. P. 516. To a like effect, are the rein each instance to prevent mischief, marks of Fry, L. J., in the same case. and this is but the adaptation to a special case of the general doctrine, has been adopted by the Ontario Court

ground that the rationale of the application of the maxim in this type of cases is that the master has been guilty of a breach of duty, but that the voluntary action of the servant in exposing himself, with knowledge, to the danger created by such breach prevents him from relying upon it as a cause of action.<sup>2</sup>

lantic R. Co. (1895) 22 Ont. App. Rep. Wallace (1854) 28 Eng. L. & Eq. 48,
 292 (see § 377, note 6, infra).
 1 Macq. H. L. Cas. 748.

Compare also the following passages: "If the plaintiff did voluntarily undertake the risk from which he suffered, there could, as a matter of course, be L. J. Exch. N. S. 521, as quoted in § no negligence imputable to the defendants." Smith v. Baker (1891) A. C. "It is well settled that a servant as-325, 352, 60 L. J. Q. B. N. S. 683, 65 sumes the obvious risks of the service

Rep. 392, per Lord Watson.

13 Ont. Rep. 47.

self cannot say, That is owing to your none." See also § 323, ante. negligence," is possibly another judicial 2 The most forcible exposition of this

of Appeals in Hurdman v. Canada At- recognition of the theory. Paterson v.

See also opinion of Cockburn, Ch. J., in Woodley v. Metropolitan Dist. R. Co. (1877) L. R. 2 Exch. Div. 384, 386, 46

376, a, infra.

L. T. N. S. 467, 55 J. P. 660, 40 Week. into which he enters, even if the business be ever so dangerous, and if it "In the course of the argument I said might easily be conducted more safely that the maxim, Volenti non fit injuria, by the employer. This is implied in his did not apply to a case of negligence, voluntary undertaking, and it comes that a person never was volens that he within a principle which has a much should be injured by negligence,—at broader general application, and which least, unless he specially agreed to it. I is expressed in the maxim, Volenti non think so still The maxim opplies where least, unless he specially agreed to it. I is expressed in the maxim, Volenti non think so still. The maxim applies where, fit injuria. The reason on which it is knowing the danger or risk, the man is founded is that, whatever may be the volens to undertake the work." Lord master's general duty to conduct his Bramwell in Smith v. Baker (1891) A. business safely in reference to persons C. 325, 60 L. J. Q. B. N. S. 683, 40 who may be affected by it, he owes no Week. Rep. 392, 65 L. T. N. S. 467, 55 Legal duty in that respect to one who J. P. 660 (p. 344 of Law Reports).

"Where both parties have equal means of knowledge, the rule is that respect to one who contracts to work in the business as it is." Fitzgerald v. Connecticut River means of knowledge, the rule is that Paper Co. (1891) 155 Mass. 155, 157, the master is under no obligation to provide for the safety of the servant to a greater extent than the servant is one part of its judgment went so far

a greater extent than the servant is one part of its judgment went so far bound to provide for his own safety. as to extend this theory to cases where To this case the maxim, Volenti non fit the defense raised is contributory neg-injuria, applies." Rudd v. Bell (1887) ligence, and declared that a jury "should not be permitted to consider "One who, knowing and appreciating the conduct of the defendant by itself, a danger, voluntarily assumes the risk and find that it was negligent, and then of it, has no just cause of complaint consider the plaintiff's conduct by itagainst another who is primarily reself, and find that it was reasonably sponsible for the existence of the dancareful." But this doctrine is inconsistsponsible for the existence of the danger. As between the two, his voluntary ent with the accepted view of the signassumption of the risk absolves the other from any particular duty to him ly an allegation that the plaintiff's negin that respect, and leaves each to take ligence has severed the causal connecsuch chances as exist in the situation, tion between the defendant's act and without a right to claim anything from the other. In such a case there is no actionable negligence on the part of him who is primarily responsible for the 57 L. T. N. S. 537, 35 Week. Rep. 555, danger." O'Maley v. South Boston 51 J. P. 516, per Bowen, L. J., who Gaslight Co. (1893) 158 Mass. 135, 47 L. R. A. 161, 32 N. E. 1119.

The remark of Lord Cranworth, that "contributory negligence arises when there has been a breach of duty on the defendant's part, "a party who rushes into danger him-not where, ex hypothesi, there has been "a party who rushes into danger him- not where, ex hypothesi, there has been

Which of these antagonistic views is correct as a matter of abstract logic is a question upon which the commentator may well refrain from expressing any decided opinion, since it is apparent from the above citations that any opinion which he expresses must necessarily run counter to that of some of the most distinguished of modern jurists. But it seems quite safe to say that the latter view is the more likely, in the practical administration of justice, to lead to correct conclusions. An act which changes its quality completely, according as the servant is or is not aware of the physical consequences which it may entail, is, we think, a conception altogether too subtle and refined to be comprehended by the average juror. This consideration should perhaps be deemed decisive in any court

view is contained in the following passage from Lord Esher's opinion in a run the risk," said (p. 657 of Law Recase where the servant was injured by ports); "I must confess I do not like a vicious horse of whose qualities he that way of putting it. I think there had for some time past been fully is a duty, though I agree that there is aware: "If the master had any duty no actionable breach of that duty if at all to take care of his workmen, then the person injured, knowing and appreallowing this imperfect plant to conciating the danger, voluntarily elects tinue to be used was surely a breach to encounter it." Lindley, L. J., in the of that duty. But it is said he may same case seems to have regarded the of that duty. But it is said he may same case seems to have regarded the have had that duty, and may have neg-situation in the same light. See p. 659 lected it as to those of his workmen of the Law Reports. lected it as to those of his workmen who did not know of, or were not affected by, the particular defect, but not as to the plaintiff, who, knowing of the Captage and therefore comes within the maxim referred to. I confess that has always seemed to me to be not a bad way of illustrating the result; but it is to my mind a horrible way of stating the duty, to say that a master owes no duty to a servant who knows and, having pointed it out to one in authority, goes on using it. It seems cruel and unnatural, and, in my view, utterly abominable. It may be that the breach of this duty gives no right of action,—that it is what is called a duty of imperfect obligation."

As to the plaintiff, who, knowing of the Law Reports.

Compare also the statement of Lord Herschell in Smith v. Baker (1891) A.

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Compare also the Law Reports.

Compare also the Law Reports Q. B. Div. 647, 652, 57 L. J. Q. B. N. S.
7, 36 Week. Rep. 281. In a later passage in his opinion the same judge, referring to the theory of Bowen, L. J., 179, 193, 58 L. J. Q. B. N. S. 563, 61 in Thomas v. Quartermaine (1887) L. L. T. N. S. 566, 38 Week. Rep. 145, 54 R. 18 Q. B. Div. 685, 694, 695, 56 L. J. J. P. 244.
Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, that "the defence of premises which J. Q. B. N. S. 918, it was assumed by have an element of danger upon them reaches its vanishing point in the case determined was whether the servant had of those who are cognizant of the full lost his right of action for injuries

which follows the rule laid down in the leading case on the subject,3 that the question whether the maxim is a bar to an action must always, in the first instance at least, be one of fact; though it is of less moment in those jurisdictions in which the functions of the jury are virtually restricted to determining in doubtful cases whether the servant fully appreciated the conditions under which he was working at the time of the accident.

375. Ordinary risks always presumed to have been voluntarily undertaken .-- That a servant is "volens" in regard to what are termed the "ordinary" risks of his employment—that is to say, risks the existence of which does not import negligence on the master's part—is axiomatic in this branch of law. As to these the presumption, both of knowledge and of voluntariness of action, must necessarily be conclusive, whatever conception may be entertained as to the economic aspect of the relations between masters and servants. What risks

Lord Watson in Smith v. Baker (1891) A. C. 325, 356, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 Week. Rep. 392.

ployed, though its application may well hired to repair was in a dangerous conbe invoked in such a case. The prindition, as he is paid for the risk he runs ciple embodied in the maxim has sometimes in relation to cases of employer curs it. Roberts & W. Employers' Liand employed, been stated thus: A perbility, 3d ed. 252, quoted with approval son who is engaged to perform a danby Fry. L. J., in Thomas v. Quartergerous operation takes upon himself the maine (1887) L. R. 18 Q. B. Div. 685, risks incident thereto. To the propo-

caused by a breach of duty on the mas- sition thus stated there is no difficulty ter's part. See § 377, note 7, infra. in giving an assent, provided that what In Wallace v. Culter Paper Mills Co. is meant by engaging to perform a dan-(1892) 19 Sc. Sess. Cas. 4th series, 915, gerous operation, and by the risks init was laid down that the servant's con-cident thereto, be properly defined. The tinuance of work did not show a will- neglect of such definition may lead to ingness to take the risk on agreement error. Where a person undertakes to "to relieve his master of the conse- do work which is intrinsically dangerquences of any injury caused by what, ous notwithstanding that reasonable ex hypothesi, is the master's fault." care has been taken to render it as quences of any injury caused by what, our notwithstanding that reasonable ex hypothesi, is the master's fault." care has been taken to render it as <sup>3</sup> Smith v. Baker (1891) A. C. 325, little dangerous as possible, he no doubt 60 L. J. Q. B. N. S. 683, 40 Week. Rep. voluntarily subjects himself to the risks 392, 65 L. T. N. S. 467, 55 J. P. 660.

1 "There are many kinds of work in which danger is necessarily inherent, plain that a wrong has been done him, where precautions such as would insure even though the cause from which he safety to the workman are either impact of the suffers might give to others a right of where precautions such as would insure even though the cause from which he safety to the workman are either impossible, or would only be attainable at action. For example, one who has an expense altogether incommensurate agreed to take part in an operation newith the end to be accomplished. In all cessitating the production of fumes insuch cases the workman must rely upon jurious to health would have no cause his own nerve and skill; and, in the of action in respect of bodily suffering absence of express stipulation to the or inconvenience resulting therefrom, contrary, the risk is held to be with though another person residing near to him, and not with the employer." the seat of these operations might well ford Watson in Smith v. Baker (1891) maintain an action if he sustained such maintain an action if he sustained such injuries from the same cause."

"A workman, whether he belongs to Week. Rep. 392. the regular staff of the occupier of premises, or is called in for the occathe same case, "has no special applicasion, cannot be heard to complain that tion to the case of employer and em- a part of those premises which he is ployed, though its application may well hired to repair was in a dangerous conare deemed ordinary, so as to fall within the scope of this rule, is a question already discussed in a former chapter. See §§ 264-269, unte.

376. Doctrine that voluntary action is inferable, as matter of law, when appreciation of an extraordinary risk is proved.—a. United Kingdom and British Colonies.—The earlier decisions in England proceed upon the theory that the servant's inability to maintain the action became a necessary inference as soon as it was clearly established that he had accepted or remained in the employment with a full comprehension of the risk from which his injury resulted.1

employment, they do so without making ing train which came upon him unex-

N. S. 537, 35 Week. Rep. 55, 51 J. P. against a railway company by a contractor's servant who was injured, employment, they do so without making other people liable for injuries they sustain." Lindley, L. J., in his opinion delivered in the court of appeals in Smith v. Baker (1891) A. C. 325, 343, 60 L. J. Q. B. N. S. 683, 40 Week. Rep. 392, 65 L. T. N. S. 467, 55 J. P. 660. In the same case (p. 346), Lord Bramwell argues on the hypothesis that the maxim operates as a bar to an action under such circumstances, and expressly appeal, that "a person who is engaged to perform a dangerous operation takes the risk of the operation of the work that he is called on to perform."

If the employment is in its own nature attended with danger, the work that he is called on to perform."

If the employment is in its own nature attended with danger, the work that he is called on to perform."

If the employment is in its own nature attended with danger, the work and therefore, if he voluntarily engages in it, he is not entitled to complain of the danger attending it. In such a case the maxim, Volenti non fit injuria, is applicable. Cook v. Bell (1857) 20 Sc. Sess. Cas. 2d series, 137. See also Rudd v. Bell (1887) 13 Ont. Rep. 47, where a servant whose hand came into contact with the knives of a jointer working through a slot in a table was denied recovery. "If people will enter into dangerous while working on the track, by a passjointer working through a slot in a course. But, with a full knowledge of table was denied recovery. the danger, he continued in the employtable was defied recovery.

1 Skipp v. Eastern Counties R. Co. (1853) 9 Exch. 223, 3 C. L. Rep. 185, 28 L. J. Exch. N. S. 23; Senior v. Ward happened. A man who enters on a nec- (1859) 1 El. & El. 385, 28 L. J. Q. B. essarily dangerous employment with his N. S. 139, 5 Jur. N. S. 172, 7 Week. eyes open takes it with its accompany-Rep. 261; Griffiths v. Gidlow (1858) 3 ing risks. On the other hand, if the Hurlst. & N. 648, 27 L. J. Exch. N. S. danger is concealed from him and an accident happens before he becomes aware of it or if he is led to expect or aware of it or if he is led to expect or aware of it or if he is led to expect or aware of it or if he is led to expect or The most elaborate presentment of aware of it. or if he is led to expect, or this view is to be found in the leading case of Woodley v. Metropolitan Dist.

R. Co. (1877) L. R. 2 Exch. Div. 384, er to prevent or lessen the danger, and 46 L. J. Exch. N. S. 521. Three out of from the want of such precautions an five justices of the court of appeal held accident happens before he becomes aware of their absence, he may

This theory is now superseded in that country and its colonial dependencies by the one which will be explained in § 377 infra. But even in the cases which have established the new rule there has been more or less difference of opinion. Some distinguished judges have unreservedly declared themselves in favor of retaining the original

hold the employer liable. If he be-sulting therefrom to a stranger lawcomes aware of the danger which has fully resorting to their premises in igbeen concealed from him, and which he norance of the existence of the danger, had not the means of becoming ac-will give no such right to one who, be-quainted with before he entered on the ing aware of the danger, voluntarily employment, or of the want of the nec-encounters it, and fails to take the exessary means to prevent mischief, his tra care necessary for avoiding it. The proper course is to quit the employ-same observation arises as before: With ment. If he continues in it he is in the full knowledge of the manner in which same position as though he had accept- the traffic was carried on, and of the ed it with a full knowledge of its dan-danger attendant on it, the plaintiff ger in the first instance, and must be thought proper to remain in the employ-

taken to waive his right to call upon the ment. No doubt he thought that by the taken to waive his right to call upon the ment. No doubt he thought that by the employer to do what is necessary for exercise of extra vigilance and care on his protection, or, in the alternative, to his part the danger might be avoided. quit the service. If he continues to take By a want of particular care in deposit-the benefit of the employment he must ing one of his tools he exposed himself take it subject to its disadvantages. to the danger, and unfortunately suf-He cannot put on the employer terms to fered from it. He cannot, I think, make which he has now full notice that the the company liable for injury arising employer never intended to bind him-from danger to which he voluntarily self. It is competent to an employer, at exposed himself. The contractor, the self. It is competent to an employer, at exposed himself. The contractor, the least so far as civil consequences are immediate employer of the plaintiff, unconcerned, to invite persons to work for dertook to execute work which he knew him under circumstances of danger would be attended with danger in the caused or aggravated by want of due circumstances under which it was to be precautions on the part of the employ- executed. The plaintiff as his servant er. If a man chooses to accept the em- did the same. They are in a very dif-ployment, or to continue in it with a ferent position from that in which they knowledge of the danger, he must abide would have stood had they been at work the consequences, so far as any claim on the defendants' premises in ignoto compensation against the employer is rance of the danger." Mellor, J., exconcerned. Morally speaking, those pressed his concurrence as follows: who employ men on dangerous work "When, therefore, the contractor in this without doing all in their power to obtained the danger are highly reprehensible, as I certainly think the company which the plaintiff was engaged at the
were in the present instance. . . . time of the accident, it is reasonable to
But it may be said the plaintiff was not assume that the character and nature in the service of the defendants at all. of the work was duly considered and inHe was on their premises, not only on cluded in the price paid for it; and
lawful business, but it may be said by
if the plaintiff thought that there was
their invitation, as he was working under a contractor employed by them to
der a contractor employed by them to
der the work in question. He sustained have stipulated with his master or the do the work in question. He sustained have stipulated with his master or the the injury complained of through what company to provide some additional the jury have found to have been neglimeans or precautions against such posgence on the part of the company; he sible danger, or, as he was better able is therefore entitled to damages. But to judge than they whether the work this reasoning appears to me to be fala- could safely be performed without adcious. That which would be negligence ditional precautions, he ought to have in a company with reference to the state refused the task unless they were proof their premises or the manner of con-vided. . . . I think that the comducting their business, so as to give a pany can in no respect be said to be right to compensation for an injury reguilty of negligence. They conducted

doctrine.2 Others, while they admit that proof of the servant's knowledge of the risk which caused his injury is not of itself sufficient to let in the operation of the maxim, have so qualified the effect of this concession, both by the language in which they have stated their abstract doctrinal position, and by the practical construction which they have placed upon the maxim with reference to concrete facts, that the adoption of their views would do very little to improve the servant's position. Indeed, their utterances have been cited as authority for decisions which are in no respect different from what they would have been if the original English theory had been relied upon.9

and night have declined the work, ed an emphatic dissent from the conand refused to undertake it, without additional precautions being taken or Lords. The original theory seems also
means provided by his master, but, as to have held its ground in Scotland
it appears to me, that was a matter aflength is relation with his master, and
Baker was decided.

Baker was decided. not in any way affecting the duty of the company."

der the employers' liability act of 1880: ing for injuries caused by a bite.

"Whereas, before the act knowledge in another case, where a judge put would have disentitled the workman to recover, now knowledge in the specified cases is no longer to create a disability, acter of a restive horse he was told to cases is no longer to create a disability, acter of a restive horse he was told to provided the workman gives information; but if, after giving information, with knowledge of the danger to which he continues in the employment knowholedge of the danger to which he was exposed, undertake the charge ing the danger he is incurring the same of it, "a finding that the plaintiff knew inference arises as heretofore, viz., the inference that he voluntarily runs the he ran in taking charge of it" was held risk; and any evidence of negligence to imply that the plaintiff went volunarising from any breach of duty on the part of the employer is by the work-

In Fraser v. Hood (1887) 15 Sc. Sess. the company."

In Frace (1887) L. although the vicious temper of a horse R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. was a defect in the plant of his emS. 7, 36 Week. Rep. 283 (p. 667) Lopes, player, a stableman who entered his L. J., thus sums up his views with re- stall, having known for four years that gard to the application of the maxim in the animal was a dangerous one, was, as cases where the servant brings suit unmatter of law, debarred from recover-

arising from any breach of duty on the tarry to drive the horse and undertook part of the employer is by the work-man's conduct displaced." See further, verdict for the defendant. Wilson v. as to this judge's views, in § 383, note Boyle (1889) 17 Sc. Sess. Cas. 4th 4, infra.

In Membery v. Great Western R. Co. (1889) L. R. 14 App. Cas. 179, 58 L. J. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N.

b. United States.—In most of the American states the correctness of the original English theory has always been taken for granted, the consequence being that the servant's position in cases where he is shown to have had knowledge of the abnormal risk to which his injury was due is the same, whether the master relies upon the theory of a contractual assumption of that risk or upon the defense furnished by the maxim.4

S. 7, 36 Week. Rep. 283, it is mentioned tion against his employer. that for some months after the publi- Pacific R. Co. (1872) 50 Mo. cation of the opinions delivered in Thomas v. Quartermaine (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516, the judges of the courts of first instance made a practice of taking cases from the juries whenever the servant's knowledge of the risk was proved, this course being supposed to be justified or required by the decision of the court of appeal. That this supposition was not altogether inexcusable is clear from the extracts from the opinions both of Bowen and Fry, LL. J., which is set out in note 11 to the following sec-

The true significance of the decision of Thomas v. Quartermaine, as it was afterwards explained in Yarmouth v. France (see § 377, infra), was also missed in two Australian cases. In one of these it was laid down that the servant cannot recover if, before the happening of the accident, he had full knowledge, not merely of the facts, but of the risks attendant upon the perins everal American cases, where the formance of his duties. Collins v. defendant was not the plaintiff's mas-Munro (1887) 14 Vict. L. R. (L.) 1. ter, and the doctrine of a contractual In the other the maxim was held to be assumption of risks had, therefore, no a bar to the action, as a matter of law, where the plaintiff went on using a deeven under the older theory the decision is probably erroneous in view of Mass. 604, 18 N. E. 578. the fact that the servant had gone on The danger which arises from the

tion against his employer. Devitt v. Pacific R. Co. (1872) 50 Mo. 302: Mad River & L. E. R. Co. v. Barber (1856) 5 Ohio St. 541, 67 Am. Dec. 312: West v. Southern P. Co. (1898) 29 C. C. A. 219, 56 U. S. App. 323, 85 Fed. 392; Williams v. Louisville & N. R. Co. (1901) 23 Ky. L. Rep. 1124, 64 S. W. 738: Reagnesbutte v. Smith (1886) 84 738; Bogenschutz v. Smith (1886) 84 Ky. 330, 1 S. W. 578; Southern P. Co. v. Johnson (1895) 16 C. C. A. 317, 44 U. S. App. 1, 69 Fed. 559.

In Knisley v. Pratt (1896) 148 N. Y. 372, 32 L. R. A. 367, 42 N. E. 986, where the servant was injured by reason of the master's failure to fence machinery, as required by statute, the court said: "Where the obvious risks of the business result in injury, the inability of the employee to sue is due to the fact that he voluntarily assumed those risks, not necessarily under an implied contract to do so, but by an independent act of waiver evidenced by his entering the employment with a full knowledge of all the facts."

pertinence.

An employee of a railroad company fective boiler after receiving a promise which has the right under a contract that it should be repaired. Simat v. to use the railroad track of another Silva (1887) 8 New So. Wales L. R. party has no right of action against (L.) 415. The correctness of the latter decision was questioned in Patter- ceived in consequence of his foot becomson v. Stevens (1890) 1 New So. Wales ing caught in a defective or improperly L. R. (L.) 83, on the ground that it protected frog in such track, where he was inconsistent with Thomas v. Quarwent to work upon the track knowing termaine. This change of view was preits condition. His assumption of the sumably the result of the explanatory risks of the employment is no less than remarks in Yarmouth v. France. But if he had been under contract with such

The danger which arises from the fact working in reliance on the promise of that merchandise is piled against the repairs. See chapter XXII., post. slats inclosing the well of a freight elrepairs. See chapter XXII., post. slats inclosing the well of a freight el
'In the following cases the maxim evator in a leased store in such a manwas explicitly referred to as operating ner that the tenant's employees can to bar the servant's recovery in an ac-only start the elevator by standing on

In Alabama the extreme view was at first taken that the maxim never constituted a defense to an action under an employers' liability act which was copied from that of England.<sup>5</sup> But this doctrine was repudiated five years afterwards by a decision which embodied the more rigorous rule that the maxim is applicable, as a matter of law, whenever the risk was appreciated by the servant.6

In two Massachusetts cases a strong inclination was manifested to adopt the English doctrine explained in § 377, infra. But shortly

accepted by them in such a sense that is some danger in passing over them, one of them cannot hold the landlord their condition is constantly changing

Co. (1897) 49 La. Ann. 86, 21 So. 153, ing she works in except the steps. it was conceded that a brakeman emin Mahoney v. Dore (1892) 155 ployed by a steam railroad, who was in Mass. 513, 30 N. E. 366, where a fejured through being swept off the top male employee was injured through of a car by a guy-wire maintained in slipping on a staircase which became a dangerous position by an electric rail- temporarily covered with ice during the road company, would be debarred from term of her employment, it was held recovering damages from the latter com- to be a question of fact whether, when pany if it had been proved that he had she started down the stairs, she undercontinued in the service with a positive stood and appreciated the danger of goknowledge of the precise danger as- ing, and, if she understood it, whether sumed; but it was held that the evi- she assumed it voluntarily, or because dence did not establish the conclusion. she felt obliged to continue in the serv-

Thomas v. Quartermaine (1887) L. R. was a conclusive defense in the case of 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. ordinary risks and extraordinary dan340, 57 L. T. N. S. 537, 35 Week. Rep. gers which may be considered normal, 555, 51 J. P. 516, to apply the maxim, proceeded thus: "But in a much larger Volenti non fit injuria, to the case of class of cases it is a question of fact, defect of which the applyary was when one has been injured by a defect of which the employer was when one has been injured by reason aware and negligently failed to rem- of an exposure which he knew involved construction of the statute."

fect see Louisville & N. R. Co. v. Banks a question of law and sometimes a ques-(1894) 104 Ala. 508, 16 So. 547; Louis- tion of fact; secondly, if he appreciated ville & N. R. Co. v. Stutts (1894) 105 it, whether he assumed it voluntarily Ala. 368, 17 So. 29; Alabama G. S. R. or acted under such an exigency, or such Co. v. Davis (1898) 119 Ala. 572, 24 an urgent call of duty, or such con-So. 862; Bridges v. Tennessee Coal, I. straint of any kind, as, in reference to & R. Co. (1895) 109 Ala. 287, 19 So. the danger, deprives his act of its volun-495.

Paper Co. (1891) 155 Mass. 156, 29 N. der extraneous pressure which amounts E. 464, it was held that an employee in almost to compulsion, expose himself to attempting to descend slippery steps a danger which originates in another's holding by the rail does not, as mat-fault, and under such circumstances it ter of law, voluntarily assume the risk cannot be said that he assumes the risk of slipping and falling, where, although voluntarily. . . . The tendency of

the platform is obvious, and therefore she knows their condition and that there liable for injuries received in operating the elevator. McCarthy v. Foster the extent of the danger is not obvious, (1892) 156 Mass. 511, 31 N. E. 385. from a mere ocular inspection, and she In Erslew v. New Orleans & N. E. R. has no means of egress from the build-

<sup>5</sup> Mobile & B. R. Co. v. Holborn ice and make the best of the situation (1887) 84 Ala. 133, 4 So. 146. The in which she found herself. Knowlton, court said: "If it was intended in J., after laying it down that the maxim edy, we are not willing to adopt such some risk, whether he voluntarily took construction of the statute." <sup>6</sup> Birmingham R. & Electric Co. v. The question divides itself into two Allen (1892) 99 Ala. 359, 20 L. R. A. parts, first, whether he understood and 457, 13 So. 8. To the same general efappreciated the risk, which is sometimes tary character. He may reluctantly, so In Fitzgerald v. Connecticut River far as the danger is concerned, and unafterwards, that doctrine was denied to be applicable to a case in which the risk was due to the condition of a permanent structure which had remained unchanged since the servant began work, several years before the accident.8 In a still later case it was laid down that where a new risk is created by the introduction of new appliances after the servant has entered the employment, and he continues to work without any objection, he is as much debarred from an action as if the risk had existed when he first entered the employment.9 It would seem, therefore, that this court has finally elected to repudiate the English doctrine in toto. Compare § 384, infra.

377. Doctrine that voluntary action is not inferable, as matter of law, when appreciation of an extraordinary risk is proved.—a. United Kingdom and British Colonies. — After an extraordinarily protracted and elaborate discussion by some of the ablest of the English judges, it has at length been finally settled that, in order to let in the defense embodied in the maxim, it is necessary to do something more than to prove that the servant knew of and comprehended the risk from which his injury resulted.

This doctrine is possibly recognized in an early Scotch case which was afterwards declared by the House of Lords to have been rightly decided on the facts.1 But the language used was, as is indicated

that he was not aware of any adjudica- mine. tions in Massachusetts which were necjudges, both English and American.

recent decisions is to hold that, in restrap. The maxim was not mentioned gard to dangers growing out of the masin the opinion of the majority, but ter's negligence, which are not covered Knowlton, J., in a lengthy dissenting by the implied contract between the judgment, argued on the assumption master and servant when the service that the rights of the plaintiff turned was undertaken, it is a question of fact upon the question whether the servant whether a servant who works on, appre- was volens, and he considered that this ciating the risk, assumes it voluntarily question, in view of the fact that the or endures it because he feels con-risk had been superadded to the emstrained to." The learned judge added ployment, was for the jury to deter-

<sup>1</sup> In Sword v. Cameron (1839) 1 Sc. essarily inconsistent with the "just and Sess. Cas. 2d series, 493, where the dereasonable doctrine" of Smith v. Baker fendant was held liable for a defective (see § 377, note 7, infra), although dif- system in blasting which left the workferent opinions had been expressed on man an insufficient interval to reach a the point ruled in that case by eminent place of safety after the signal to fire the charge. Lord Mackenzie remarked judges, both English and American.

\* O'Malcy v. South Boston Gaslight that he did not see any ground for supco. (1893) 158 Mass. 135, 47 L. R. A. 170, 51 N. E. 1119 (servant denied resupplying that the plaintiff had not used sufficient expedition to escape, except it should be thought that the maxim Volenti non fit injuria, could apply. "The English of that," said the learned judge, Co. (1898) 170 Mass. 79, 48 N. E. 1079. "would just be that, if the pursuer wished to be killed, why let him be so. Mass. 548, 47 L. R. A. 170, 51 N. E. But I am afraid that will hardly do. 20, where a servant was denied recovery to the blast and sat down on the by the passage quoted in the note below, rather nebulous, and more than thirty years elapsed before the theory thus vaguely hinted at was adopted by any English judge. The decision referred to was, however, carefully limited to the point that voluntary action is not necessarily deducible from the servant's knowledge, if the injury was caused by the master's breach of a specific duty imposed by statute for the protection of the servant.<sup>2</sup> A few years afterwards a similar doctrine, devested of this restriction, was propounded in a dissenting opinion delivered by Mellish, L. J., in a case where the action was brought by the servant of a contractor against the railway company by which the latter was employed.3

that he did state his chief it stead he would be totely a woodleg, it must be remembered that the liability of the defendants here is not at common law, but by statute.

\*\*Woodleg v. Metropolitan Dist. R.\*\*

Co. (1877) L. R. 2 Exch. Div. (C. A.) is not at common law, but by statute.

384, 46 L. J. Exch. N. S. 521. "Is it, They are in default to begin with, and then," asked the learned judge, a necther mere circumstance that the deceased essary inference in point of law from

top of the charge, it could scarcely be exposed." In the Law Journal the last pleaded that Duff [the foreman] was sentence is considerably expanded, and entitled then to fire the shot, and say that if the pursuer wished to be blown the plaintiff is not placed in the dilemup he should be indulged." This case may which arises when the action is for was relied upon by Lord Watson in a breach of a duty at common law. Smith v. Baker (1891) A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 647, 55 J. P. 660, 40 Week. Rep. 392, vious, the servant must have known it who considered that Lord Cranworth, although he did not refer directly to the maxim, must have approved of the reasoning of the Scotch court, as he expressed the opinion that the decision was justifiable, in Barton's Hill Coal pensed with the performance of it, Ko. v. Reid (1858) 4 Jur. N. S. 767, 3 Macq. H. L. Cas. 290.

Baritton v. Great Western Cotton Co. 1872) L. R. 7 Exch. 130, 41 L. J. Channell, B., is said to have expressed (1872) L. R. 7 Exch. 130, 41 L. J. Channell, B., is said to have expressed Exch. N. S. 99, 27 L. T. N. S. 125, 20 his agreement with Bramwell, B., as to Week. Rep. 525, where the plaintiff's the distinction which he drew between decedent was caught in an unprotected an action on a breach of a common-law fly wheel while greasing the bearings. duty and an action on a breach of a The reasons of the judges are rather obstatutory duty, and to have added: "In scurely stated, and the difficulty of asthe latter case, if the plaintiff rushed certaining their precise point of view is into the danger with a full knowledge increased by the fact that the language of it, he could not maintain an action ascribed to them in the Law Reports for negligence; but in the present case differs in some important respects from the deceased [plaintiff], though he was that found in the Law Journal. In the volens, in the sense that he was at libformer the gist of the argument of erty to accept or reject the employment, Bramwell, B., is given as follows (p. yet he was not *volens* in the sense of 137): "It is further contended that at being guilty of contributory negligence. any rate the deceased knew the danger If the servant, fully aware of the danas well as his employers. That may be gerous nature of the employment, was doubtful in fact. . . . Assuming, induced to accept it by a higher pay, however, that he did share his employ- then it is clear he would be volens."

entered on a dangerous employment the fact of the plaintiff having worked does not exonerate them, unless he in the tunnel for a fortnight, without knew the nature of the risk to which, making any objection and without in consequence of that default, he was abandoning his service with his master,

The fact that this case was decided only by a bare majority of three justices to two possibly explains to some extent the reopening of the question ten years later in the same court. But the main reason why another discussion was inevitable was that, during the intervening period, the employers' liability act had come into force, and it was necessary to determine how far, if at all, the defense of assumption of risks was open to the master in actions brought under that statute. The conclusion of the court of appeal was that, as the servant was, by the words of the statute, put upon the same footing as a stranger, he could no longer be debarred from recovery on the ground of an implied agreement to assume the abnormal risk which caused his injury, but that the principle embodied in the maxim was still available to the master if the evidence was such as to render it applicable.4 If the judgment in the case referred to had stopped there, the differentiation of the two defenses would have been of no advantage to the servant, for the reason that, under the earlier decisions, it was, for practical purposes, a matter of indifference

to lose his right of action against the there being no contract between the derailway company for negligently runfendants and the plaintiff any more ning over him. I think he is entitled than between the cabman and the to say: 'I know I was running great scraper of the streets. On the whole, I risk, and did not like it at all, but I am of opinion that the judgment of could not afford to give up my good place from which I get my livelihood, and I supposed that if I was injured by R. 18 Q. B. Div. 685, 56 L. J. Q. B. 340, their carelessness I should have an active company, and that if 51 J. P. 516. The doctrine here expected the streets of the streets. On the whole, I was killed my wife and children plained seems to have been anticipated. would have their action also. Suppose by the scotten court of session in a case this case: A man is employed by a decided two years previously. Murdoch contractor for cleansing the street, to v. Mackinnon (1885) 12 Sc. Sess. Cas. scrape a particular street, and for the 4th series, 810. But the decision did space of a fortnight he has the oppornot actually turn upon the effect of the tunity of observing that a particular maxim, nor was it specifically referred hansom cabman drives his cab with extended to by the judges.

that he consented to the company's run- tremely little regard for the safety of ning their trains as usual without tak- the men who scrape the streets. At the ing any precautious for the safety of the end of a fortnight the man who scrapes workmen in the tunnel? In my opinion the streets is negligently run over by it is not. In the first place, it is by no means certain that the plaintiff, an ordinary bricklayer's laborer, understood at all what the extent of the risk was which he was running, or what the precautions were which were reasonably necessary. In the next place, assuming that he did understand what the risk was which he was running, and that he knew that the workmen in the tunnel lit will not be disputed the scraper of were not reasonably protected, it seems to me it would be extremely unjust to hold that he was obliged either at once to quit his master's employment, or else to lose his right of action against the railway company for negligently runit is not. In the first place, it is by no the cabman. An action is brought in

I was killed my wife and children plained seems to have been anticipated would have their action also.' Suppose by the Scotch court of session in a case

whether the effect of the evidence was considered with reference to the conception of an implied contract or with reference to the maxim. In either event it was a peremptory inference of law that the servant could not recover for an injury caused by a risk which he comprehended. See § 376, supra. But Bowen, L. J. (with whom Frv, L.J., concurred), went on to draw the very important distinction that, although the servant's knowledge of the risk was a conclusive bar to his action under the theory of an implied agreement, it was merely evidence tending to show his acceptance of the risk in cases where the master was forced to rely upon the maxim. A portion of the remarkably able judgment in which this conception of the effect of the maxim was explained has been already quoted. See § 376, note 3, supra. As there stated, much of the language used by the Lord Justices (see note 11, to the present section) created a misapprehension as to the real scope of the doctrine propounded, and the position of the court of appeal remained somewhat obscure until the rendition of another decision a few months later.<sup>5</sup>

not do; there must be an assent on the unsafe to drive, whereupon the foreman part of the workman to accept the risk, said: "You have to drive him; and, if with a full appreciation of its extent, any accident happens, we (meaning the to bring [him] the workman within the employer) will be responsible." The maxim." Yarmouth v. France (1887) trial judge thought be was bound be maxim." Yarmouth v. France (1887) trial judge thought he was bound by L. R. 19 Q. B. Div. 647, 657, 57 L. J. Thomas v. Quartermaine to decide that Q. B. N. S. 7, 36 Week. Rep. 283, per there could be no recovery for injuries Lord Esher, summarizing the effect of caused by a kick which the plaintiff re-Thomas v. Quartermaine.

"unless the circumstances were such as Lindley, L. J., were of a different opin-

to the conclusion that the whole risk all one way; there was evidence that

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ceived from the animal. Two members The plaintiff is entitled to recover of the court of appeal, Lord Esher and "unless the circumstances were such as Lindley, L. J., were of a different opinto warrant a jury in coming to the conclusion that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it." Per Lord menting on the construction placed by Esher in the same case. (This statement was adopted in Osborne v. London & N. W. R. Co. [1888] L. R. 21 Q. principles laid down in that case are B. Div. 220, 57 L. J. Q. B. N. S. 618, no doubt to be accepted and followed; and, if I may say so, I entirely concur in them; but it is not, in my opin improved in the construction placed by the trial judge upon Thomas v. Quartermaine, Lindley, L. J., said: "The principles laid down in that case are B. Div. 220, 57 L. J. Q. B. N. S. 618, no doubt to be accepted and followed; and, if I may say so, I entirely concur in them; but it is not, in my opin ion, correct to regard that case as de-"The question in each case must be, ion, correct to regard that case as denot simply whether the plaintiff knew ciding this. The facts there and the of the risk, but whether the circumfacts here are materially different. In stances are such as necessarily to lead Thomas v. Quartermaine the facts were was voluntarily incurred by the plain- the plaintiff was volens, and not merely tiff." Per Lindley, L. J., in the same sciens; he was not even directed to do case (p. 660 of Law Reports). what led to his injury; he did it volcase (p. 660 of Law Reports).

In Yarmouth v. France the injury untarily, of his own accord; there was was caused by a vicious horse bought no evidence that the plaintiff was several years after the plaintiff had entered the employment. The essence of the evidence was that the plaintiff objected to driving him, and told the fore-

During the next four years the doctrine thus established was applied in several cases,6 and was then finally ratified by a majority of the House of Lords in a decision, the effect of which, broadly speak-

cident; and the case might well have (Q. B. D. 1890) 6 Times L. R. 339. been decided on that ground alone. In the present case the horse was vicious; where a defective machine was stopped of it to the defendant's foreman; the he was told when he resumed work, foreman told the plaintiff to go on driving it, and the plaintiff did so rather than run the risk of dismissal; nor is with knowledge and appreciation of comprehension on his part of the danof both the risk and the danger volger and the risk, and a voluntary underuntarily took the risk upon himself. taking by him of that risk and a voluntary underuntarily took the risk upon himself. vicious horses; and the conversation with the foreman, though not evidence by him to take the risk, is, in my opinion, admissible to explain the conduct of the plaintiff, and to rebut the inferupon himself."

Lord Esher, while he agreed with these views in the abstract, considered that, on the facts, Thomas v. Quartermaine had been wrongly decided: "For myself, I cannot help thinking that ter xxxv., post. whether or not a workman has voluntarily agreed to incur the risk of defectthe decision in Thomas v. Quartermaine wrong, for the majority of the judges there took upon themselves to decide not referred to). the question of fact, whereas in my The mere fact opinion they had no right to decide it; object and refuse were conclusive to show that the plaintiff did voluntarily—in the sense in which they understood the word-accept the risk. This revives the old difcases of railway accidents. . . . I have always protested that it is not for the judge to say whether or not a plain-

of the jury."

death) has been guilty of contributory

the injury was the result of a pure ac- understood the risk. Amos v. Duffy

The maxim is not a bar to the action the plaintiff was constantly complaining upon the complaint of the plaintiff, and that it was working properly. Bacon v. Dawes (1887) 3 Times L. R. 557. "Mere knowledge by the workman

it possible to regard this case as one of that a risk would be run by him is not taking by him of that risk and danger." Brooke v. Ramsden (1890) 63 L. T. N. S. 287, 55 J. P. 262.

Where a servant was killed by falling against the defendant of any promise from an unrailed platform, the court held that his continuance of the service with knowledge of the risk justified a finding that he was willing to encounter ence that he voluntarily took the risk that risk. Church v. Appleby (Q. B. D. 1889) 5 Times L. R. 88.

> As to the case of Baddeley v. Granville (1887) L. R. 19 Q. B. Div. 423, 56 L. J. Q. B. N. S. 501, 57 L. T. N. S. 268, 36 Week. Rep. 63, 51 J. P. 822, see chap-

A finding that the servant knew that the frog in which he caught his foot ive machinery is a question of fact, and was not packed is not conclusive against that, in my opinion, would have made him. LeMay v. Canadian P. R. Co. (1889) 18 Ont. Rep. 314, (Affirmed in 17 Ont. App. Rep. 293, but the maxim was

The mere fact that a servant does not object and refuse to take the risk when the utmost they properly could do was he becomes apprehensive that danger to send it back to the county court. will result from the system adopted for They held in that case that the facts doing the work in hand does not show doing the work in hand does not show that he assumes the risk. Madden v. Hamilton Iron Forging Co. (1889) 18 Ont. Rep. 55.

See also Bateman v. Moffatt (1868) ficulty as to contributory negligence in W. W. & A'B. (Victoria) "162, § 383, note 5, infra.

Where a servant of one of several contractors engaged in erecting a buildtiff (or the deceased in the case of ing suffered injury through the negligent manner in which another of those negligence; he (the judge) has no right contractors carried on his work, an acto hold that the evidence of it is conclution against the latter contractor is not sive; it should be left for the decision necessarily barred by the maxim because the injured servant had asked to 6 A judge is not justified in with- be protected from danger, and had gone drawing the case from the jury unless on working after his request had been the evidence can bear no other construct refused. Thrussell v. Handyside (1888) tion than that the servant thoroughly L. R. 20 Q. B. Div. 359, 57 L. J. Q. B.

ing, is that the mere fact of the servant's having continued to work with a knowledge of the abnormal risk which caused his injury does not necessarily and as a matter of law require the inference that he had voluntarily consented, within the meaning of the maxim, to assume that risk.7

Q. B. N. S. 618, 59 L. T. N. S. 227, 36 He sought to recover damages on the Week. Rep. 809, 52 J. P. 806, a railway ground that this system of handling the passenger was injured in attempting to stones without taking precautions to cannot succeed in a court of review on progress indicated negligence. The evithe ground that the maxim is applicational dence on which it was asserted that a ble, unless he has either had a finding nonsuit should have been granted conof fact in his favor, or all the facts are sisted of the statements of the plaintiff before the court, so that it is in a posihimself. Speaking of the operation of tion to decide it. Grantham, J., said: slinging the stones over the heads of "I think that the judgment of Bowen, the workmen, he said that it was not maxim, Volenti non fit injuria, does not the way. The gang foreman told the apply to such a case as the present. If workmen to get out of the way of the it did, it would go to the root of the liastones which were being slung. The bility of all persons who would otherwise be liable to provide safe premises at the work to know that it was danor safe machinery. For instance, in gerous, and another workman in his the case of a stage coach, if a passenger hearing had complained that it was a sees that one of the horses is vicious, dangerous practice. A clear statement is he hound to stay at home and give of the rationale and effect of this deciis he bound to stay at home and give of the rationale and effect of this deci-up his journey, or if he does not do so, sion, abstracted from the more general and suffers injury, is he to lose all remdiscussions of the maxim by the judges, cdy? The same considerations would is contained in the following passage of apply in the case of a railway. It Lord Herschell's opinion (p. 362 of the seems to me that the whole difficulty in Law Reports): "Whatever the dangers the present case arises from the answer of the employment which the employed of the plaintiff to a question put to him undertakes, amongst them is certainly in cross-examination being too much reployer's negligence, and the creation or knew there was some danger in soing enhancement of danger thereby ensenneed on. What he meant was that he ployer's negligence, and the creation or knew there was some danger in going enhancement of danger thereby engendown the steps, and that it was necessary to be careful, but he thought he in his duty towards the employed, I do could get down safely with the assistance of the hand rail. The only chance straightway refuse to continue his service, it is true to say that he is willing utory negligence on the part of the that his employer should thus act topolaintiff, and this they have failed to wards him. I believe it would be conplaintiff, and this they have failed to wards him. I believe it would be con-

discharging when injured. These coning to a breach of duty on the part of sisted in drilling holes in a rock cutting his employer, the mere fact that he connear a crane worked by his coemployees, tinues his work, even though he knows

N. S. 347, 58 L. T. N. S. 344, 52 J. P. which at times would swing stones so that they passed over his head. One of In Osborne v. London & N. W. R. Co. the stones broke in pieces while it was (1888) L. R. 21 Q. B. Div. 220, 57 L. J. in the sling, and fell upon the plaintiff. descend a flight of ice-covered steps. warn him so that he might move to a The court laid it down that a defendant place of safety while the hoisting was in L. J., in Thomas v. Quartermaine consafe, and that whenever he had suffifirms the view which I take, that the cient warning, or saw it, he got out of plaintiff, and this they have latted to wards him. I believe it would be conshow."

\*\*Tamith v. Baker [1891] A. C. 325, 60 vited or assented to the act or default L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, which he complains of as a wrong, and 40 Week. Rep. 392, 55 J. P. 660. There the plaintiff, after doing different kinds of work for the defendant, had been Volenti non fit injuria becomes applicational transferred about two months before ble. . . I think that, where a the accident to the duties which he was discharging when injured. These consing to a hreach of duty on the part of

Although the decision in Smith v. Baker [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. 467, 40 Week. Rep. 392, 55 J. P. 660, was rendered in an action brought under the employers'

does not preclude his recovering in re-volved in the maxim Volenti non fit inspect of the hreach of duty, by reason juria. I think they must go to the exof the doctrine, Volenti non fit injuria, tent of saying that, wherever a person

tion to such a case." resolves itself into the question whether he voluntarily undertook the risk. If upon that point there are considerations pro and contra, requiring to be weighed though the servant was both sciens and and balanced, the verdict of the jury volens as to the danger of working withcannot be lightly set aside. The de-out anyone to warn him when the crane in their employment, after he had be- arising from unfit machinery. come aware and had complained of the Later decisions in which the risk of a stone falling in the course of its transit from the quarry to the hatchway); Medway v. Greenwich Liloading bank. . . I am unable to noleum Co. (1898) 14 Times L. R. 291; accede to the suggestion that the mere Marley v. Osborn (1894) 10 Times L. fact of his continuing at his work with R. 388; Williams v. Birmingham Batsuch knowledge and appreciation will tery & Metal Co. [1899] 2 Q. B. 336, in every case necessarily imply his ac-68 L. J. Q. B. N. S. 918; Wallace v. considerable extent upon the nature of Hamilton Cotton Co. (1893) 23 Ont. the risk and the workman's connection Rep. 425; Sim\_v. Dominion Fish Co. with it, as well as upon other considerations which must vary according to the circumstances of each case." (p. 355 of jury in an action brought by an em-Law Reports).

Lord Halsbury (p. 336 of Law Reports) thought that the nonconclusive-

of the risk, and does not remonstrate, rely must be a far wider one than is inwhich, in my opinion, has no applica- knows there is a risk of injury to himself, he debars himself from any right Another passage which may usefully of complaint if an injury should hap-be inserted here is the following extract pen to him in doing anything which infrom Lord Watson's opinion: "The volves that risk. For this purpose, and only question which we are called upon in order to test this proposition, we to decide, and I am inclined to think have nothing to do with the relation of the only substantial question in the employer and employed. The maxim in case, is this: Whether, upon the evi- its application in the law is not so limdence, the jury were warranted in find- ited; but where it applies it applies ing as they did, that the plaintiff did equally to a stranger as to anyone else; not 'voluntarily undertake a risky em- and if applicable to the extent that is ployment with a knowledge of its risks.' now insisted on, no person ever ought Whether the plaintiff appreciated the to have been awarded damages for being full extent of the peril to which he was run over in London streets; for no one exposed or not, it is certain that he was (at all events, some years ago, before aware of its existence and apprehensive the admirable police regulations of later of its consequences to himself; so that years) could have crossed London the point to be determined practically streets without knowing that there was risk of being run over.

Lord Morris concurred with the majority on the narrow ground that, alfendants' case is that the evidence is all would pass over his head, he was not one way; that the plaintiff's continuing shown to have been aware of the danger

Later decisions in which the same danger, of itself affords proof absolute doctrine has been recognized are Greenand conclusive of his having accepted halph v. Cwmaman Coal Co. (1891) 8 Times L. R. 31 (no combings round a ceptance. Whether it will have that ef- Culter Paper Mills Co. (1892) 19 Sc. fect or not depends, in my opinion, to a Sess. Cas. 4th series, 915; Rodgers v. (1901) 2 Ont. L. Rep. 69.

Where it is specially found by the ployee of a lumber company to recover for injuries caused by the negligent manner in which the servants of a railmanner in which the servants of a fairness of a plaintiff's knowledge of a risk way company shunted its cars on a sidmight be deduced from principles ing belonging to his employer, that the which are independent of the fact that employee "voluntarily accepted the the person sued is his employee. He risks of shunting," these will be taken said: "It appears to me that the proposition upon which the defendants must voluntarily incurred the risks attendant liability act, the reasoning on which it was founded is quite general in its scope and character. There is, accordingly, no ground upon which it can be contended that the principle there laid down is inapplicable to common-law actions. That it is not inapplicable was assumed in a recent decision by the court of appeals.8 The precise

upon shunting in a careful manner, and answer must therefore be rejected as irthe inference will therefore be that the relevant." maxim is not applicable. Hurdman v.

Canada Atlantic R. Co. (1893) 25 Ont. of the two causes from which the injury Rep. 209 (1895) 22 Ont. App. 292 resulted will not bar his action. Foley (1895) 25 Can. S. C. 205. Discussing v. Webster (1892) 2 B. C. 138. Comthe effect of this finding in the Ontario pare §§ 271, 295, ante. court of appeal, Osler, J., said: "This It is a misdirection to charge a jury at first sight might seem opposed to the that the servant's knowledge of the danfrom any duty towards him of taking (1896) 29 N. S. 70. care in the management of the shunting and care in the management of the shunting and the region of the control of the reason which he or the plaintiff could complaint the defendants do not assert norance of the defect. Lake v. Drury that the deceased was guilty of contributions of the defect. The plaintiff could complaint the defendants do not assert norance of the defect. Lake v. Drury that the deceased was guilty of contributions and the plaintiff of the reason which asserts are control of the defect. utory negligence, which assumes or adto those incurred by their negligent or improper management of it; in other words, that they were entitled to conduct their operations without regard to J. Q. B. N. S. 918, an action was the fact that he was in the car. But brought under Lord Campbell's act to the answer of the jury, in my opinion, recover damages at common law for the does not go as far as this. It can only death of a workman who had been killed be understood as affirming that the de- while descending from an elevated ceased assumed or accepted the risks intramway on which he had been working cident to shunting, so far as the operfor the defendant. The jury found that ation, when performed with reasonable the defendants did not exercise due care care, would be intrinsically dangerous to have the tramway in a proper condito a person in his situation, not that he tion so as to protect their servants assented to their managing it just as if working upon it against unnecessary he were not in the car. Given that the risk; that it was dangerous to descend shunting was performed without unfrom the tramway without a ladder; necessary violence, such an occurrence that the deceased had the same means as the shifting of the lumber was not of knowing that it was dangerous as inevitable, and here it was the unnecest he defendant had; that he knew that it sary force used which produced that re- was dangerous; and that he had not sary force used which produced that re-sult, and thereby caused the death of been guilty of contributory negligence. the deceased. It is a question of fact It was held that a judgment for the de-in every case in which the maxim is in-fendant could not be entered on these voked, what risks were accepted, and it findings. Romer, L. J., said: "If, by ought to be very clearly made out that reason of breach of that duty [i. e., to that of negligence was one of them. See protect a servant] a servant suffers in-Pollock, Torts, 3d ed. p. 154. There is jury, the employer is prima facie lia-no evidence here that it was, and the ble: and it is no sufficient answer to jury have not said so; the question and the prima facie liability for the em-

answers finding negligence, because if it ger of the employment is an absolute were to be inferred therefrom that the bar to the plaintiff's claim. Tobin v. deceased had absolved the defendants New Glasgow Iron, Coal & R. Co.

A court will not set aside a general mits negligence in the first instance on verdict for the defendants where there their part. Their defense is rested on is evidence sufficient to sustain a find-the application of the maxim, Volenti ing that the plaintiff was volens in renon fit injuria. The deceased, they say, gard to the special risk from which his was assenting to all risks of shunting injury resulted. Campbell v. Railway incident to his situation in the car, even Comrs. (1900) 21 New So. Wales L. R.

scope of this decision, it will be observed, is merely that, if the defendant in an action of this class has elected to rely upon the maxim, and not the theory of a contractual assumption of the risk, it is primarily a question for the jury whether he was volens. To this extent the doctrine of the earlier English cases cited in § 376, a, supra,. is abrogated. It may yet be an interesting subject of investigation, whether the modern theory of the respective provinces of the court and the jury in determining the applicability of the maxim does not logically point to the conclusion that the conception of an implied contract to assume a risk should no longer be treated as furnishing a basis for a peremptory conclusion of law. Broadly speaking, the essential question to be decided is the same, whether the servant's rights are referred to that conception or to the maxim, - viz., whether he had or had not voluntarily accepted the responsibility for any injury which he might receive owing to the existence of a certain risk known to and appreciated by him. Apart from precedent, it is difficult to see any adequate reason why it should be deemed proper that this question should be determined by the court or left to the jury, according as the defendant may elect to take his stand upon the theory of an implied agreement, or of a waiver of rights which is independent of the conception of contract.

In the leading case already cited, Lord Halsbury expressed the opinion that, "in order to defeat a plaintiff's right by the application of the maxim relied on, . . . the jury ought to be able to affirm that he consented to the particular thing being done which would involve the risk, and consented to take the risk upon himself."9

ployer to show merely that the servant either of the lord justices who delivered was aware of the risk and of the nonex- opinions. was aware of the risk and of the nonexistence of the precautions which should have been taken by the employer, and the cape liability the employer must establish that the servant has taken upon himself the risk without the precaupropers. Whether the servant has taken upon himself the risk without the precaupropers. Whether the servant has taken that upon himself is a question of fact to be decided on the circumstances of ed to the particular act done under the each case. In considering such a question of rarticular circumstances. He would

to be decided on the circumstances of each case. In considering such a question the circumstance that the servant have said, I cannot look out for myself has entered into or continued in his employment with knowledge of the risk and of the absence of precautions is important, but not necessarily conclusive against him." It had been suggested If you will not give me warning when by defendant's counsel that the rule laid down in Smith v. Baker was not applicable to common-law actions. But no do not place me under a crane which is notice was taken of this contention by

But so far as can be judged from the rest of his opinion and the conclusions at which he arrived with regard to the facts before him, the test thus proposed seems to yield, in its practical application, results which are essentially identical with those obtained by the doctrines which are enunciated in the opinions of the other members of the House of Lords. The same remark is applicable to the somewhat similar language which had previously been used by Lord Justice Lindley in an earlier case.10

The limits of the right of a court to control or override the finding of a jury in favor of a servant have not, as yet, been defined with any precision. The theoretic rule governing this right is similar to that which prevails in every instance where the extent of the respective provinces of judges and juries in drawing inferences from admitted facts comes into question; viz., that, if only one inference can reasonably be drawn, it is justifiable either to direct a verdict embodying that inference, or to set aside a verdict which is inconsistent therewith. But it seems impossible to maintain with any show of plausibility that all the cases can be satisfactorily reconciled on this basis. In only two English cases has the servant, so far as the writer has been able to ascertain, been declared unable to recover, as a matter of law. One of these cases is that which established the doctrine now under discussion. In another a judgment of the

you keep my attention fixed upon an operation which prevents my looking out for myself.' . . . So far from (1887) L. R. 19 Q. B. Div. 647, 661, 57 consenting, the plaintiff did not even know of the particular operation that was being performed over his head until the injury happened to him, and consent, therefore, was out of the question."

10 "If in any case it can be shown as ticular case must be ascertained and considered." Yarmouth v. France (1887) L. R. 19 Q. B. Div. 647, 661, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281.

11 Thomas v. Quartermaine (1887) L. R. 18 Q. B. Div. 685, 56 L. J. Q. B. N. S. 340, 57 L. T. N. S. 537, 35 Week. Rep. 555, 51 J. P. 516. There an employee in a brewery, while trying to

a fact that a workman agreed to incur a particular danger, or voluntarily exposed himself to it, and was thereby injured, he cannot hold his master liable. But, in the cases mentioned in the act, a workman who never in fact engaged to incur a particular danger, but who finds himself exposed to it and complains of it, cannot, in my opinion, be held, as a matter of law, to have impliedly agreed to incur that danger, or to have voluntarily incurred it because to submit to a jury on the question which was not fenced but surrounded by a rim 16 inches high, fell into the latter vat owing to the fact that the plank, after at first sticking fast, suddenly yielded when he gave it a harder pull. He had worked round the vats for several months and was fully acquainted with the conditions. The following passage from the opinion of Bowen, L. J., contains the gist of the reasoning by which he valuntarily incurred it or not. simply because, though he protested, he went such circumstances as leads necessarily on as before. The facts of each par-

ployee in a brewery, while trying to

10 "If in any case it can be shown as pull from under the boiling vat a plank
a fact that a workman agreed to incur which he required for the purpose of

court of appeal was affirmed by the House of Lords not long before the subject underwent the exhaustive discussion in Smith v. Baker (see note 6 in this section. In the lower court, Bowen, L. J., proceeded upon the supposition that the facts brought the case within the scope of the same rule which he had previously enunciated in the case last cited. 12 The position taken by Lord Bramwell in the House

a perception of the existence of the danger without comprehension of the risk; as, where the workman is of imperfect intelligence, or, though he knows the danger, remains imperfectly informed as to its nature and extent. There are to its nature and extent. There J. P. 660, viz., that the facts did not may, again, be concurrent facts which plustify the inquiry whether the risk, master, it seems quite impossible, upon though known, was really encountered the latest pronouncement on the subac conclusive defense in itself. But when it is a knowledge under circumstances that leave no inference open but to me complete. . . . Knowledge to the court of appeal in Williams one, viz., that the risk has been voluntarily encountered, the defense seems to to me complete. . . . Knowledge to the court of appeal in Williams one, viz., that the risk has been voluntarily encountered, the defense seems to to me complete. . . . Knowledge to the court of appeal in which the risks also were created by a permanent to me complete. . . . Knowledge to the court of the plant, with which the servant had long been familiar. a perception of the existence of the dan- im, Volenti non fit injuria, applies." consistent with the facts that, from its "2 That rule he is reported to have imperfect character, or otherwise, the stated as follows: "If a man volunentire risk, though in one sense known, tarily incurred a risk he could not only one thing.

was voluntarily incurred. The maxim, spect of an injury arising from a debe it observed, is not Scienti non fit in- feet, of which defect and of the resultjuria, but volenti. It is plain that ing damage he was as well informed as mere knowledge [of the risk] may not the defendant? I think not. To such be a conclusive defense. There may be a person it appears to me that the max-

was not voluntarily encountered; but afterwards complain. The question here, on the plain facts of the case, whether his conduct was voluntary or knowledge on the plaintiff's part can not was an issue of fact, but it was not For many always for the jury. If the evidence months the plaintiff, a man of full in- was all one way, it was for the judge telligence, had seen this vat-known all to withdraw the case from them. If about it-appreciated its danger-elect- there was conflicting evidence, -as, if, ed to continue working near it. It for instance, there was evidence of comseems to me that legal language has no meaning unless it were held that knowledge such as this amounts to a voluntary encountering of the risk."

The language used by Fry, L. J., propounds a doctrine even less favorable to the servant, whom it would virtually place in a position not, as it would seem, materially different from that ment between the plaintiff's master and which he occupied under the earlier the defendant was that the latter English decisions cited in § 376, supra. Should furnish an assistant for the purconstruing § 1 of the employers' liability act of 1880, he put the question:

"If the workman is to have the same rights as if he were not a workman, This agreement had been carried out for seems to me that legal language has no pulsion, as in Yarmouth v. France,-the rights as if he were not a workman, This agreement had been carried out for whose rights is he to have?" and an-several years. A new arrangement was swered it thus: "I think that we then made, the purport of which was ought to consider him to be a member merely that the defendant should furof the public entering on the defend- nish an assistant if it had one availant's property by his invitation. Can able, and the plaintiff continued to such a person maintain an action in re- work for several years, sometimes with

of Lords has been already stated in the last section. The judgment of the rest of the House, except in so far as it was not influenced by the special reason noticed in § 380, infra, seems rather to be based upon the conception that no negligence on the master's part had been established, than upon the conception that the maxim was, as a matter of law, a bar to the action. Supposing this to be the actual rationale of the decision, it is not inconsistent with that which was rendered in Smith v. Baker. But much of the language used in the opinions seems to indicate that the House was not as yet entirely prepared to stand sponsor for that liberal construction of the maxim which was indorsed two years afterwards. In British Columbia it has quite recently been decided that a servant who, with a full knowledge of the conditions, took a certain route which had been rendered unsafe through the master's breach of duty, when he might have taken another route which was secure, must be held, as a matter of law, to have consented to incur the risk of injury while using that route.<sup>13</sup> But the facts involved in this case would seem to indicate that the servant's inability to recover should have been referred to the conception that he was negligent in exposing himself to a danger unnecessarily, rather than to the conception of a consent to incur that danger. Hence, even if it can be properly said to fall within the scope of the maxim (see § 371, supra), it does not throw any light upon the point discussed in the English decisions just cited. See further §§ 381-383, infra.

b. United States.—The supreme court of Indiana has recently followed the lead of the English judges to the extent of holding that, where the duty violated was a statutory one, the servant's action is not necessarily barred by the fact that he was chargeable with actual or constructive knowledge of the dangerous conditions.<sup>14</sup> But a comparison of the cases cited in the last subdivision and in § 376, b, supra, shows that, on the whole, the maxim is construed in essentially different senses by the English judges and by those of the American states in which its effect has been discussed.

So far as regards the Massachusetts and Alabama decisions in actions brought under the employers' liability acts, there would seem to be good grounds for arguing that the position thus taken is in contravention of the familiar principle that the presumed intention

an assistant and sometimes without by a "ship" [i. e., elevator] from which one. It was held that, under these circumstances, he could not recover damages for an injury caused by the want of an assistant.

13 Davies v. Le Roi Min. & Smelting 64 N. E. 610, citing Smith v. Baker and Co. (1899) 7 B. C. 6 (miner ascended the decisions which preceded it.

of a legislature which adopts a foreign statute is that it shall receive the same construction as the courts have put upon it in the country where it was originally enacted. As regards Alabama, it may be remarked that the situation is peculiarly unsatisfactory, as the leading English case was not even cited in the judgment by which the prevailing rule in that state was established.15 It remains to be seen whether a controlling force will be ascribed to this principle in any of the American states in which statutes modeled upon the English one have been, or may hereafter be, adopted.<sup>16</sup>

The obligation of the American courts to defer to the authority of the English judges in actions at common law is of course not equally strong. But the reasoning which has been employed to sustain the doctrine that the applicability of the maxim in such actions also is primarily and essentially a question for the jury is in itself quite convincing.17

## В. PARTICULAR CIRCUMSTANCES BEARING UPON THE QUESTION WHETHER THE SERVANT WAS VOLENS.

378. Increased compensation given for encountering a specific risk.— The advocates of both the doctrines discussed in §§ 376, 377, supra, are apparently agreed upon the doctrine that knowledge is conclusive against a servant, where he is to receive higher pay in consideration of his doing the work which involves an abnormal risk due to a defective condition of the instrumentalities.<sup>1</sup>

Is Birmingham R. & Electric Co. v. down that there is "a marked distinction of the risk decision was rendered, as is apparent from a comparison of dates, in the year after Smith v. Baker had finally settled the English doctrine. See note 7, supra.

Is In the New York act of 1902, it will be observed that the legislature has introduced a clause expressly providing ture." Channell, B., in Britton v. that an assumption of the risk shall not Great Western Cotton Co. (1872) L. R. be inferred, as a matter of law, from the fact of the servant's knowledge. See chapter XXXVII., post. See chapter xxxvII., post.

See chapter xxxvII., post.

Soe lso in Smith v. Baker [1891]

The following remark made arguA. C. 325, 344, 60 L. J. Q. B. N. S. 683,

endo in a Maine case may perhaps be 65 L. T. N. S. 467, 55 J. P. 660, 40

regarded as indicating that the English Week. Rep. 392, Lord Bramwell laid it rule will be adopted in that state when down that a servant who undertakes the point is specifically presented: work exposing him to a particular dan-"The risk from the master's breach of ger for a certain compensation less than duty never rests upon the protesting or that which he demanded is in the same even unwilling servant. Volens, not situation as one whose wages the massciens, is the test." Dempsey v. Saw-ter agrees to increase in consideration of his incurring the additional risk.

1 On the one hand we find it laid.

On the other hand, we find one of the

378a. Injury inevitable if the servant remains at work.—In the leading English case Lord Herschell conceded that there might be cases in which a workman would be precluded by the maxim from recovering, even though the risk which led to the disaster resulted from the employer's negligence. Such a case would, he suggested, be presented if the inevitable consequence of the employer's discharging his duty would obviously be to occasion him personal injury.1

379. Assumption by the master of responsibility for any injury that may be received.—In some instances the evidence may justify the inference that it is the intention of the master to make himself answerable for any injury that the servant may receive. Under such circumstances the legal situation is simply that the master is deemed to have surrendered any right he might otherwise have had to protect himself by the maxim. The shifting of the responsibility will, of

chief advocates of the more liberal view proper machinery or otherwise, to se-expressing himself as follows: "I need cure the safety of the employed, was expressing himself as follows: "I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are for the most part so large and general tract were made at the inception of the in their language that they always include something which really is not intended to be included in them. I do not doubt that if we put this maxim into plain English part of it is true; that is to say, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is put before a workman, and he is told, 'Now, I do not asy, that if a thing is contract, and this whether such on bis contract, a

Compare the following passage, which not even, I should judge, as probable." also suggests the limitation of the effect of the maxim to cases where there by interred by a jury if it is proved that is adequate consideration for incurring the workman was told by his superinthe additional risk caused by defective tendent not to mind, and that if any acappliances: "If the employed agreed, cident happened the employer must in consideration of special remuneration, or otherwise, to work under conditions in which the care which the employer ought to bestow, by providing per Lindley, L. J. (1887) L. R. 19 Q. B. Div. 647, 661, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 281, ployer ought to bestow, by providing per Lindley, L. J.

ladder; it is ten to one that it will break sideration: "Suppose, to take an ilunder you; but if you choose to run lustration, that, owing to a defect in that risk, I will give you higher wages.' the machinery at which he was emf the workman, seeing the risk, elects ployed, the workman could not perform to incur it, no one could doubt that he the required operation without the cerwould be precluded from recovering tain loss of a limb. It may be that if damages against his employer for any he, notwithstanding this, performed the injury he might sustain from the breaking of the ladder. The same result in respect of such a loss, but that is not would follow if the injured person was the sort of case with which we have to not a workman fit for hire." Lord deal here. It was a mere question of Esher in Yarmouth v. France (1887) risk which might never eventuate in L. R. 19 Q. B. Div. 647, 36 Week. Rep. disaster. The plaintiff evidently did 281, 57 L. J. Q. B. N. S. 7.

fect of the maxim to cases where there ly inferred by a jury if it is proved that

course, enure to the servant's benefit, whatever, theory may be held as to the proper inference to be drawn from his knowledge of the risk.

380. Injury the result of the servant's own acts or omissions .--One of the exceptions to which it is conceded that the doctrine now established in England is subject rests upon a distinction which is taken between cases in which the operations or conditions which produced the servant's injury were independent of his own volition and removed from his own control, and cases in which the injury was the direct result of his own act of omission. In the former class of cases his knowledge of the risk may or may not let in the operation of the maxim; in the latter class his knowledge of the risk is deemed to be conclusive against him.1

No objection can reasonably be made to the enforcement of this qualification in any instance in which the servant created, or consented

sponsibility is implied where he directs danger in the operation of drilling in the servant to perform labor to which which the plaintiff was engaged; the

where, therefore, the application of the maxim Volenti non fit injuria is completely justified."

Similar views were thus expressed by Lord Watson in the same case (p. 357 (1889) L. R. 14 App. Cas. 179, 58 L. J. of the Law Reports): "The risk may Q. B. N. S. 563, 61 L. T. N. S. 566, 38 arise from a defect in a machine which the servant has engaged to work, of cision, in so far as it rested upon the case of the maxim was referred applicability of the maxim was referred. the servant has engaged to work, of cision, in so far as it rested upon the such a nature that his personal danger applicability of the maxim, was referred and consequent injury must be produced by Lord Halsbury to the conception by his own act. If he clearly foresaw thus explained (p. 186 of the Law Rethe likelihood of such a result, and, notwithstanding, continued to work, I think that, according to the authorities, he ought to be regarded as volens. The case may be very different when there is cover, upon the ground that he was volunderent peril in the work performed by the servant, and the risk to which he is exposed arises from a defect in the machinery used in another department over which he has no there department over which he has no himself." other department over which he has no himself." control. The present case belongs to

The master's acceptance of the re-that category. There was no intrinsic the servant to perform labor to which he is not accustomed, after the foreman of the work has sent him back for the reason that he is not deemed sufficiently over his head by a crane] was not strong. Albertz v. Bache (1890) 32 N. evoked by his act, but was brought into Y. S. R. 1014, 10 N. Y. Supp. 639.

1 In Smith v. Baker [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. was cited as an authority in a Canadian 467, 55 J. P. 660, 40 Week. Rep. 392, case where a farm servant was injured Lord Halsbury said (p. 338 of the Law Reports): "Every sailor who mounts the rigging of a ship knows and appreciates the risk he is encountering. The consequence being that the machine beact is his own, and he cannot be said act is his own, and he cannot be said gan to run at a dangerous speed and the not to consent to the thing which he driving wheel burst. It was held that himself is doing. And examples might the maxim was a bar to his recovery, as be indefinitely multiplied where the es- the evidence showed that he fully unsential cause of the risk is the act of derstood the nature of the machine, that the complaining plaintiff himself, and he had made no complaint, and that he where, therefore, the application of the had been in the habit of replacing the

to the creation of, the defect which caused his injury.<sup>2</sup> But there is a manifest danger that it may be construed by some judges in such a sense as to revive many of the hardships of the older doctrine in that large class of cases in which the employee's duties are restricted to the use of some particular instrumentality. Under such circumstances the injury is always, in a partial degree at least, the result of something done or omitted by the servant himself, and if this fact alone is sufficient to warrant a court in declaring the maxim to be applicable as a matter of law, the beneficial effect of the doctrine enunciated by the House of Lords in Smith v. Baker, must, it is clear, be seriously diminished. But perhaps it may be said that there is no longer any risk of such a result since the recent decision of the court of appeal mentioned in § 377, note 7, supra. That decision impliedly operates as an affirmation of the principle that the mere fact that the servant was using a defective instrumentality in the course of his employment does not constitute a sufficient reason for holding that his knowledge of the defect is conclusive against his right of recovery.

381. Work undertaken by the order of master or superior employee.— The effect of evidence that the work in course of performance when the injury was received was undertaken in compliance with the direct order of a superior does not seem to have been discussed by any court which infers voluntary action from the mere fact of the servant's knowledge. But presumably the significance of this element in any such court is the same as it is in cases where the servant's rights are being considered with reference to the questions whether he had contractually assumed the risk, or had been guilty of contributory negligence. See chapter xxIII., post.

Under the English doctrine, the fact that the servant was injured in obeying an order to perform dangerous duties evidently cannot be of any differentiating import. But, so far as it goes, it makes in the servant's favor.1

381a. Work undertaken outside scope of ordinary duties.—(Compare chapter xxv., post.)—In all jurisdictions, English, colonial, and American, it would probably be held, as it has been held in Massa-

<sup>2</sup> Highland Ave. & Belt R. Co. v. Wal-right of recovery might have been deters (1890) 91 Ala. 435, 8 So. 357, hold-nied on the same special ground. ing that a railway company cannot be In one case it was held to be a quesheld liable for the death of a yardmastion for the jury whether the servant ter due to his being thrown off the foot-was willing to encounter the danger, ter due to his being thrown off the foot-was willing to encounter the danger, board on the front of a switch engine where he was ordered to adjust a belt, by striking against a pile of coal near that duty being outside the scope of his the track, which had been deposited employment and dangerous. Baxter v. there by the consignee with his permission. See also Poll v. Hewitt cited in another he was allowed to recover while retail according in which the servent's complying with an order to clear more note 1, supra, in which the servant's complying with an order to clean mov-

chusetts, that the servant is debarred from recovery, as a matter of law, where he was injured while engaged in work outside his ordinary duty, which was undertaken at the suggestion of a fellow workman, and with the mere consent of his immediate superior.<sup>1</sup>

If such work was undertaken by the orders of an employee who represented the master, the question whether the servant was volens will depend upon the considerations adverted to in the preceding section. See the first of the two cases cited in note 1.

382. Servant's fear of losing his position.— (Compare §§ 288, 302) (6), ante.)—It is manifest that, in the last analysis, the evidential significance which shall be attached to the influence exercised upon a servant's mind by the apprehension that, if he declines to undertake a certain extra-hazardous duty, he may lose his position, must depend upon considerations which are sociological rather than juristic. See § 62, ante.

One theory applied in the decisions embodies the same conception of the relation between masters and servants as that postulate of economic science which is commonly known as the mobility of labor. The servant, that is to say, is assumed to be an entirely free agent in respect to taking up or abandoning an employment. This assumption obviously involves the corollary that no coercive influence can be ascribed to his fear of the consequences of a refusal to incur an abnormal risk. According to the judges who take this view of the

plained of the danger of the work he would have been told that someone else would do it. The remark of the judge was that this was "a very sensible answer, . . . but that showed that he had an option to do it, or not to do it." Is notens or has the shifting made This brief comment was expanded into him volens? There must be a strange the following incisive homily in the notion either that a man who does a opinion which he delivered in Membery thing and grumbles is notens, is unwill-v. Great Western R. Co. (1889) L. R. ing, has not the will to do it, or that 14 App. Cas. 179, 58 L. J. Q. B. N. S. there is somthing intermediate between 563, 61 L. T. N. S. 566, 38 Week. Rep. nolens and volens, something like a man

ing machinery. Marley v. Osborn (1894) 10 Times L. R. 388.

Mellor v. Merchants' Mfg. Co. (1890) 150 Mass. 362, 5 L. R. A. 792, 23 N. E. 100. There a loom fixer who was injured by a belt slipping off a pulley while he was attempting to repair a defect failed to recover, for the reason that he had voluntarily taken the risk of an obvious danger.

The most uncompromising of the English exponents of this theory was alone. He wills to do it. He does not the late Lord Bramwell. In Ogden v. Rummens (1863) 3 Fost. & F. 751, while he was trying a case one of the workmen testified that if he had complained of the danger of the work he it. The other grumbles, but wills to do it. it. The other grumbles, but wills to do it, and does it. Are both men nolentes. unwilling? Suppose an extra shilling induced the man who did the work. had an option to do it, or not to do it." Is he nolens or has the shilling made

situation, the servant's proper course is to throw up his position, as he has a right to do.2

The other theory takes into account the notorious and indisputable fact that in those parts of the civilized world in which the common law prevails the industrial conditions are such that the labor market is normally more or less overcrowded, and in times of unusual stress is "thronged with suitors" to such an extent that fresh employment in any given line of business is almost impossible to procure. It is recognized that the servant's knowledge of this fact may reasonably be supposed to impair his freedom of will, to a greater or less extent, when he finds that a new hazard has been superadded to his environment by a breach of duty on his master's part, and that he is compelled to elect between encountering that hazard, or abandoning his position, or running the risk of a possible discharge, if, without actu-

being without a will, and yet who wills. people go to see dangerous sports? If the shilling made him volens, why Acrobats daily incur fearful dangers—does not the desire to continue emlion-tamers and the like. Let us hold ployed do so? If he would have a right to the law. If we want to be charitable, to refuse the work and his discharge gratify ourselves out of our own pockwould be wrongful, with a remedy to ets." Smith v. Baker [1891] A. C. 325, him, why does not his preference of cer-346, 60 L. J. Q. B. N. S. 683, 65 L. T. tain to an uncertain law not make him N. S. 467, 55 J. P. 660, 40 Week. Rep. tain to an uncertain law not make him volens as much as any other motive?

There have been an infinity of profoundly learned and useless discussions as to freedom of the will; but this notion is new. This is an important question. Is the maxim to be got rid of? J., was of opinion that the inference of Are we to say Volenti fit injuria provided he grumbles, as Mr. Bell contended? To do so would be most unjust and unreasonable. The master and unreasonable. The master that a refusal to incur the risk would says, Here is the work, do it or let it alono. If you do it, I pay you; if not, It think I am right; if wrong, I am liable to an action. The master says this, the servant does the work and to enforce the contract and defend his earns his wages, and is paid, but is rights." Crichton v. Keir (1863) 1 hurt. On what principle of reason or justice should the master be liable to ground, also, I am of opinion the judgground, also, I am of opinion the judg-ment should be affirmed. I may observe Exch. N. S. 521, per Cockburn, Ch. J., that the court of appeal thought that whose remark that "if a man, for the neither of the cases where this novel sake of the employment, takes it or conneither of the cases where this novel sake of the employment, takes it or connotion was entertained bore on the prestinues in it, with a knowledge of its ent." In the later case we find him reiterating these views: "It is said that clear of injury," seemed to Lopes, L. to hold the plaintiff is not to recover J., to embody the true principle. Yaris to hold that a master may carry on his work in a dangerous way and damage his servant. I do so hold, if the servant is foolish enough to agree to it.

This sounds very cruel. But do not that he "could not consider that he [the

ally leaving the service, he declines to do the work which will involve exposure to the hazard.3 See § 65, ante.

supra.
<sup>8</sup>In Yarmouth v. France (1887) L. R. maxim, and was therefore, upon the au- 876, 53 J. P. 38. thority of Thomas v. Quartermaine, dis-

servant] was acting under compulsion, in the following year by Lord Esher, even if he had been bound by contract who in discussing the meaning of a proto serve." Britton v. Great Western vision in the employers' liability act of Cotton Co. (1872) L. R. 7 Exch. 130, 27 1880 made these remarks: "There have L. T. N. S. 125, 20 Week. Rep. 525, 41 always been, I think, two schools of L. J. Exch. N. S. 99 (as reported in the thought in relation to cases of this latter social only p. 101). The views of kind. latter serial only p. 101). The views of kind. . . . The view of one school this learned judge, however, respecting has been that, in order to prevent inwhat is and is not compulsion, are of a justice to masters, the construction of very extreme character. See note 1, these enactments relating to masters and workmen should be narrowed, and that they should be construed as strict-19 Q. B. Div. 647, 57 L. J. Q. B. N. S. ly as possible. The view of the other 7, 36 Week. Rep. 281, Lord Esher and school is that masters and workmen are Lindley, L. J., both declared that evi- not really on an equal footing; that, if dence of the servant's fear of being dis- there is danger in the employment it charged tended to rebut the inference does not exist with regard to the masthat he was volens in continuing to ter, but only in the case of the workwork. The former said (p. 657 of Law man; and the workman is not on an Reports): "Here the judge of the equal footing, because he must run the court below has come to the conclusion risk or give up his employment. . . . that the moment it appeared that the I myself have always belonged to the plaintiff knew and appreciated the dan-latter school." Walsh v. Whiteley ger, and did not at once quit the de- (1888) L. R. 21 Q. B. Div. 371, 374, 57 fendant's employ, he came within the L. J. Q. B. N. S. 586, 36 Week. Rep.

About the same time we find Hawentitled to recover. He did not bring kins, J., using the following language in his mind to bear upon the motives which Thrussell v. Handyside (1888) L. R. 20 induced the plaintiff to act as he did,—Q. B. Div. 359, 57 L. J. Q. B. N. S. 347, whether he relied upon the foreman's 58 L. T. N. S. 344, 52 J. P. 279: "It statement that the employer would be cannot be said, where a man is lawfully responsible in case of an accident, or engaged in work, and is in danger of whether he was influenced by the fear dismissal if he leaves his work, that he of being thrown out of employ if he disobeyed the foreman's orders. All that encounter in the course of such work, was for a jury; and the judge ought to and here the plaintiff had asked the was for a july; and the judge ought to that here the plainth had asked the have applied his mind to it." The lather said (p. 660 of Law Reports): ferent where there is no duty to be per"The act [i. e., employers' liability] formed, and a man takes his chance of cannot, I think, be properly construed the danger, for there he voluntarily enin such a way as to protect masters who counters the risk. If the plaintiff could knowingly provide defective plant for have gone away from the dangerous their workmen, and who seek to throw place without incurring the risk of losthe risk of using it on them by putting ing his means of livelihood, the case them in the unpleasant position of hav- might have been different; but he was ing to leave their situations or submit obliged to be there; his poverty, not his to use what is known to be unfit for will, consented to incur the danger." use. . . . If nothing more is proved The learned judge also suggested that, than that the workman saw the danger, if it had been impossible for the defendreported it, but, on being told to go on, ants to take precautions against the went on as before in order to avoid dis-missal, a jury may, in my opinion, prop-the plaintiff was bound to take his erly find that he had not agreed to take chance. The case was distinguished the risk, and had not acted voluntarily from Woodley v. Metropolitan Dist. R. in the sense of having taken the risk Co. (1877) L. R. 2 Exch. Div. 384, 46 upon himself. Fear of dismissal, rather L. J. Exch. N. S. 521, on the ground than voluntary action, might properly that, in the latter case the plaintiff not only knew that there was danger, but Similar views were again expressed had it in his power to protect himself,

383. Complaint, objection, or protest omitted or made. — (Compare § 290, ante.)—The logical significance which shall be ascribed to the fact that, before the accident, the servant either had or had not complained of, objected to, or protested against, the maintenance of the abnormally dangerous conditions which caused his injury, will obviously depend upon the particular doctrine held by the court as to the inference to be drawn from the servant's having continued to work with a knowledge of the conditions, -such knowledge being manifestly an element always present in any case where the servant has thus expressed dissatisfaction with his environment.

a. No complaint, protest, or objection established by the evidence. -If the maxim is deemed to be a conclusive bar to his action whenever it is shown that he went on working with a knowledge of the risk which caused his injury, the failure to express any dissatisfaction can carry no higher significance than that of a circumstance tending

while in the former the plaintiff could and Mathew, J., in Sanders v. Barker not have avoided the danger, unless he (1890) 6 Times L. R. 324. In Madden v. Hamilton Iron Forging nau disobeyed the orders of his employers, and incurred the risk of dismissal. In Madden v. Hamilton Iron Forging Co. (1889) L. R. 14 App. Cas. 179, 58 L. J. avoid being discharged was mentioned Q. B. N. S. 563, 61 L. T. N. S. 566, 38 as one of the elements which excluded Week. Rep. 145, 54 J. P. 244, the other members of the House of Lords seem to have been somewhat staggered by Lord Week. Rep. 145, 54 J. P. 244, the other the operation of the maxim.

members of the House of Lords seem to In Mellor v. Merchants' Mfg. Co. have been somewhat staggered by Lord (1890) 150 Mass. 362, 5 L. R. A. 792, Bramwell's outspoken advocacy of the 23 N. E. 100, Holmes, J., remarked: doctrine that the putting a man in fear "It may be that a case like Thomas v. of starvation does not amount, in a lequartermaine (1887) L. R. 18 Q. B. gal point of view, to the application of Div. 685, 56 L. J. Q. B. N. S. 340, 57 physical coercion (see note 1, supra), L. T. N. S. 537, 35 Week. Rep. 555, 51 and preferred to reserve their conjugar. Vol. I. M. & S.—64.

and preferred to reserve their opinion J. P. 516, comes very near the line; on the subject. Lord Halsbury conbecause, if the servant is acting within tented himself with saying that there the scope of his regular employment, or was no evidence that the plaintiff had in obedience to special orders, the fear been compelled to do the work by any of losing his place may take away his such fear, but subsequently remarked choice so far that he cannot be said that he wished to leave open the questiful to take the risk upon himself." tion as to the true scope of the maxim. Compare the following remarks of the Lord Herschell also desired that the matsame judge in Boyle v. New York & N. ter should be left open for argument and declined to express any positive opinion E. 827. "This accident happened before as to the correctness of Lord Bramwell's the date of this statute, and here there views. Lord Fitzgerald did not directly can be no doubt that the risk was as-discuss the question whether the fear sumed by the plaintiff's intestate, so of losing employment was compulsion, that even if his conduct was not neglibut thought that no compulsion could gent in the sense of culpable, still, as be predicated of a case where the serv- it involved danger manifest to him, he ant, after having asked for assistance could not complain of the consequences, and met with a refusal, simply went on or argue, as it might be argued, per-doing the same work in the same man- haps, in some cases under the act of ner in which he must often have done 1887, that if he acted under the fear of it before during his seven years of service. The "physical compulsion" theory own peril, unless a jury found him to of Lord Bramwell was, however, emphatically condemned by Lord Coleridge plication of these expressions of indi-

to corroborate the inference of voluntary action. Under such circumstances it cannot be a differentiating element.<sup>1</sup>

Under the doctrine that knowledge is not of itself conclusive of the voluntary character of the servant's action, the fact of his not having complained is ordinarily nothing but a circumstance for the jury to consider in connection with the rest of the evidence in the case.<sup>2</sup> But in cases in which the court is justified, apart from this circumstance, in declaring that the maxim is applicable, the fact of his having made no complaint sometimes appears as a corroborative element.3

b. Complaint, protest, or objection established by the evidence.— In any jurisdiction in which voluntary action is inferred, as a matter of law, as soon as it appears that the servant comprehended the risk to which his injury was due, it is obvious that the fact of a complaint having been made is nothing but a circumstance which shows

ited to cases arising under the employ-opinion upon the matter, I thought it ers' liability act. If not so limited clearly to be my duty not to leave the they are in direct conflict with the specase to them upon the chance of their cific rulings of this court, as noticed \$ finding a verdict for the plaintiff from 288. ante. Compare § 65, ante.

23, where the servant was injured owing He, however, carried it on for several to the inadequacy of the number of months, and never made the least comservants furnished for the work. The plaint upon the matter." judges, during the argument of counsel. In a very recent case a brakeman unanimously declared that he could not was denied recovery for an injury unanimously declared that he could not was denied recovery for an injury recover for reasons stated by each of caused by his falling into an uncovered them as follows: "The case," said culvert, where he knew at the time when Platt, B., "falls within the maxim Volettin non fit injuria." "I acted upon were all in this condition, and had rethat principle at the trial," said Martin, B., "being of opinion that the comout objection. West v. Southern P. Co. pany was not liable, as the plaintiff had done the same work for several months 323. 85 Fed. 392.

without any intimation on his part that be was unable to carry it on; and I continues his work even though he Similar language was employed by Mar- of the Law Reports). tin. B., in his opinion: "I think that if "See, for example, Poll v. Hewitt the case had gone to the jury they must (1893) 23 Ont. Rep. 619 (§ 380, note have found a verdict for the defendants. 1, ante).

vidual opinion seems intended to be lim- But, as I entertained a very strong motives of commiseration. The plain-1 The earliest case in which this sit- tiff brought the accident upon himself; uation is illustrated is Skipp v. East- for if he found that he could not do the ern Counties R. Co. (1853) 9 Exch. 223, work which was set him, he ought to 3 C. L. Rep. 185, 23 L. J. Exch. N. S. have declined it in the first instance.

he was unable to carry it on; and I continues his work, even though he therefore considered him a voluntary knows of the risk and does not remonagent." "The defendants," said Parke, strate, does not preclude his recovering B., "were bound to use all due and reain respect of the breach of duty, by reasonable care only. Here the plaintiff son of the doctrine. Smith v. Baker was engaged in the same work for sev- [1891] A. C. 325, 60 L. J. Q. B. N. S. eral months, and made no complaint 683, 65 L. T. N. S. 467, 55 J. P. 660, 40 whatever as to the inadequacy of the Weck. Rep. 392, per Lord Herschell (p. means employed. If he felt that he was 365 of the Law Reports). See also in danger by reason of the want of a Yarmouth v. France (1887) L. R. 19 Q. sufficient number of fellow servants, he should not have accepted the service."

Week. Rep. 283, per Lindley, J. (p. 660

conclusively that he understood the hazardous nature of his environment, and which therefore serves merely to establish the existence of the single element upon which, in this point of view, the applicability of the maxim depends.4

On the other hand, under the modern English doctrine, the servant's expressions of dissatisfaction are naturally regarded as evidence that he was not volens within the meaning of the maxim.<sup>5</sup> Especially

'In Yarmouth v. France (1887) L. R. but long after he had been made aware 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. of its vicious nature he continued to 7, 36 Week. Rep. 281, Lopes, L. J., drive it. There was no evidence that argued as follows in his dissenting opin- Woodley ever made any complaint to his ion: "The point that Yarmouth was employer. Yarmouth, on the contrary not engaged to drive a dangerous horse complained, but continued in the emis met by the fact that he continued in ployment. Having regard to the judgthe service after he knew the horse was ments of the majority of the court, I dangerous; and his constant complaints do not think that what I have suggested may be regarded as evidence of his thorough appreciation of the risk he was incurring and of his willingness to incur that risk rather than relinquish his employment. After complaining he repoint in Membery v. Great Western mains in the service for a long time, R. Co. (1889) L. R. 14 App. Cas. 179, knowing the risk and knowing that no 58 L. J. Q. B. N. S. 563, 61 L. T. N. S. knowing the risk and knowing that no steps had been taken to prevent its continuance. This is more consistent with sin Smith v. Baker [1891] A. C. 325, his acquiescence in a disregard of his 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. complaints, and with a willingness to 467, 55 J. P. 660, 40 Week. Rep. 392, incur the risk, than with the contrary where the servant had been exposed for 516. In the latter case there is little, plaints. The latter said: "The coment case the evidence is strong to show their continuing to work, might be fairthat Yarmouth thoroughly understood ly construed as an intimation to the deon Woodley's Case (see § 376, note I, they were willing to submit to it or supra.) the learned judge said: "The to accept the risk of it." only distinctions that I can find between that case and the present are the follow- L. R. 557, it was held that the serving: Woodley was hired to do danger ant could recover where the evidence ous work, and knew its dangerous character and attendant risks. Yarmouth of a defect in a machine, that the work was hired to do work not dangerous, had been stopped for the purpose of viz., amongst other work to drive remedying the defect, and that when he horses, which most frequently are man-resumed work he was told it was workageable. The horse which did the mis- ing properly. Cave, J., said that merechief was intrusted to his care after he ly going on with work is not enough to entered on the employment, and it was let in the maxim; to produce that rethen first he learned its propensities; sult there must be something to show

furnishes any substantial ground for distinction."

See also the extract given in § 381, 566, 38 Week. Rep. 145, 54 J. P. 244.

incur the risk, than with the contrary where the servant had been exposed for view.

The present case seems two weeks to the danger which produced a stronger case of voluntary exposure his injury, two members of the house, to danger than that of Thomas v. Quar- Lord Halsbury (p. 337) and Lord Wattermaine (1887) L. R. 18 Q. B. Div. son (p. 357) explicitly rejected the 685, 56 L. J. Q. B. N. S. 340, 57 L. T. contention that his remedy was barred N. S. 537, 35 Week. Rep. 555, 51 J. P. because he had made repeated comif any, evidence that Thomas knew of or plaints made to the foreman by his felappreciated the danger; but in the preslow workmen, coupled with the fact of the danger to which he was exposing fendants that they must either discon-himself. With a knowledge of the dantinue the vicious practice of slinging ger, though complaining, he continues stones over the heads of their workmen in the service, indicating thereby a will- or take the consequences. It was a ingness to incur the risk rather than protest against the practice, which does give up his employment." Commenting not naturally or necessarily imply that

In Bacon v. Dawes (1887) 3 Times

will a court refuse to hold the action not maintainable, as a matter of law, where the servant's protest elicited from the master a promise that the dangerous conditions should be remedied. See chapter xxII., post. But where the period during which the servant continued to work was so long that the only inference which can reasonably be drawn is that he had resolved, however reluctantly, to make the best of a dangerous situation, it would seem the presumption of an acceptance of the risk becomes so strong that it cannot be disturbed by evidence that he had often expressed his dissatisfaction.7

384. Existence of risk contemporaneous with or subsequent to entry upon the employment.—(Compare § 283, ante.)—Taking the Massachusetts decisions as they stood a few years ago, the doctrine then prevailing might, it would seem, be enunciated in this form: that, in cases where the risk to which the servant's injury was due existed when he commenced the performance of his contract, proof that he was chargeable with an appreciation of that risk would justify the court in declaring, as a matter of law, that he was volens in regard to it; while on the other hand, in cases where the risk in question had

on, that he had made no complaint, and that he understood and acquiesced in the danger.

In Sanders v. Barker (1890) 6 Times L. R. 324, it was laid down broadly that evidence of a remonstrance by the servant tended to negative the inference of

voluntary action on his part. In Brooke v. Ramsden (1890) 63 L. T. N. S. 287, 55 J. P. 262, Mr. Justice Cave remarked that "if everyone who complained or knew of a defect was held to be disentitled to recover, bad masters would only have to point out defects to put themselves in a better position than masters who took all possible pains to ensure the safety of their workmen."

Where a machine became unfenced Where a machine became unfenced after the servant entered the employment, and he was injured, after making complaint, while he was pointing out the defect to the employer's engineer, the question of his consent was held to be for the jury. The proper inference from his complaining and not getting the defect removed is that he let the master take the risk. Wallace v. Culter Paper Mills Co. (1892) 19 Sc. Sess. Cas. 4th series, 915. Cas. 4th series, 915.

In Dean v. Ontario Cotton Mills Co. (1887) 14 Ont. Rep. 119, it was held that evidence of a complaint made by the servant justified the inference that Boston Gaslight Co. (1893) 158 Mass. he had not consented to take the risk. 135, 47 L. R. A. 161, 32 N. E. 1119, he had not consented to take the risk.

By an Australian court it has been

that he was perfectly contented to go declared that the maxim is not a bar to an action merely because a servant, although he objects to his master's mode of driving, voluntarily allows himself to be driven by him. The master is still bound to exercise skill and proper caution. Bateman v. Moffatt (1868) 5 W. W. & A'B. (Victoria) 125, Reversed in (1869) L. R. 3 P. C. 115, 22 L. T. N. S. 140, 6 Moore P. C. C. N. S. 369, but not on this point.

"Foley v. Webster (1892) 2 B. C. 138. Thus, in Membery v. Great Western R. Co. (1889) L. R. 14 App. Cas. 179, 58 L. J. Q. B. N. S. 563, 61 L. T. N. S. 566, 38 Week. Rep. 145, 54 J. P. 244, where the plaintiff had remained in the service several years after the alleged breach of duty in not furnishing a helpcr, all the law lords, including some who afterwards concurred in the decision in *Smith* v. *Baker* [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 40 Week. Rep. 392, 65 L. T. N. S. 467, 55 J. P. 660, were of opinion that the fact of the servant's having made repeated demands for additional assistance, and protested against the dangers to which he was exposed on account of its not being furnished, will not prevent the maxim Vo-lenti non fit injuria from being a conclusive bar to his action.

'This is the effect of O'Maley v. South

supervened after he began work, the applicability of the maxim was essentially a matter to be determined by the jury.2 But this doctrine has now been definitely repudiated in that state (see § 376, b, supra), and there can be very little doubt that the distinction suggested by the decisions just referred to is neither warrantable on logical grounds nor sustained by any adequate authority.

The objections to which it is open on the former score are sufficiently obvious. Although a person who is seeking employment generally enjoys a larger liberty of action in regard to the acceptance or rejection of work which involves an abnormal amount of danger than one who, after he has entered upon the performance of his duties, finds himself confronted by the necessity of choosing between incurring an additional peril or looking for a new place, yet the unwillingness to decline a situation which is desirable, except in the single respect that some of the instrumentalities are in a bad condition, is a feeling which is the same in kind as his unwillingness to throw up a situation having the same drawback. There is, accordingly, no satisfactory grounds upon which it can be affirmed that evidence of the servant's having had notice of a risk before he entered the employment should be regarded as raising an absolute bar to an action for injuries due to that risk, while voluntariness of action is not a necessary inference from evidence that he obtained knowledge of a risk after entering the employment, and with that knowledge went on working. To ascribe essentially different legal consequences to the operation of a specific constraining motive, simply because it may exercise a somewhat more powerful influence in the one case than in the other, is, it is submitted, wholly unjustifiable. There is clearly no logical alternative between refusing altogether to treat this feeling as a factor in the problem, and declaring it to be a constant quantity in that problem, the effect of which is that, whether the extraordinary risk existed when the contract of service was made, or only arose after-

<sup>2</sup>Such were the circumstances involved in Fitzgerald v. Connecticut River Paper Co. (1891) 155 Mass. 156. 29 N. E. 464: Mahoney v. Dore (1892) 155 infra, ad finem.) The court said it was Mass. 513, 30 N. E. 366. In the latter case it was considered that the effect Massachusetts which were necessarily of Smith v. Baker [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 40 Week. Rep. 392, 65 L. T. N. S. 467, 55 J. P. 660, was that "a servant who continues to work where he is exposed to a danger that the presumptions with reference to which he understands and appreciates, and which results from his employer's negligence, and which he did not assume risk existed when the servant began negligence, and which he did not assume the service, does not, as matter of law, the employment.

<sup>2</sup>Such were the circumstances involved voluntarily assume it by merely remain-

negligence, and which he did not assume risk existed when the servant began by his implied contract when he entered work, or was afterwards superadded to

wards, the servant's assumption of that risk cannot be inferred from his knowledge alone.

It will be observed that, in this point of view, the question whether the contract under which the servant was working was one which bound him for a definite period, or one which was terminable at will, is wholly immaterial. The action is in no event sustainable unless the master has been guilty of some act of commission or omission which, when considered without reference to the servant's knowledge, and possibly whether that knowledge be treated as a factor or not (see § 374, supra), constitutes a breach of duty, and that breach of duty clearly absolves the servant from any obligation under which he may otherwise lie to remain in employment for a certain term. The most that can be said with regard to such an obligation is that, if such a term had come to an end between the time when the risk was discovered and the injury was received, that school of thought which regards the servant as a free agent will naturally view the fact of his having failed to take advantage of the expiration of the term as being absolutely conclusive evidence of his consent to acquiesce in the situation.3

The authorities are in full accord with the conclusions to which this reasoning conducts us.

Of none of these English decisions can it be reasonably affirmed that the time when the risk became an incident of the servant's environment was really treated as a differentiating factor. In those instances in which the risk existed when the servant began work, he was held unable to recover either because, as under the older theory, his knowledge was deemed to be conclusive proof that he had consented to incur the risk,4 or because, as under the later theory, the facts were such that a jury could not reasonably infer involuntary action.<sup>5</sup> The decisions in which the maxim is held to be a bar to recovery for injuries caused by a risk superadded after entry into the

<sup>8</sup> In Smith v. Baker [1891] A. C. 325, if a servant found himself exposed to a 60 L. J. Q. B. N. S. 683, 65 L. T. N. S. new danger after his term of employ-467, 55 J. P. 660, 40 Week. Rep. 392, ment had begun, the right course for Lord Bramwell, speaking with special him to take was to sue for a breach of reference to the terms of the contract the engagement, and that, if he continof hiring, under which most English laued work with a knowledge of the conditional states of the conditions of th fore his last week's work was under a contract made by the plaintiff, with full knowledge of the risk. If we suppose Exch. N. S. 521. the contract was from week to week till solution of the does not give the notice." In the solution of the does not give the notice. In the solution of the does not give the notice. The solution of the solut

borers work, said (p. 346 of Law Re-borers): "In these services every week claiming any indemnity for an injury there is a new engagement, and, there-traceable to that danger.

employment are governed by precisely the same considerations, the former being the rationale of the conclusion arrived at in the older cases,6 the latter being relied upon in those of a more recent date.7

The negative testimony which is thus furnished against the soundness of any theory which would place on a different footing risks which existed when the employment began and risks subsequently added thereto is corroborated by the fact that none of the cases, either early or recent, in which the maxim was held not to be applicable. attach any controlling importance to the time when the risk came into existence, the specific grounds upon which recovery was allowed being either that the duty infringed was statutory,8 or that knowledge was not of itself conclusive of the voluntary character of the servant's actions.9 Various specific circumstances are adverted to by the courts as evidence tending to negative such voluntary action (see preceding sections); but there is no suggestion that the servant's position is in any respect strengthened by the fact that the risk was one not originally incident to the employment.

The American cases lend even less support, if that be possible, than those of the English courts, to the doctrine stated at the commencement of this section. Setting aside the suggestions contained in the Massachusetts cases there cited, the authorities unanimously hold that the maxim constitutes a bar to the action in any case in which the servant is proved to have continued work with an appreciation of that

\*Skipp v. Eastern Counties R. Co. Co. (1887) 14 Ont. Rep. 119; Foley v. (1853) 9 Exch. 223, 23 L. J. Exch. N. Webster (1892) 2 B. C. 138. S. 23, 3 C. L. Rep. 185; Senior v. Ward (1859) 1 El. & El. 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261; Griffiths v. Gidlow (1858) 3 Hurlst. & N. 648, 27 L. J. Exch. N.

7 Membery v. Great Western R. Co. (1889) L. R. 14 App. Cas. 179, 58 L. J. Q. B. N. S. 563, 61 L. T. N. S. 566, 38 Week. Rep. 145, 54 J. P. 244.

<sup>8</sup> Britton v. Great Western Cotton Co. (1872) L. R. 7 Exch. 130, 41 L. J. Exch. N. S. 99, 27 L. T. N. S. 125, 20 Week. Rep. 525.

Risk existing when work begun.-Williams v. Birmingham Battery & In this connection it should be re-Metal Co. [1899] 2 Q. B. 338, 68 L. J. marked that, although the actual sub-Q. B. N. S. 918; Greenhalgh v. Cwma-Rep. 425; Dean v. Ontario Cotton Mills livered in the House of Lords, that the

Risk superadded after employment began.—Yarmouth v. France (1887) 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283; Smith v. Baker [1891] A. C. 325, 60 L. J. Q. B. N. S. 683, 40 Week. Rep. 392, 65 L. T. N. S. 467, 55 J. P. 660; Baxter v. Wyman (1888) 4 Times L. R. 255; Amos v. Duffy (Q. B. D. 1890) 6 Times L. R. 339; Brooke v. Ramsden (1890) 63 L. T. N. S. 287, 55 J. P. 262; Bacon v. Dawes (1887) 3 Times L. R. 557; Marley v. Osborn (1894) 10 Times L. R. 388; Sim v. Dominion Fish Co. [1901] 2 Ont. L. Rep.

stance of the decision in Smith v. Baker Man Coal Co. [1891] 8 Times L. R. 31; [1891] A. C. 325, 60 L. J. Q. B. N. S. Medway v. Greenwich Inlaid Linoleum 683, 40 Week. Rep. 392, 65 L. T. N. S. Co. (1898) 14 Times L. R. 291; Wallace 467, 55 J. P. 660, is correctly stated by v. Culter Paper Mills Co. (1892) 19 Sc. the supreme court of Massachusetts in Sess. Cas. 4th Series, 915; Rodgers v. the case cited in note 2, supra, there is Hamilton Cotton Co. (1893) 23 Ont. no intimation, in any of the opinions derisk, whether that risk existed when he began work,10 or supervened subsequently.11

385. Length of time which elapsed between the discovery of the risk and the occurrence of the accident.— (Compare §§ 284, 302, ante.) -The cases in which the maxim is directly discussed throw no light whatever upon the materiality of the question whether the length of the period which elapsed between the time when the servant ascertained the existence of the risk and the time when he received the injury was a long or short one. Under the English rule this question can very seldom be of any practical importance, inasmuch as the opinion of the jury must in any event be taken in the first instance; and since the most recent decision on the subject by the court of appeal,1 it seems difficult to maintain that any period of continuance, however long, would be conclusive against the servant.

Under the American rule, it might be that some courts would, in a case where the maxim was specifically relied upon, be unwilling to draw a legal inference of voluntary action under circumstances such as those discussed in § 302, ante (notes 6-9). But it is merely a matter of conjecture what position they would take in these instances. As a matter of fact it will almost always happen that, where the servant is held to have assumed a new risk, the injury was received a sufficient time after the servant's knowledge was acquired to render it not unreasonable to say that he had had an opportunity for considering whether he should go on with or give up the work. The time may be only a few hours, or it may be several years, but if it has been long enough to furnish an opportunity for real deliberation and an estimate of the comparative advantages of continuing in or leaving the employment, it would seem that the respective rights of the master and servant are definitely fixed, and that an extension of the period can carry with it no additional or characteristic legal results.

386. Act rendered necessary by the arrangement of the plant .-There is some authority for the doctrine that, where the character of

ville & N. R. Co. v. Banks (1894) 104

fact of the servant's environment hav- 13 So. 8; Bridges v. Tennessee Coal, I. ing been rendered more dangerous after & R. Co. (1895) 109 Ala. 287, 19 So. he entered the employment is in itself 495; Alabama G. S. R. Co. v. Davis to be regarded as a material circum- (1898) 119 Ala. 572, 24 So. 862; Louisstance.

<sup>11</sup> Birmingham R. & Electric Co. v. Al- Metal Co. [1899] 2 Q. B. 338, 68 L. J. len (1892) 99 Ala. 359, 20 L. R. A. 457, Q. B. N. S. 918.

a servant's action in taking a certain route through his master's premises is in question, the fact that, owing to manner in which the plant was arranged, he had practically no alternative but to take that route, tends in some degree to show that he was not a free agent in subjecting himself to the risks which were thus encountered.1

'In one case it was remarked that evidence which showed that an employee the risk of using the steps. Fitzgerald had no way of leaving his employer's v. Connecticut River Paper Co. (1891) mill except by going down steps covered 155 Mass. 155, 29 N. E. 464. with ice was proper to be considered in

## CHAPTER XXI.

## WHEN KNOWLEDGE OF A RISK IS IMPUTED TO A SERVANT.

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  - 390. Provinces of court and jury in determining whether knowledge shall be imputed to a servant.
  - 391. When a servant is chargeable with knowledge; generally.
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- C. MINORITY AS A DIFFERENTIATING ELEMENT; SIGNIFICANCE OF.
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  - 399. Cases illustrating the capacity for appreciating dangers, which is imputed to minor servants.
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- D. SERVANT'S MEANS OR OPPORTUNITIES OF KNOWLEDGE.
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- D. COMPARISON BETWEEN THE POSITION OF MASTER AND SERVANT IN REGARD TO IMPUTED KNOWLEDGE.
  - 405. Servant's means or opportunities of knowledge equal to those of the master.
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- E. SERVANT'S DUTY AS REGARDS INSPECTION AND INQUIRY.
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    - a. Servant not bound to take notice of concealed defects.
    - b. Different standards of care in the case of master and servant.
    - Servant entitled to assume that the master has performed his duties properly.
  - 410. Doctrine considered with reference to the sufficiency of the complaint.
  - 410a. Doctrine considered with reference to the propriety of the instructions.
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    - 411. Decisions illustrative of the doctrine.
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    - 413. Limits of the servant's exemption from the duty of inspection; generally.
  - 413a. Duty of inspection; when predicable from circumstances indicative of danger.
    - 414. Duty of inspection inferred from the nature of the functions discharged by the servant.
    - 415. When this inference is not drawn.
    - 416. Duty of inspection under rules, special notices or orders, and express contracts, generally.
  - 417. Limits of the duty under these circumstances.

As to the circumstances under which a servant is chargeable with knowledge of rules, see § 227, ante.

Other cases bearing upon the circumstances under which knowledge of risks is imputed to servants are discussed in the four following chapters, with special reference to the elements indicated in the titles.

387. Introductory.—In all the cases of the types reviewed in the five preceding chapters the primary and essential, though not the sole, question to be determined is whether the servant appreciated the risk to which his injury was due. Direct testimony bearing upon that question may be, and sometimes is, adduced; but in the great

The fact that a servant who fell into that he had the danger in mind. Caran uncovered vat while passing through rigan v. Washburn & M. Mfg. Co. a dimly lighted room was moving cautiously just before the accident indicates

majority of instances the answer which it should receive must be a matter of inference and deduction from certain facts which tend to establish either the conclusion that the servant ought, in the exercise of reasonable care, to have known of and comprehended the risk, or the conclusion that he could not, by the exercise of reasonable care, have obtained such knowledge and comprehension of the risk. The ensuing chapter will be devoted to a review of the cases which turn upon the effect of circumstantial evidence of this description.

## A. General principles.

388. Constructive and actual knowledge identical for juridical purposes.— The proposition that a servant is presumed to have observed and understood whatever an ordinarily prudent and intelligent person having the same means and opportunities as the servant for acquiring a knowledge of the material facts and estimating their significance, would have observed and understood, and that he is not presumed to have observed or understood anything more than this, is as completely axiomatic as the corresponding proposition, which defines the extent of the master's liability. See chapter x., ante. That is to say, the true test of his right to recover is whether he ought to have known and comprehended the danger in question, and not whether he did in fact know and comprehend it. 1 As the abstract correctness of this principle is taken for granted in all the cases cited in the following sections, it would be a work of supererogation to quote more than a very few of the statements in which it has been recognized by the courts.<sup>2</sup> In any case where the evidence is susceptible of the construction that the servant ought to have known of

'Klatt v. N. C. Foster Lumber Co. faculties nature has given him." Day (1896) 92 Wis. 622, 66 N. W. 791. v. Cleveland, C. C. & St. L. R. Co. 2"The master has a right to expect (1893) 137 Ind. 210, 36 N. E. 854. him [i. e., the servant] to be alert to in— In his dissenting opinion in Davis v.

him [i. e., the servant] to be alert to inform himself of existing conditions, and he cannot attack the master from the cannot attack the master from the L. R. A. 170, 51 N. E. 20, Knowlton, J., shelter of unjustifiable ignorance of the business, machinery, and methods which tractual assumption of the open and

where he fails to discover the danger, In Brown v. Louisville & N. R. Co. if he made no attempt to employ the (1895) 111 Ala. 275, 19 So. 1001, the

business, machinery, and methods which he is employed to use. Actual ignorance obvious permanent risks of the business, will not alone suffice to charge a master; said: "The rights of the parties dethe ignorance must also be excusable." pend, not necessarily upon that which Ragon v. Toledo, A. A. & N. M. R. Co. (1893) 97 Mich. 265, 56 N. W. 612.

"The law requires that men shall use the senses with which nature has endowed them; and when, without excuse, one fails to do so, he alone must suffer right to suppose that he understands the consequences, and he is not excused where he fails to discover the danger.

In Brown v. Louisville & N. R. Co.

the risk to which his injury was due, and it is therefore material that the jury should comprehend the doctrine that obligatory knowledge stands, in a juridical point of view, upon the same footing as actual knowledge, it is error for the trial judge to give any instructions which directly contravene that doctrine, or to omit to explain its significance and scope in the instructions formulated by himself,4 or to refuse to comply with a request by the defendant for an instruction in which it is enunciated,5 or to give, at the plaintiff's request, an in-

court used the following language: Phænix Cotton Mills (1901) 106 Tenn. "Notice is not, in such cases, of the equivalent of knowledge. A brakeman an instruction that the defendant, in orwould have notice of a rule forbidding him to uncouple moving cars if he had information that his employer had ence of a certain obvious defect); Wells adopted and promulgated a set of rules v. Coe (1886) 9 Colo. 159, 11 Pac. 50 for the conduct of employees. This (jury in effect told that the servant's would put him on inquiry which, if means of knowledge concerning the conpursued, would lead to a knowledge of ditions which caused the injury could the particular rule. Still, until the inquiry has been made and the knowledge N. C. Foster Lumber Co. (1896) 92 Wisgained, his conduct as to care or neglification. quiry has been made and the knowledge N. C. Foster Lumber Co. (1896) 92 Wis. gained, his conduct as to care or negligence cannot be measured by the rule,—

a factor which did not operate upon him

An instruction in an action for perin the act done. He might be negligent sonal injuries to a painter whose cloth-in not pursuing the inquiry, but such ing caught upon a set screw in a revolv-negligence would be only a remote cause ing shaft, that because he asserted that of the injury suffered by doing the act in a manner forbidden by the unknown truding set screws he did not assume rule." It is difficult to see how this the risk of working near a coupling proargument can be reconciled with the vided with such protruding screws, is principle now under discussion.

that the jury are likely to draw the inference that the servant's action is maintainable unless he actually knew of and comprehended the danger in question. Louisville & N. R. Co. v. Hall lor-Craig Corp. v. Hage (1895) 16 C. C. (1890) 91 Ala. 112, 8 So. 371 ("notice," A. 339, 32 U. S. App. 548, 69 Fed. 581. said the court, "meets all the require-"
"Union P. R. Co. v. Monden (1893) 50 ments of the law"); Atchison, T. & S. F. R. Co. v. Alsdorf (1892) 47 III. App. 200; Pennsylvania Co. v. Ebaugh (1898) 152 Ind. 531, 53 N. E. 763; Louisville R. Co. v. Shivell (1892) 13 Ky. L. Rep. 902, 18 S. W. 944; Hewitt v. Flint & P. M. R. Co. (1887) 67 Mich. 61, 34 N. W. 659 (disapproving instruction to effect that trainmen were not negligent in failing to secure a car on a side track, if they did not know that it followed them out onto the main track); Hill v. Meyer Brothers' Drug Co. (1897) 140 Mo. 433, 41 S. W. 909 min Atha & I. Co. v. Costello (1899) 63 alleged defects and the dangers of at-

ing shaft, that because he asserted that he could not see that there were proerroneous, where his testimony warrants <sup>3</sup>As, where the language used is such an inference that he knew that the shaft was not perfectly smooth, and that there might be some projection near the screws which would catch his clothing if it came in contact with them. Tay-

Kan. 539, 31 Pac. 1002.

<sup>6</sup> Haley v. Jump River Lumber Co. (1892) 81 Wis. 412, 51 N. W. 321, 956; (train wrecked by large log lying near the track); Illinois C. R. Co. v. Sporleder (1900) 90 Ill. App. 590 (section hand injured while attempting to drive a claw bar under a sunken spike holding

a rail).

In a case where the defense relied upon was contributory negligence, it was held error to refuse to give an instruction to the effect that if the jury found from the evidence that the in-(jury were told that they might find jured servant knew, or by the exercise the servant negligent "if they believed of ordinary care and prudence would that he knew of" the danger); Benjahave known in time to avoid injury, the N. J. L. 27, 42 Atl. 766; Ferguson v. tempting to manipulate them under the

struction which tells the jury in unqualified terms that they are to find for him if they believe that the defendant did not use reasonable precautions to secure his safety.6

On the other hand, any instruction is unexceptionable and proper which lays it down that, in so far as the servant's right of action depends upon his knowledge, it is a matter of indifference whether the danger was actually known to him, or whether he ought, in the exercise of ordinary care, to have known of it.7

As the servant is only bound to exercise ordinary care to the end that he may ascertain the dangers connected with his employment, it is error to give an unqualified instruction that it is his duty, on entering the employment, to ascertain those dangers.8 Compare §§ 408 ct seq., infra.

In spite of a general allegation of the absence of knowledge on the servant's part, a complaint is demurrable if the specific allegations show that he must have known of the defects, or had the same means and opportunity for such knowledge as the master possessed.9

Special findings that the plaintiff might have known of the defect which caused his injury, and the manner in which the defective appliance was operated, preclude the entry of a judgment in his favor. 10

389. Servant's failure to know of certain risks may be treated as specific contributory negligence.— For the purposes of the rule stated in the preceding section, the ultimate logical fact which is considered is the servant's imputed comprehension of the risk. But it is also evident that, in any case in which his right to recover depends upon its being shown that he was excusably ignorant of the danger, and it is proved that his ignorance was not excusable, his inability to maintain the action may, by shifting the standpoint, be referred to the conception that his failure to acquire the obligatory knowledge of

to manipulate them was negligence. Rep. (L) 4. Muldowney v. Illinois C. R. Co. (1874) An instru 39 Iowa, 619.

<sup>6</sup>Aldridge v. Midland Blast Furnace Co. (1883) 78 Mo. 559.

An instruction to the effect that "an employee must make reasonable use of his senses to avoid danger and injury in the course of his employment" states the law correctly. Hughes v. Winona & St. P. R. Co. (1880) 27 Minn. 137, 6 N. W.

A charge to the effect that if a servant goes on working a machine, knowing, or having the opportunity of knowing, its faulty construction, he takes the risk on himself, has been approved.

circumstances in evidence, the attempt Litton v. Thornton (1881) 7 Vict. L.

An instruction that if the danger in question was one which was known and comprehended by him, or was so open or obvious that, considering his age, intelligence, experience, judgment, and discretion, he ought, in the exercise of reasonable care, to have known it, then he assumed the risk, is proper. Renne v. United States Leather Co. (1900) 107 Wis. 305, 83 N. W. 473. \*Holman v. Kempe (1897) 70 Minn. 422, 73 N. W. 186.

<sup>o</sup>Louisville & N. R. Co. v. Kemper (1897) 147 Ind. 561, 47 N. E. 214. <sup>10</sup> Moran v. Harris (1884) 63 Iowa, 390, 19 N. W. 278,

the danger was contributory negligence. Negligence, as has been observed, may, and often does, consist in failing to know, as well as in failing to do.1

390. Provinces of court and jury in determining whether knowledge shall be imputed to a servant. - In all the cases it is asserted or taken

Hewitt v. Flint & P. M. R. Co. mentioned in the same case. Gustafsen (1887) 67 Mich. 61, 34 N. W. 659.

"The servant is culpable if he fail to discover such a defect as would have been apparent without a thorough examination, if he had used ordinary diligence to discover it." Chesson v. John L. Roper Lumber Co. (1896) 118 N. C. 59, 23 S. E. 925.

"It is the [servant's] duty to use ordinary care in informing himself of the dangers and responsibilities attending his employment. . . . Moreover, the servant's duty in this regard is a continuing one. He may not close his eyes to serious defects or weaknesses in machinery or appliances, occasioned by use, of which, considering his employment, he might reasonably take notice." Wells v. Coe (1886) 9 Colo. 159, 11 Pac. 50.

Where ordinary inspection and carefulness will enable the employee to avoid the danger, there he will be required to use such inspection and carefulness. Steinhauser v. Spraul (1893) 114 Mo. 551, 21 S. W. 515, 859.
The phrase "negligent in not know-

ing" occurs in George v. Clark (1898) 29 C. C. A. 374, 56 U. S. App. 505, 85 Fed. 608.

For other cases in which the conception that the servant's failure to observe a danger may be treated as specific contributory negligence has been recognized, see Brooks v. Northern P. R. Co. (1891) 47 Fed. 687; Lake Shore & M. S. R. Co. 41 Fed. 051; Lake Shore & M. S. R. Co. v. Stupak (1886) 108 Ind. 1, 8 N. E. 630; Western & A. R. Co. v. Bradford (1901) 113 Ga. 276, 38 S. E. 823; Hill v. Gust (1876) 55 Ind. 45; Haynes v. Erk (1893) 6 Ind. App. 332, 33 N. E. 637. Fieheler v. Hanagi (1880) 40 637; Eicheler v. Hanggi (1889) 40
Minn. 263, 41 N. W. 975; Fredenburg
v. Northern C. R. Co. (1889) 114 N. Y.
582, 21 N. E. 1049; Albert v. New York
C. & H. R. R. Co. (1894) 80 Hun, 152,
29 N. Y. Supp. 1126; Philadelphia & R. Z. R. C. v. Huber (1889) 128 Pa. 63, 5 L. R. A. 439, 18 Atl. 334; Bemisch v. Roberts (1891) 143 Pa. 1, 21 Atl. 998.

The two kinds of contributory negligence—the failure to observe a continuing danger incident to the work, and the plaintiff was guilty of a want of ordiomission to use due precautions at the nary care which contributed to the intime of the accident—are sometimes jury. This precludes his recovery."

v. Washburn & M. Mfg. Co. (1890) 153

Mass. 468, 27 N. E. 179.

In Goltz v. Milwaukee, L. S. & W. R. Co. (1890) 76 Wis. 136, 44 N. W. 752, the question was as to the true construction of this finding in a special verdict: "Up to the time the hook was delivered to the plaintiff there was a defect in it that could be observed by the owner of the hook, or parties that used it, if they were exercising ordinary care in using or taking care of it." The court said: "The learned counsel of the respondent contends that this finding refers only to the defendant, the owner of the hook, and to parties that used it for the defendant before it was delivered to the plaintiff, and is a finding of the defendant's negligence. But the language is too broad and comprehensive for such a restrictive meaning. It may embrace the defendant, but it also embraces the plaintiff and all persons who used the hook. It is impossible to construe it otherwise. 'Up to [or at] the time the hook was delivered to the plaintiff there was a defect in it that could be observed by parties that used it if they were exercising ordinary care in using it' (or while using it). The defect at that time was such, and had been such, as to be observable to the plaintiff or any parties that used it, including the plaintiff, if he or they was or were exercising ordinary care in or while using it. The legal effect is inevitable that the defect was such that the plaintiff could have observed it if he had exercised ordinary care while he was using it. If he had observed or discovered the defect he was then negligent in continuing to use it. If he did not observe it then he was negligent in not observing it. In either case he was not exercising ordinary care, or he was guilty of a want of ordinary care. If he had exercised ordinary care he would not have been injured by that defect, He would have avoided it. The jury in this finding found certain facts, the legal conclusion of which is that the

for granted that there are two situations in which the question whether the servant was chargeable with notice of the risk from which his injury resulted must be left to the jury to determine, and in which their findings with regard to that question are conclusive in a court of review:

(a) Where the evidence is conflicting as to the material circumstances which are available for the purpose of determining whether the servant ought to have known of the risk. It is clear that such a conflict is presented where the evidence tending to establish ignorance is that of the injured servant himself, whether it merely has a direct relation to the physical conditions existing at or before the time of the accident,<sup>2</sup> or amounts to a general denial of his possession of the knowledge which it is sought to impute to him. But it is also clear

the planking between the rails over a been pulled up and was dragging along street crossing was so obvious that an the ground struck an obstacle, and, beemployee ought to have known of it is ing twisted around, struck the plainfor the jury, where the evidence is con-tiff). flicting as to its size and whether or

where the evidence was that he had been using it for a considerable time, and that he knew it had been broken pre-

was to take several turns found a post and assumed the risk of injury from the with the end of a cable which was atbreaking of the belts occasioned by detached at the other end to a car, and hold fendant's neglect to lace them properly. on to the cable until it was drawn taut McGar v. National & P. Worsted Mills by the movement of the car, and thus (1901) 22 R. I. 347, 47 Atl. 1092. either broke or pulled up the post.

"See the cases cited in the following Union P. R. Co. v. O'Hern (1888) 24 note,

The question whether or not a hole in Neb. 775, 40 N. W. 293 (post which had

<sup>2</sup>Whether or not an employee at work not there were others like it in the in a box car was guilty of contributory yard, as well as upon the question of negligence in failing to discover a hole what caused it. Valley R. Co. v. Keegan in the car floor about 6 inches wide and (1898) 31 C. C. A. 255, 58 U. S. App. 10 inches long, 14 inches from the door jam, and 5 or 6 inches from the wall of It is for the jury to say whether a the car, precluding recovery for injuries servant injured by the breaking of a by stepping into the hole, is for the ladder understood the risk of using it, jury, upon his testimony that the hole was concealed by pieces of bark and by snow and straw, and that the accident occurred about twenty minutes after he viously and was spliced; while the testimony as to the strength of spliced lad-tified that the hole was in plain sight, ders was conflicting; some witnesses and had been mentioned on the car. stating that they were only from one King v. Chicago & N. W. R. Co. (1899) half to three fourths as strong as oras strong. Jones v. Pacific Mills workman injured by the collapse of the (1900) 176 Mass. 354, 57 N. E. 663.

On the ground that the witnesses had ciently shored up, swore that he had obexpressed different opinions as to the served nothing to warn him of the existdangerous character of the work, the ence of danger. Schmit v. Gillen (1899) question whether the servant should 41 App. Div. 302, 58 N. Y. Supp. 458. have so fully realized the perils to Where a servant injured by the parting which he was subjected by continuing of a belt in a spinning room of a mill to work that he should have left the testified that she had seen only one belt employment was held to be for the jury, break during her employment, and dein a case where a laborer was engaged in fendant showed that belts were frethe operation of pulling up signal posts quently breaking there, it could not be on a railway, and the method adopted said, as a matter of law, that the servwas to take several turns round a post ant assumed the risk of injury from the

that if the courts were always to decline to interfere with the verdict of a jury in cases in which the servant has thus testified in his own favor, their controlling functions would, for practical purposes, be confined within very narrow limits. There are, it may be supposed, very few trials in which the servant does not swear that the risk was unknown to him. Due weight is attached to this consideration; for, taking the cases as they stand, it seems permissible to say that such a denial is treated as being a merely corroborative element which furnishes an additional justification for a conclusion in itself not unwarrantable even if that element were abstracted. This predicament is exemplified by a case in which the servant's injury was traceable to dangers which could not be appreciated without experience or special technical training (see subtitle B, infra), and his own positive statement that he did not possess those qualifications has not been contradicted by any other witness; 4 by a case in which the minority of a female servant was treated as a sufficient reason for refusing to impute knowledge to her, as a matter of law, although she was skilled in her work; 5 and by the cases in which the servant's statement that the risk was not known to him is mentioned in connection with facts which justify the inference that his opportunities for obtaining such knowledge were not such that a reasonably observant man could not have failed to discover it. See subtitle D, infra. Both on principle

(properties of dynamite).

<sup>5</sup>Crocker v. Banks (1888) 4 Times L.

subd. z, infra.

Whether one who had for two years been a brakeman on a road, the regulation distance between tracks on which is 7 feet, knew, or ought to have known, it is a fair inference from the testimony that a certain siding was only 5 feet 6 that, considering the opportunities inches from the next track, and of the available for acquiring a knowledge of consequent danger, he testifying that he the location and height of an overhead

knew that certain ties at a place where S. C. 550. a switch had been removed projected unusually far is for the jury, where he tion for the jury where he has testified has testified that he did not know that that he did not know that the ditch the ties projected, though he had fre- into which he stepped had been dug, and quently stopped at or near them, and that he had never been on that particuit had been his custom to alight at a lar part of the spur track across which freight house close by to deposit his it had been dug. Hollenbeck v. Miswaybills, while the train proceeded a souri P. R. Co. (1897) 141 Mo. 97, 38 short distance to a passenger depot. S. W. 723, 41 S. W. 887.

Whitcher v. Boston & M. R. Co. (1900) Where a switchman was injured in at-70 N. H. 242, 46 Atl. 740.

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\*Mather v. Rillston (1894) 156 U.S. The question whether a railroad 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464 switchman was chargeable with notice of obvious defects in a switch should be submitted to the jury, where he denies R. 324. For facts, see § 399, note 1, knowledge thereof and his service at that point was mainly at night. Peirce v. Clavin (1897) 27 C. C. A. 227, 53 U.

S. App. 492, 82 Fed. 550.

A nonsuit is properly refused where did not know thereof, is for the jury. bridge on a railway, the plaintiff was Vorhees v. Lake Shore & M. S. R. Co. not chargeable with knowledge, and (1899) 193 Pa. 115, 44 Atl. 335. should have received instructions. Al-The question whether a conductor tee v. South Carolina R. Co. (1884) 21

The plaintiff's knowledge is a ques-

tempting to jump onto a moving train

and authority it is indisputable that if the servant's testimony is contrary to all probability when the rest of the evidence is considered, it may be disregarded by a court of review.

at a point where there was a pile of v. Morse (1893) 160 Mass. 143, 35 N. E. stones about 2½ feet high near the track, it cannot be said, as a matter of law, that he knew of the obstruction, where there were no other similar piles of stones along the track, and he testified that he had never seen the stones in question. Donahue v. Boston & M. R. Co. (1901) 178 Mass. 251, 59 N. E. 663.

Where a street-railway conductor, being ordered to change from one car to another at an unusual place, where the company had paving stones piled up near the track, which it was repairing, was thrown by the sudden starting of the car, as he was attempting to board it, and, striking against the stones, was rolled under it, he will not be held, as matter of law, to have assumed the risk arising from the presence of the stones; he testifying that his attention was first called to the stones at that time. North Chicago Street R. Co. v. Dudgeon (1900) 184 III. 477, 56 N. E. 796, Affirming (1899) 83 III. App. 528.

In a case where a servant was injured while coupling a car to an engine, he testified that he had not been on the engine much; that he did not think he had coupled a car to the front of the engine more than four times; that, when the engine first approached the car, it stopped 10 feet from it; that he did not notice the height of the car, and did not know that there was any danger that the bunter would pass under the car until he actually attempted to make the coupling. The defendant produced adverse testimony. The court held the question of the servant's contributory negligence to be one for the jury, adverting to the general principle that its function is not to pass upon the weight of the evidence, but merely to determine whether there was evidence which should be submitted to the jury. Lawless v. Connecticut River R. Co. (1883) 136 Mass. 1.

In the face of the plaintiff's own express assertion that he did not observe the dangerous conditions, a court cannot say, as a matter of law, that a servant working occasionally near a

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Knowledge of the risk is not a necessary inference where an employee not engaged in using the defective rope by the breaking of which he was injured testified that he had no knowledge of the defect. Thomas v. Ann Arbor R. Co. (1897) 114 Mich. 59, 72 N. W. 40.

Whether a stevedore engaged in stowing away lumber in the hold of a vessel where it was lowered through a hatchway, and who was injured by lumber slipping from a box in which it was being lowered, because there was nothing over the end of it and no warning as to its descent was given, assumed the unusual risk, there being evidence that the ends were usually closed, depends on whether the employer understood and had a right to believe that the stevedore knew and assumed it; and this is a question for the jury, though the stevedore testifies that such lumber was sometimes loaded in open Hennesey v. Bingham (1899) boxes. 125 Cal. 627, 58 Pac. 200.

In a case where a servant was injured by a machine which fell on him while he was attempting to move it, he is entitled to go to the jury, where his own testimony and that of his witnesses goes to show that he had never seen the machine before, and that he was required to handle it in a dim light. Walsh v. Peet Valve Co. (1872) 110 Mass. 23.

See also Thompson v. Chicago, R. I. & P. R. Co. (1900) 86 Mo. App. 141; Whitney v. Queen City Ice Co. (1900) 49 App. Div. 485, 63 N. Y. Supp. 535; Galveston v. Hemmis (1889) 72 Tex. 558, 11 S. W. 29.

<sup>7</sup> A statement by an employee that he did not know the risk of using a cracked saw for the purpose of sawing an iron plate is insufficient to overcome the presumption of knowledge resulting from an experience of fourteen years with machinery. Erdman v. Illinois Steel Co. (1897) 95 Wis. 6, 69 N. W. 993.

The testimony of a youth eighteen years of age at the time of the accident, planer was chargeable with a knowl- that he did not know that if he got his edge of the risk created by revolving fingers into the rolls of a straw cutter knives which he could not see from the they would be caught thereby, or that if position which he occupied, Veginan they were caught he would be injured,

(b) Where the evidence is of such a character that the proper inference to be drawn from it is a question with respect to which different opinions may not unreasonably be formed.8 This is the situation illustrated by most of the cases to be hereafter cited, in which the servant was allowed to go to the jury or to retain a verdict in his favor. Whether it actually exists in any given instance is a matter which, it is manifest, affords a very wide scope for a diversity of views, and which will, in practice, be determined according to the theory which in the jurisdiction where the right of recovery is being determined is entertained with respect to the proper significance of the extremely vague phraseology which is employed in this connection for the purpose of defining the boundary line between the prov-

a question would obviously have no v. Oregon Mfg. Co. (1870) 4 Or. 52; particular weight in jurisdictions where Galveston v. Hemmis (1889) 72 Tex. the plaintiff has the burden of proving 558, 11 S. W. 29; Litton v. Thornton that he was not negligent.

\*\*Rummell v. Dilworth (1885) 111 In an English case Pollock, C. B. is

Washington & G. R. Co. (1886) 5 Mackservant's means of knowledge is a ev. 144, Affirmed (1890) in 135 U. S. question of law (Dynen v. Leach [1857] 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 26 L. J. Exch. N. S. 221), but this re-1044; Powers v. Fall River (1897) 168 mark was presumably made with ref-Mass. 60, 46 N. E. 408; Magee v. North erence to the circumstances under dis-Pacific Coast R. Co. (1889) 78 Cal. 430, cussion. 21 Pac. 114; Ingerman v. Moore (1891)

does not raise a question for submission to the jury, where defendant, his employer, had a right to assume that he possessed the usual faculties of a boy of that age. Roth v. S. E. Barrett Mfq. 535: Elgin, J. & E. R. Co. v. Eselin Co. (1897) 96 Wis. 615, 71 N. W. 1034. Admissions by a brakeman suing for personal injuries incurred while coupling cars, that he could and did see the drawhead, and that the link and pin were properly adjusted, and his failure to deny that he knew the car had a sill, will render his statement that he did not have time to see the sill before the than a scintilla of evidence, which need not be submitted to the jury. Vany v. Peirce (1897) 26 C. C. A. 521, 54 U. S. App. 196, 82 Fed. 162.

It has been asserted that the guestion of an ap-th-graph of the cars and the submitted to the pure about her the unsound condition of an ap-th-graph of the cars and the submitted to the pure about her the condition of an ap-th-graph of the cars and the submitted to the pure about her the submound condition of an ap-th-graph of the cars and the submitted to the pure about her the submound condition of an ap-th-graph of the cars and the submitted to the pure about her the submound condition of an ap-th-graph of the cars and the submitted to the submitted whether the unsound condition of an ap- Co. (1897) 59 N. J. L. 226, 36 Atl. 473; whether the unsound condition of an ap- Co. (1897) 59 N. J. L. 226, 36 Atl. 473; pliance should have been perceived by Simmons v. Peters (1895) 85 Hun, 93, the servant is one of contributory negli- 32 N. V. Supp. 680; Mahaney v. St. gence, in respect to which the master Louis & H. R. Co. (1891) 108 Mo. 192, has the burden of proof, and which, by 18 S. W. 895; Muirhead v. Hannibal & consequence, he cannot ask to have with- St. J. R. Co. (1885) 19 Mo. App. 634; drawn from the jury. Atchison, T. & S. Higgins v. Missouri P. R. Co. (1891) F. R. Co. v. Mulligan (1895) 14 C. C. 43 Mo. App. 555; Moore v. St. Louis A. 547, 34 U. S. App. 1, 67 Fed. 569. Wire Mill Co. (1893) 55 Mo. App. 491; This reason for denying the power of a Loke Shore & M. S. R. Co. v. Fitzcourt to interfere in the decision of such patrick (1877) 31 Ohio St. 479; Stone a question would obviously have no v. Oregon Ma. Co. (1870) 4 Or. 52:

<sup>8</sup> Rummell v. Dilworth (1885) 111 In an English case Pollock, C. B. is Pa. 343, 2 Atl. 355, 363; *McDade* v. reported to have laid it down that the

inces of courts and juries. A comparison of the decisions adverse and favorable to the servant indicates very clearly that some judges claim and exercise more extensive powers than others in regard to the control and review of verdicts. Upon the whole, however, it seems impossible to deny that in cases of this class the general tendency of judicial opinion has been decidedly adverse to the servant, and that the courts have often encroached upon the proper domain of juries to an extent which cannot be justified under any reasonable conception of that partition of functions which is the essence of the common-law system of procedure.

In the great majority of instances the doctrine that the servant's constructive knowledge of a risk is a question with regard to which the finding of a jury is prima facie conclusive is usually asserted for the benefit of the servant. But this doctrine will, of course, inure to the advantage of the master under appropriate circumstances.9

391. When a servant is chargeable with knowledge; generally.— The juridical theory of imputed knowledge, which is applied in actions by a servant against his employer, is simply this: that he is or is not chargeable with a comprehension of the conditions which caused his injury and of the risks created by those conditions, according as it may reasonably be inferred that those conditions or those risks would or would not have been comprehended by a person of ordinary prudence, whose mental and physical capacities, both natural and acquired, and opportunities for observing the facts indicative of danger, were the same as those of the servant himself.1

ashes to remain on the track. N. E. 117.

¹This principle has been enunciated "A servant will be deemed . . . so frequently that it would be a waste to have notice of all risks which, to a of time and space to attempt to col-lect even a tithe of the statements in which it has been stated with more or less precision and amplitude. The following paragraphs will illustrate sufficiently the language used by the courts:

will assumed, all of the risks involved, under like circumstances would have but whether the risks are incident to comprehended the danger and the risk and naturally grow out of the employ- Craven v. Smith (1894) 89 Wis. 119, 61 ment in which he is engaged, and are N. W. 317. such as, taking his age, intelligence, and

\*\* \*\*Hughes v. Winona & St. P. R. Co.\*\* experience into account, he must be held (1880) 27 Minn. 137, 6 N. W. 553. to have appreciated if he saw, and such Plaintiff slipped on a pile of wet ashes as, if he did not see, he could have seen while coupling cars, and fell under the and understood if he had looked. If the wheels. Verdict for defendant upheld, risks are of this character, then they the jury having found that the plaintiff are said to be obvious, and the employee had reasonable means of knowledge of assumes them." Kenney v. Hingham the custom of the company to allow the Cordage Co. (1897) 168 Mass. 278, 47

person of his experience and understanding, are or ought to be open and obvious." Rummell v. Dilworth, (1885) 111 Pa. 343, 2 Atl. 355, 363.

An employee is not acquitted of assumption of the risk merely because he "The question in each case is not does not comprehend the danger; but whether the employee has actually obthe true test is whether an ordinarily served, and by a conscious act of the prudent person of his age and experience

Instructions are correct or erroneous, according as they are consistent or inconsistent with this principle.2

open to observation, or such as the ord- Galveston, H. & S. A. R. Co. v. Garrett inary use of the machine in the busi- [1889] 73 Tex. 262, 13 S. W. 62; ness the servant is engaged in would O'Neal v. Chicago & I. Coal R. Co. disclose to an ordinarily observant man [1892] 132 Ind. 110, 31 N. E. 669; operating it, and the servant had ample Lumley v. Caswell [1877] 47 Iowa, 159; opportunity by operating it before beNix v. Texas P. R. Co. [1891] 82 Tex.
ing injured to observe the defect, his 473, 18 S. W. 571); or of "ordinary diliopportunity to know would be held as gence." (Denver Tranway Co. v. Nesknowledge, whether in fact he knew of the defect or not." Porter v. Hannibal & St. J. R. Co. (1879) 71 Mo. 66, 77, 36 Am. Rep. 454.

"A servant assumes a risk which, from the facts before him, it was his duty to infer." Russell v. Minneapolis & St. L. R. Co. (1884) 32 Minn. 230, 20 N. W.

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which Those risks are assumed "should have been seen by the employee v. Sioux City & P. R. Co. [1883] 62 had he exercised such prudence as a Iowa, 285, 17 N. W. 585; Pennsyl-

knowledge of the character of what is (Western U. Teleg. Co. v. McMullen apparent as, by his employment, he as- [1895] 58 N. J. L. 155, 32 L. R. A. 351, sumes to have or from his education or 33 Atl. 384); or of "reasonable care and experience he actually has." Pennsyl- diligence" (Moran v. Harris [1884] 63

An open and visible risk which is assumed by a servant is one so patent that 402, 59 N. W. 217); or of "reasonable a person familiar with the business will and ordinary care" (Haley v. Jump instantly recognize it, and about which River Lumber Co. [1892] 81 Wis. 423, there can be no difference of opinion be- 51 N. W. 321, 956); or of "reasonable tween intelligent persons accustomed to observation" (Whipple v. New York, N. the service. Johnston v. Oregon Short H. & H. R. Co. [1896] 19 R. I. 587, 35 Line & U. N. R. Co. (1892) 23 Or. 94, Atl. 305); or of "reasonable care and 31 Pac. 283.

of such defects in an instrument which he is frequently using as are obvious to the senses, or with reasonable diligence Co. [1891] 63 Vt. 336, 22 Atl. 656). ought to be discovered or known by him. (1888) 39 Minn. 523, 41 N. W. 104.

In numerous cases the risks assumed by a servant have been declared to be those discovered by the exercise either of "ordinary care" (Williams v. Delaware, L. & W. R. Co. [1889] 116 N. Y. A jury is properly instructed that it 628, 22 N. E. 1117; Sievers v. Peters was plaintiff's duty to inform himself Box & Lumber Co. [1898] 151 Ind. 642, 50 N. E. 877. Rehearing Denied in 151 in question, so far as he could by ob-Ind. 662, 52 N. E. 399; Johnson v. Ash- servation, and that if it was defective land Water Co. [1890] 77 Wis. 51, 45 N. he cannot recover unless it appears by W. 807; Greenleaf v. Illinois C. R. Co. a preponderance of evidence, that the

"If however the defect is patent, [1870] 29 Iowa, 14, 4 Am. Rep. 181; bit [1896] 22 Colo. 408, 45 Pac. 405; Chesson v. John L. Roper Lumber Co. [1896] 118 N. C. 59, 23 S. E. 925; Mayes v. Chicago, R. I. & P. R. Co. [1884] 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680; Bryce v. Chicago, M. & St. P. R. Co. [1897] 103 Iowa, 665, 72 N. W. 780); or of "reasonable care," (Pennsylvania Co. v. Ebaugh [1898] 152 Ind. 531, 53 N. E. 763; Kitteringham man of ordinary prudence would have vania Co. v. Witte [1896] 15 Ind. App. exercised under like circumstances." 583, 43 N. E. 319, 44 N. E. 377; Gulf, C. & S. F. R. Co. v. Johnson Louisville, N. A. & C. R. Co. v. Quinn (1892) 83 Tex. 630, 19 S. W. 151. [1896] 14 Ind. App. 554, 43 N. E. 240); 892) 83 Tex. 630, 19 S. W. 151. [1896] 14 Ind. App. 554, 43 N. E. 240); The servant is chargeable with "such or of "reasonable care and skill" in the charge of the charge of what is (William 17). vania Coal Co. v. Kelly (1894) 54 Ill. Iowa, 390, 19 N. W. 278); or of "reason-App. 622. able care and prudence" (Carlson v. Sioux Falls Water Co. [1894] 5 S. D. caution" (Lindvall v. Woods [1891] 44 The servant is held to take the risk Fed. 855); or of "ordinary observation reasonable skill and diligence" (Latremouille v. Bennington & R. R.

<sup>2</sup> An instruction that, if the plaintiff Anderson v. Minnesota & N. W. R. Co. could have seen or known of the abnormal conditions by the exercise of ordinary care and prudence, the defendant would not be liable, is proper. Ferguson v. Phænix Cotton Mills (1901) 106

Tenn. 236, 61 S. W. 53.

as to the danger in using the appliance

The conditions and the risks which are presumed, as a matter of law, to be comprehended by a servant, are also frequently characterized by descriptive epithets or phrases, used either singly or in combination, which are intended to express in a brief form the conclusion that those conditions and risks must have been appreciated by the servant if he had used proper care.3

defect was not observable by ordinary, careful observation. Chilson v. Lansing Wagon Works (1901) 128 Mich. 43, 87

N. W. 79.

It is error to charge that plaintiff did not assume the risk incident to the method under which defendant connecessarily" have known of such method the expression "must necessarily have known" is not synonymous with "could

that even if the appliance in question was defective, yet if from his opportunities of observation the plaintiff's intestate knew, or should have known, of its defective condition, he is held in law to have assumed the risk of its insufficiency, is erroneous in that it fails to define with sufficient precision the degree of care or observation which the law requires. Durand v. New York & L. B. R. Co. (1901) 65 N. J. L. 656, 48 Atl. 1013.

s "Obvious."

49 Neb. 649, 68 N. W. 1057; Shields v. Robins (1896) 3 App. Div. 582, 38 N. Y. Supp. 214; Findlay v. Russell Wheel & Foundry Co. (1896) 108 Mich. 286, 66 N. W. 50; Young v. Boston & M. R. Co. (1898) 69 N. H. 356, 41 Atl. 268; Larich v. Moies (1894) 18 R. I. 513, 28 ducted its business, unless he "must Atl. 661; Goodes v. Boston & A. R. Co. (1894) 162 Mass. 287, 38 N. E. 500; by the exercise of ordinary care; since Toomey v. Donovan (1893) 158 Mass. if plaintiff by the exercise of ordinary 232, 33 N. E. 396; Southern Kansas R. care could have known of such methods, Co. v. Drake (1894) 53 Kan. 1, 35 Pac. his knowledge might be presumed, and 825; Larson v. St. Paul, M. & M. R. Co. (1890) 43 Minn. 423, 45 N. W. 722; known" is not synonymous with "could have known." is not synonymous with "could have known." N. J. L. 292, 45 Atl. 638; Chanaier v. Galveston, H. & S. A. R. Co. v. English Atlantic Coast Electric R. Co. (1898) (1900; Tex. Civ. App.) 59 S. W. 626.

In instructing a jury it should be clearly explained to them that the test N. W. 337; Shaw v. Sheldon (1886) " which the servant's presumed comprehension of the risk is to be deter-mined is his exercise or nonexercise of v. Central R. Co. (1900; N. J. L.) 45 "ordinary care" in the premises. Ac-ordinary care an instruction to the effect Steam Brick Co. (1898) 20 R. I. 452, 40 Atl. 7; Williams v. J. G. Wagner Co. (1901) 110 Wis. 456, 86 N. W. 157. "Obviously evident." Scanlon v. Boston & A. R. Co. (1888) 147 Mass. 484,

18 N. E. 209. "Visible and obvious." DeGraff v. New York C. & H. R. R. Co. (1874) 3

Thomp. & C. 255.

"Open and obvious." This combination is very common. Connelly v. Hamilton Woolen Co. (1895) 163 Mass. 156, 39 N. E. 787; Storrs v. Michigan Starch <sup>3</sup> "Obvious." Garnett v. Phænix Co. (1901) 126 Mich. 666, 86 N. W. Bridge Co. (1899) 98 Fed. 192; Whalen 134: Carlson v. Sioux Falls Water Co. Bridge Co. (1899) 98 Fed. 192; Whalen 134; Carlson v. Sioux Falls Water Co. v. Whiteomb (1901) 178 Mass. 33, 59 (1895) 8 S. D. 47, 65 N. W. 419; O'Neal N. E. 666; McIntire v. White (1898) v. Chicago & I. Coal R. Co. (1892) 132 171 Mass. 170, 50 N. E. 524; Gold-Ind. 110, 31 N. E. 669; Bohn v. Chicachhvait v. Haverhill & G. Street R. Co. go, R. I. & P. R. Co. (1891) 106 Mo. (1894) 160 Mass. 554, 36 N. E. 486; 429, 17 S. W. 580; Riverside Cotton Joyce v. Worcester (1885) 140 Mass. Mills v. Green (1900) 98 Va. 58, 34 S. 245, 4 N. E. 565; Wilson v. Steel Edge E. 963; Clark v. Richmond & D. R. Co. Stamping & Retinning Co. (1895) 163 (1884) 78 Va. 709, 49 Am. Rep. 394; Mass. 315, 39 N. E. 1039; Watts v. Philadelphia & R. R. Co. v. Hughes Hart (1893) 7 Wash. 178, 34 Pac. 423, (1888) 119 Pa. 301, 13 Atl. 286; Rum-771; Kennedy v. Manhattan R. Co. mell v. Dilworth (1885) 111 Pa. 343, (1884) 33 Hun, 457; Demers v. Decring 2 Atl. 355, 363; Southern R. Co. v. (1899) 93 Me. 272, 44 Atl. 922; Chi-Mauzy (1900) 98 Va. 692, 37 S. E. 285; cago, B. & Q. R. Co. v. McGinnis (1896) Wood v. Heiges (1897) 83 Md. 257, 34

Not infrequently these epithets and phrases are supplemented and amplified by other words. In some instances these appear to have been introduced merely for the sake of emphasis.4 But it will also be found that not a few of these additions suggest with greater or

70 N. W. 662.

veying a similar meaning are these: veying a similar meaning are these: (1892) 9 Houst. (Del.) 322, 32 Atl. "Visible." Kelly v. Baltimore & O. R. 726.

Co. (1887; Pa.) 10 Cent. Rep. 56, 11
Atl. 659; Thomas v. Quartermaine F. R. Co. v. Jackson (1894) 12 C. C. A. (1887) L. R. 18 Q. B. Div. 685, 56 L. 507, 27 U. S. App. 517, 65 Fed. 48; J. Q. B. N. S. 340, 57 L. T. N. S. 537, Williams v. Walton & W. Co. (1892) 35 Week. Rep. 555, 51 J. P. 516, per 9 Houst. (Del.) 322, 32 Atl. 726; Mc-Bowen, L. J.; Davis v. Baltimore & O. Cain v. Chicago, B. & Q. R. Co. (1896) R. Co. (1893) 152 Pa. 314, 25 Atl. 498. 22 C. C. A. 99, 40 U. S. App. 181, 76 "Plainly visible." Baker v. Barber Fed. 125; American Dredging Co. v. Asphalt Pav. Co. (1899) 92 Fed. 117; Walls (1898) 28 C. C. A. 441, 55 U. S. Davis v. Baltimore & O. R. Co. (1893) App. 460, 84 Fed. 428; Anglin v. Texas

(1889) 40 Fed. 784.

"Open and visible." Tuttle v. Detroit, v. Irwin (1887) 37 Kan. 701, 16 Pac. G. H. & M. R. Co. (1887) 122 U. S. 195, 146.

30 L. ed. 1116, 7 Sup. Ct. Rep. 1166; "Apparent." Kohn v. McNulta Riley v. West Virginia C. & P. R. Co. (1893) 147 U. S. 238, 37 L. ed. 150, 13 (1885) 27 W. Va. 146; Fisher v. Chicago & G. T. R. Co. (1889) 77 Mich. Oil Co. (1900; N. J. L.) 47 Atl. 803; 546, 43 N. W. 926; French v. Aulls Fancher v. New York, L. E. & W. R. Co. (1893) 72 Hun, 442, 25 N. Y. Supp. (1894) 75 Hun, 350, 27 N. Y. Supp. 188; Wallace v. Central Vermont R. Co. 62; Melzer v. Peninsular Car Co. (1892) 43 N. Y. S. R. 639, 18 N. Y. (1889) 76 Mich. 94, 42 N. W. 1078; Ol-Supp. 280; Johnston v. Oregon Short son v. McMurray Cedar Lumber Co. Line & U. N. R. Co. (1892) 23 Or. 94, (1894) 9 Wash. 500, 37 Pac. 679. "Manifest." Casey v. Pennsulvania 31 Pac. 283.

P. R. Co. (1887) 36 Kan. 129, 12 Pac. 47 Atl. 1128. 582; Chicago & A. E. R. Co. v. Wagner "Open and manifest." Herold v. 582; Chicago & A. E. R. Co. v. Wagner (1896) 17 Ind. App. 22, 45 N. E. 76, Pfister (1896) 92 Wis. 417, 66 N. W.

"Open to view." Gleason v. New York & N. E. R. Co. (1893) 159 Mass.

Pa.) 10 Cent. Rep. 56, 11 Atl. 659.

Sellers (1887) 39 La. Ann. 1011, 3 So. Co. (1894) 9 C. C. A. 133, 23 U. S. App. 363; Sykes v. Packer (1882) 99 Pa. 86, 60 Fed. 555.

465: Porter v. Hannibal & St. J. R. Co. "Open to observation." Covey v. (1879) 71 Mo. 66, 77, 36 Am. Rep. 454; Hannibal & St. J. R. Co. (1885) 86 Mo. The Maharajah (1891) 1 C. C. A. 181, 635; Woods v. St. Paul & D. R. Co. 1 U. S. App. 20, 49 Fed. 111; Tewas & (1888) 39 Minn. 435, 40 N. W. 510; P. R. Co. v. Rogers (1893) 6 C. C. A. Texas & P. R. Co. v. French (1893) 86 403, 13 U. S. App. 547, 57 Fed. 378; Tex. 98, 23 S. W. 642.

Atl. 872; Miclke v. Chicago & N. W. R. Arkadelphia Lumber Co. v. Bethea Co. (1899) 103 Wis. 1, 79 N. W. 22; (1892) 57 Ark. 76, 20 S. W. 808. Osborne v. Lehigh Valley Coal Co. "Patent dangers are those seen, or by (1897) 97 Wis. 27, 71 N. W. 814; their presence perceptible to the senses," Larsson v. McClure (1897) 95 Wis. 533, "Latent dangers are those not seen or N. W. 662. perceptible to the senses by their pres-Other examples of a terminology conence." Williams v. Walton & W. Co. (1892) 9 Houst. (Del.) 322, 32 Atl.

Daris v. Baltimore & O. R. Co. (1893) App. 460, 84 Fed. 428; Anglin v. Texas 152 Pa. 314, 25 Atl. 498; Henderson v. & P. R. Co. (1894) 9 C. C. A. 130, 23 Coons (1888) 31 Ill. App. 75.

U. S. App. 62, 60 Fed. 553; Bennett v. "Visible and plain." The Maharajah Tintic Iron Co. (1893) 9 Utah, 291, 34 Pac. 61; St. Louis, Ft. S. & W. R. Co. "Open and visible." Tuttle v. Detroit, v. Irwin (1887) 37 Kan. 701, 16 Pac.

"Manifest." Casey v. Pennsylvania "In plain view." Rush v. Missouri Asphalt Paving Co. (1901) 198 Pa. 348,

"Palpable." Yarmouth v. France (1887) L. R. 19 Q. B. Div. 647, 57 L. J. Q. B. N. S. 7, 36 Week. Rep. 283 (per 68, 34 N. E. 79.

"Open, permanent, and visible." Lord Esher); Rajotte v. Canadian P. R. Kelly v. Baltimore & O. R. Co. (1887; Co. (1889) 5 Manitoba L. Rep. 365. <sup>4</sup> As, for example, the following:

"Patent." Rietman v. Stolte (1889) "Patent and open to the eye of the 120 Ind. 314, 22 N. E. 304; Faren v. plaintiff." McGrath v. Texas & P. R.

less distinctness one or more of the essential elements which are involved in the fundamental principle set forth at the commencement of this section.5

"Patent to the understanding." Davis v. Baltimore & O. R. Co. (1893) 152

Pa. 314, 25 Atl. 498.

"Patent and open to observation." Nix v. Texas & P. R. Co. (1891) 82 Tex. 473, 18 S. W. 571.

"Apparent to the senses." Week v. Fremont Mill Co. (1892) 3 Wash. 629, 29 Pac. 215.

"Obvious to the senses." Waldhier v. Hannibal & St. J. R. Co. (1885) 87

"Open to the senses, requiring only their exercise to become known to the servant." Quick v. Minnesota Iron Co. (1891) 47 Minn. 361, 50 N. W. 244.

<sup>5</sup> Thus we find such phrases as these: "Apparent to a casual observer." Lamotte v. Boyce (1895) 105 Mich. 545, 63 N. W. 517; Ragon v. Toledo, A. A. & N. M. R. Co. (1893) 97 Mich. 265, 56 N. W. 612.

"Patent to the most cursory observation." McCain v. Chicago, B. & Q. R. Co. (1896) 22 C. C. A. 99, 40 U. S. App. 181, 76 Fed. 125.

"Ascertainable by simply looking." Hathaway v. Michigan C. R. Co. (1883) 51 Mich. 253, 47 Am. Rep. 569, 16 N.

Ascertainable by "a casual glance." Peterson v. Sherry Lumber Co. (1895) 90 Wis. 83, 62 N. W. 948.

"Plain at a glance." Shaw v. Sheldon (1886) 103 N. Y. 667, 9 N. E. 183. "Obious even to a passing glance." Kohn v. McNulta (1893) 147 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. 298.

"Open and patent to common obser-

"Apparent to ordinary observation." Gibson v. Erie R. Co. (1875) 63 N. Y. 449, 20 Am. Rep. 552; Davidson v. Cornell (1892) 132 N. Y. 234, 30 N. E. 573; Dering v. New York C. & H. R. R. Co. (1893) 50 N. Y. S. R. 832, 22 N.

"Patent to observation." Mellott v. (Scharenbroich v. St. Cloud Fiber-Ware Louisville & N. R. Co. (1897) 101 Ky. Co. [1894] 59 Minn. 116, 60 N. W. 212, 40 S. W. 696. 1093); or of "ordinary observation." (Latremouille v. Bennington & R. R. Co. [1891] 63 Vt. 336, 22 Atl. 656).

"Patent, manifest to ordinary observation." Boland v. Louisville & N. R. Co. (1895) 106 Ala. 641, 18 So. 99.

"Obvious defects and such as can be discovered by reasonable observation." Wabash & W. R. Co. v. Morgan (1892) 132 Ind. 430, 31 N. E. 661.

"Apparent and which the servant has the opportunity to detect." Bland v. Shreveport Belt R. Co. (1896) 48 La. Ann. 1057, 36 L. R. A. 114, 20 So. 284.

"Open to the observation of any man of ordinary capacity." Texas & P. R. Co. v. French (1893) 86 Tex. 98, 23 S. W. 642.

"Obvious to any person of ordinary observation." Bonnet v. Galveston, H. & S. A. R. Co. (1895; Tex. Civ. App.) 31 S. W. 525.

"Obvious to persons of the experience and understanding of the servant." Mulm v. Thelin (1896) 47 Neb. 686, 66 N. W. 650.

"Patent defects which an ordinary observation of the employee's duty would readily disclose." Evansville & T. H. R. Co. v. Duel (1892) 134 Ind. 156, 33 N. E. 355.

"Obvious, and such as cannot escape ordinarily careful observation." Lamotte v. Boyce (1895) 105 Mich. 545, 63 N. W. 517.

"So obvious as not to escape the observation of an ordinarily prudent person." Moore v. St. Louis Wire Mill Co. (1893) 55 Mo. App. 491.

"Obvious defects, of which the servvation." St. Louis, A. & T. R. Co. v. ant knew, or, as a reasonably prudent Lemon (1892) 83 Tex. 143, 18 S. W. man, might have known." Yates v. Mc-Cullough Iron Co. (1888) 69 Md. 370, 16 Atl. 280.

"Plain to be seen by anyone inclined to look for them." Lake Shore & M. S. R. Co. v. McCormick (1881) 74 Ind. 440.

"Manifest to one of common sense Y. Supp. 344; France v. Rome, W. & O. and observation, and which by the pru-R. Co. (1895) 88 Hun, 318, 34 N. Y. dent exercise of the senses and common Supp. 408; Kean v. Detroit Copper & sense can be perceived." Quick v. Min-Brass Rolling Mills (1887) 66 Mich. nesota Iron Co. (1891) 47 Minn. 361, 277, 33 N. W. 395.

Dangers which may be understood by "Dangers which a person of common the exercise of "common observation." intelligence" would observe. Peterson

The phraseology which is thus used to designate the risks of which a servant is bound to take notice is also employed with the addition of a negative, for the purpose of defining the limits of the knowledge which is imputed to him.6 But the risks of which a servant may be ignorant without necessarily incurring the charge of negligence are more usually described by the epithets "latent," "concealed," or the like. See §§ 408 et seq., infra.

- 392. Evidential elements to be considered in determining whether knowledge shall be imputed to a servant.— As is indicated by the language used in stating the general principle enunciated in the preceding section, the elements with reference to which it is determined whether the injured servant was chargeable with a knowledge of the given risk are partly subjective, and partly objective. They are as follows:
- (a) The servant's natural and acquired capacity for obtaining knowledge. The essential matters to be considered under this head are the extent of his intelligence, as deducible from his age or other circumstances; and the extent of his technical skill and information, whether that skill and information be derived from his practical experience in the employment to which the risk was incident, or from a special education and training received in some other way.
- (b) The servant's opportunities or means of obtaining a knowledge of the material conditions which created the given risk.1
- (c) The extent of the servant's duty of active inspection and inquiry with regard to the existence of such risks as that to which the injury was due.

The precise significance of each of these elements with relation to the countless groups of slightly variant facts which are presented in actions by injured servants it is frequently impossible to ascertain,

v. Sherry Lumber Co. (1895) 90 Wis. man could not overlook it except by 83, 62 N. W. 948. gross negligence. is not erroneous. 83, 62 N. W. 948.

Defects which the servant "by proper Kansas City, P. & G. R. Co. v. Spellwatchfulness might have discovered." man (1900) 42 C. C. A. 321, 102 Fed.

watchfulness might have discovered."

Coyle v. Griffing Iron Co. (1899) 63 N.

J. L. 609, 47 L. R. A. 147, 44 Atl. 665.

Thus, it has been said that an employee does not assume the risk of using a defective appliance, where the defect is not open to observation in its ordinary use. Nicholds v. Crystal Plate Glass Co. (1894) 126 Mo. 55, 27 S. W. 516, 28 S. W. 991.

Where the evidence tended to show that the defect was not a patent one, a that the defect was so visible that a in the American reports.

"The phrase "means of knowledge" occurs in the case which laid the foundation of the modern law of employer's liability. Priestly v. Fowler (1837) 3 Mees. & W. 1, Murph. & H. 305, 1 Jur. 987, 7 L. J. Exch. N. S. 42. As is shown by many of the cases cited in subtitle D, infra, the phrase has always been, and still is, a familiar one. But the alternative combination of charge that, to make plaintiff guilty of contributory negligence, it must appear is possibly found rather more frequently that the defect was so visible that a

for the reason that, in a large number of the cases in which several of them are involved, the language used does not indicate with certainty whether the court intended to attribute to two or more of them in combination a differentiating value which would not have been imputed to a single one of them when considered separately, or to ascribe such a value to each of them independently, or to make the decision turn upon a particular one of them to the exclusion of the others. That the difficulties of classification are, under such circumstances, enormously increased, is sufficiently obvious; but it is hoped that the arrangement adopted in the ensuing sections will be found reasonably serviceable for the purposes of research.

## B. What risks are deemed to be within the comprehension of adult servants.

- 393. Generally.— The cases turning upon the natural and acquired capacity of adult servants may be conveniently divided into four main classes, illustrative of one or the other of the following conclusions:
- (a) That the risk was within the comprehension of any adult of ordinary intelligence, irrespective of the question whether he had or had not any special experience or training in the work in which he was engaged.
- (b) That, by reason of his inexperience, the servant was not necessarily chargeable with a comprehension of the risk.
- (c) That a comprehension of the risk was imputable, as a matter of law, to a person having the same amount of special experience and training as the servant.
- (d) That the amount of special experience or training possessed by the servant was not sufficient to warrant a court in declaring, as a matter of law, that he ought to have understood the risk.

The decisions which illustrate each of these conclusions will be discussed in the ensuing sections. But it should be remembered that the actual effect of many of them is somewhat problematical, for the reason explained at the end of the last section.

To the situations indicated by the above statements may also be added a fifth, which is of such exceptional occurrence, and, comparatively speaking, of such slight importance, that it merely deserves a passing notice; viz., that the servant's previous experience of the conditions ordinarily prevailing in the employment in question may lead him to draw false inferences as to the conditions actually prevailing at the time of the accident. If the evidence is susceptible of this

construction, a court will not say that he was chargeable, as a matter of law, with a knowledge of the resulting risk. See § 396, infra.

It will be observed that a considerable number of the cases cited in the two sections, 394, 396, infra, in which the servant's comprehension of the risk was treated as an inference of law, involve injuries resulting from risks which are included either by all or by some of the courts among the ordinary or normal class. Whenever this situation is disclosed by the evidence, the decision might be referred directly to the general principle that such risks, in so far as they are obvious, are presumed to be accepted by any servant who undertakes the employment to which they are incident. See §§ 259, et seq., ante. But as the conclusions reached are arrived at without the aid of that presumption, and the material elements considered and the criterion employed are equally applicable whether the risk be ordinary or extraordinary, cases of this type must, in a logical point of view, and therefore for purposes of classification, be treated as belonging to a different category from those in which recovery is denied for the reason that the risk in question was an ordinary one.

394. Risks which every adult is presumed to comprehend without any special experience.— In the subjoined note are collected a large number of cases in which it is either certain, or seems to be a matter of reasonable inference from the language of the court, that the inability to maintain the action was predicated in spite of or independently of the element of special experience or technical skill.<sup>1</sup>

v. Toledo, A. A. & N. M. R. Co. (1893) (b) Obstructions beside railway 97 Mich. 265, 56 N. W. 612 (experience for servant not adverted to).

of law, be presumed to understand the be comprehended by a newly employed risk incident to working without it. conductor. Jennings v. Tacoma R. & Mayes v. Chicago, R. I. & P. R. Co. Motor Co. (1893) 7 Wash. 275, 34 Pac. (1884) 63 Iowa, 562, 14 N. W. 340, 19 937.

N. W. 680, modifying on rehearing the opinion expressed at the first hearing, operation of.—(See also subd. x, in-

 $^{1}$  (a) Railway tracks and appurte- pull it round. Mellott v. Louisville & nances.—The risk created by the want N. R. Co. (1897) 101 Ky. 212, 40 S. W. of ballast between the ties on a siding 696 (element of inexperience was not has been treated as one which, in re-adverted to, but was apparently regard-

The danger arising from the want of trail car and a doorway in the power a block between a rail and a guard rail house of a street railway, through at a switch is so obvious that even an which a street car must be pushed to inexperienced brakeman will, as matter attach it to the dummy, is presumed to

—that it was for the jury to say wheth—fra.) A servant who has for several er the inexperience of the brakeman months been handling various cars was a sufficient excuse for his nonappre- equipped with two kinds of self-couplers ciation of the danger.

A carpenter in a railway shop is an attempt is made to unite them is chargeable with a knowledge of the risk of being crushed against the wall inclosing a turntable, while he is helping to McDonald (1891) 88 Va. 352, 13 S. E.

It will be seen that the general effect of these cases is that an adult servant of ordinary intelligence is presumed to have been capable of

of ordinary intelligence who accepts the attempts to make a coupling. Missouri, position of brakeman is presumed to K. & T. R. Co. v. Hauer (1895; Tex. understand the risk incident to coup- Civ. App.) 33 S. W. 1010. ling cars with double deadwoods. Hathaway v. Michigan C. R. Co. (1883) 51 ence, assumes the risk of aprons pro-Mich. 253, 47 Am. Rep. 569, 16 N. W. jecting 12 inches from the ends of flat 634. In this case a brakeman twentya general way as to the danger of coupknowledge of the manifest risk of coup- be seen, he has abundant opportunity court, commenting on Michigan C. R. Co. v. Smithson (1881) 45 Mich. 212, 7 N. W. 791 (see § 396, note 1, subd. (d), post), said: "The correctness of that decision is not questioned, but admitted by the plaintiff's counsel in this E. 1121. case, and the only difference claimed between the two cases is that in the a curve is something which is so obvilong experience in coupling, and in the car can be permitted to claim ignorance present case he had little or none at all. of it. Hence, an employee in the car This fact, if admitted, cannot make this sheds of a street railway assumes the case an exception to the rule. If the risk of having his leg caught and broken character of any particular danger is so between the ends of two cars on curves simple that it can as well be ascertained at a single view as at many, it is difficult to see how additional observation taken out is swung against the end of could be of any benefit to the party another standing on the other curve, at whose duty it is to encounter it." Later a point where the tracks are close to-Michigan decisions to the same effect gether. The fact that the risk to which Michigan decisions to the same effect are Dysinger v. Cincinnati, S. & M. R. Co. (1892) 93 Mich. 646, 53 N. W. 825; Fenlon v. Duluth, S. S. & A. R. Co. (1896) 108 Mich. 284, 66 N. W. 51. This rule holds even where the plaintiff the absence of the regular brakeman. East Tennessee, V. & G. R. Co. v. Turvaville (1893) 97 Ala. 122, 12 So. 63. For other cases as to double deadwoods, note 1, subd. (b), post; § 396, note 1, subd. (d), post.

The danger caused by couplings differing so much in height that they overlapped and allowed the cars to come to-

A switchman who has to supply himcouple, from the pins scattered about not specifically adverted to). the yard, assumes the risk of using a Where a machinist is summoned out

It has been held that any adult which he finds lying thereon when he

A brakeman, though without expericars which he undertakes to couple, so four years old, who had been warned in as to leave only an inch between them when the cars are shoved together, ling cars, was held to be affected with where they are in plain view, clearly to ling cars with double deadwoods. The to see them, his attention is directed to them, and he is told the necessity of keeping from between them. Chicago & A. E. R. Co. v. Wagner (1896) 17 Ind. App. 22, 45 N. E. 76. Rehearing De-nied in (1897) 17 Ind. App. 28, 45 N.

The swing of a street car passing over Smithson Case the coupler injured had ous that no one employed about such leading out of the shed in opposite directions, when one of the cars being he is thus exposed has been increased during his term of employment by the use of longer and wider open cars will not render the street car company liable to him for such injuries. Goldthwait v. is a brakeman temporarily employed in Harerhill & G. Štreet R. Co. (1894) 160 Mass. 554, 36 N. E. 486.

A brakeman, although inexperienced, will be presumed to know that the object of detaching an engine from a movsee §§ 73, 253, note 8, 263, ante; § 395, ing train is to let it move away from the train so as to allow the train to continue to move for a certain distance. Gorman v. Minneapolis & St. L. R. Co. (1889) 78 Iowa, 509, 43 N. W. 303.

The want of a fender on a street car gether is deemed to be obvious to any creates an obvious risk. Chandler v. intelligent man. Simms v. South Caro- Atlantic Coast Electric R. Co. (1898) lina R. Co. (1886) 26 S. C. 490, 2 S. E. 61 N. J. L. 380, 39 Atl. 674 (experience not mentioned); Denver Tramway Co. v. Nesbit (1896) 22 Colo. 408, 45 Pac. self with proper coupling pins for dif- 405 (servant had worked as conductor ferent drawheads on cars which he is to for a few weeks, but this element was

pin too large for the drawhead of a car, of a railway shop to help in moving an

ascertaining every fact which could have been apprehended by the senses of a person having the same opportunities as he had for exer-

engine, and it is necessary, in doing this, breaking of the walking beam. No speto couple and move some ears, there is cial skill or knowledge is required to no obligation to warn him of the danger enable a servant to appreciate such a of placing his hand upon the deadwood risk. Powers v. New York, L. E. & W. of one car at the very place where it R. Co. (1885) 98 N. Y. 274. A section had been previously struck twice by the hand is chargeable with knowledge of buffer of another car which he had un- the strain which a sound handle of a successfully attempted to couple to it. lever car will probably bear, when of a Wormell v. Maine C. R. Co. (1887) 79 given size. East Tennessee, V. & G. R. Me. 397, 10 Atl. 49.

It has been held that a carpenter who move a car, was chargeable with knowling one, and would fall when the two 904, Reversing (1900) 93 Ill. App. 235. cars were separated. Day v. Cleveland, It has been held that a servant who had from another kind of work.

Fancher v. New York, L. E. & W. R. Co. McWilliams (1901) 64 App. Div. 63, 71 (1894) 75 Hun, 350, 27 N. Y. Supp. 62 N. Y. Supp. 680. (plaintiff had been several years in the company's employ; but this circum- tected by railings .- The risk of injury stance was in no way relied upon). A by falling from a platform not protected common laborer is deemed to understand by a railing is presumably obvious to the dangers to his hand which are creany adult of ordinary intelligence. ated by any inequalities there may be Moulton v. Gage (1885) 138 Mass. 390

wiper).

eration of.—Any person who has once to prise a pulley loose broke under his worked the lever of a moving hand car, weight; but his official position is not or seen another do it, is presumed to specially adverted to as a material eleknow without instruction that it is dangerous to "lose the motion of the lever." Jones v. Louisville & N. R. Co. (1894) where a servant (experience not men-95 Ky. 576, 26 S. W. 590. A section tioned) was injured through the absence man undertaking to work the lever of a of a barrier round a stack of ice on hand car by means of a crowbar used as which he was working. Thorn v. New a substitute for a broken handle is pre- York City Ice Co. (1887) 46 Hun, 497. sumed, as matter of law, to have known that the application of an unusual force which a servant was standing, which in this manner might result in the was 8 feet high and 5 inches broad at

Co. v. Smith (1882) 9 Lea, 685.

(f) Weight-sustaining structures.—A had been summoned, according to a com- knot running across a plank furnished mon practice, to help the painters to an employee for a scaffold being obvious, he is bound to take notice of the edge of the danger created by the fact defect and to know that it weakens and that a running board had been laid renders the plank unsafe. Armour v. from the top of that car to the adjoin- Brazeau (1901) 191 Ill. 117, 60 N. E. C. C. & St. L. R. Co. (1894) 137 Ind. been working for several years in a coal 206, 36 N. E. 854. But the propriety yard, and was injured by the breaking of deciding such a point as a matter of of a plank on which he was standing law seems to be very questionable, con- while trying to prise open the doors of sidering that the servant was taken a coal car, could not recover, as no technical skill or knowledge was neces-(d) Locomotives; construction and sary to enable him to understand the operation of .- The want of chains across weight-sustaining power of a plank the opening in an engine cab was held which was of a certain thickness and a risk which was obvious to a fireman. not inherently defective. Warszawski v.

(g) Elevated working places not proin a metal surface which he is directed (servant who had never done similar to wipe. McCain v. Chicago, B. & Q. R. work before fell from a platform on the Co. (1896) 22 C. C. A. 99, 40 U. S. App. third day after he commenced the per-181, 76 Fed. 125 (sliver projecting ½ formance of his duties); Chesapeake, O. inch beyond the tire of a wheel and ex- & S. W. R. Co. v. McDowell (1894) 16 tending six inches along the circumfer- Ky. L. Rep. 1, 24 S. W. 607 (servant ence, stuck in the arm of an engine here was the foreman of a railway woodshop, who was injured owing to the fact (e) Hand cars; construction and op-that a scantling by which he was trying

In another case recovery was denied

The risk of falling from a trestle on

cising those senses in relation to the dangerous conditions which caused the injury.

and a servant familiar with the structure falls into the water while using it, the risk is deemed to be a patent one.

was going down a winding staircase, owing to the fact that loose pieces of subd. (j) infra.) An uncovered hole left in one of the floors of a building under construction creates a danger presumed to be obvious to an inexperienced laborer. Schwartz v. Cornell (1891) 36
N. Y. S. R. 646, 13 N. Y. Supp. 355.
170, 50 N. E. 524 (element of experience by an unguarded elevator well in a dark basement is established where the evidence of the servant birmal.

and was jostled in. Sullivan v. Louisout of it; demurrer to complaint sustained. Bullivant v. Spokane (1896) 14

Wash. 577, 45 Pac. 42.

the top, was obvious to any adult serv-ant. Garnett v. Phænix Bridge Co. employer with liability for failure to (1899) 98 Fed. 192. make inspection of the ice tiers upon Where a privy erected over a river is which the employee stood, since the fennot boarded up on the side of the river, dency of an ice block to slip is inherent and well known. Shea v. Kansas City, Ft. S. & M. R. Co. (1898) 76 Mo. App.

dence of the servant himself shows he from any dangerous part of the plant knew it to be unguarded, and, while which happens to be in the neighborfeeling his way about in its neighbor- hood, is deemed to be obvious to any hood, he was looking for the well to servant of ordinary intelligence. No reshun it. Taylor v. Carew Mfg. Co. covery can be had where his slipping (1885) 140 Mass. 150, 3 N. E. 21 (serv-causes him to fall into a well filled with ant had been in employment for several scalding water. Feely v. Pearson Cordyears, but this fact is not emphasized). age Co. (1894) 161 Mass. 426, 37 N. E. (i) Deep water.—No action can be 368 (servant had been employed four or maintained where a servant consented five weeks, but this fact is not adverted to work on a narrow plank over a river, to). Or against moving machinery. Murphy v. American Rubber Co. (1893) ville Bridge Co. (1872) 9 Bush, 81. A 159 Mass. 266, 34 N. E. 268 (servant workman is presumed to see and appre- who caught his foot between the coupciate the peril of working near a dam ling of a shaft and the floor had been having an angle of about 135 degrees working for a year in the same estabwith the surface of the water, where the lishment, and for three weeks in the current is so swift that he cannot swim room where the accident occurred; but these elements were not adverted to); Kleinest v. Kunhardt (1893) 160 Mass. 230, 35 N. E. 458 (experience not re-(j) Slippery surfaces.—It is pre-sumed that even an inexperienced serv-ant can appreciate the danger of losing 60 N. W. 1093 (there the foot of a servwhose existence and extent everyone has been into contact with a pinion; but equal capacity for determining"). Or the length of the employment can that his hand will slip upon such a scarcely be material except in so far as equal capacity for determining"). Or the length of the employment can that his hand will slip upon such a scarcely be material except in so far as surface, if pressed against it at a cerit bears on his opportunities of observtain angle. Cowhill v. Roberts (1893) ing the conditions); Clark v. Barnes 71 Hun, 127, 24 N. Y. Supp. 533 (work- (1885) 37 Hun, 389; Storrs v. Michigan man's hand slipped on an ice-covered Starch Co. (1901) 126 Mich. 666, 86 N. girder to which he had climbed). Or W. 134 (servant came into contact with that a block of ice may slip from under a revolving screw across which he was him while he is standing upon it. One stepping); Disano v. New England injured while at work filling an ice Steam Brick Co. (1898) 20 R. I. 452, 40 house, by the slipping of a cake of ice Atl. 7 (demurrer sustained to complaint

The sense which is most frequently referred to is, naturally, that of sight. Numerous decisions exemplify the general principle that

and fell into an unguarded hole, and which did not contain any averment of inexperience).

(k) Saus. - An inexperienced employee who, on the day after his employment, slipped on the bark and sawdust which had accumulated on the floor of a mill, and fell against the uncovered saws of the lath-cutting machine which he was operating, cannot recover on the theory that he ought to have been instructed as to the dangerous conditions which caused his injury. Hazen v. West Superior Lumber Co. (1895) 91 Wis. 208, 64 N. W. 857. The general danger had not been familiar with machinery, of contact with a circular saw is obvious even to an inexperienced workman special instructions, the risk of having just beginning to use it. Wheeler v. his coat sleeve caught in gear wheels Wason Mfg. Co. (1883) 135 Mass. 294; Hanson v. Ludlow Mfg. Co. (1894) 162 Mass. 187, 38 N. E. 363. See further as to these cases § 395, note 1, subd. (h) infra.

Any mill hand is presumed to understand the obvious risk created by a saw projecting over its frame and partly across a narrow passageway. Stephenson v. Duncan (1889) 73 Wis. 404, 41 N. W. 337 (experience not mentioned).

An action for breach of the duty of inthe complaint merely shows that the servant was injured owing to the sudden jumping of a plank which threw his N. J. L. 292, 45 Atl. 638. hand against a rip-saw, although it also is stated that he had never before used ers.—The absence of any duty to insuch a saw; that his only experience in struct has been asserted, in a case where such work had been with a circular saw which he had used for half a day; and that he had not done any carpentering had nothing to do with the machinery, at all until about three weeks before the was injured through attempting to Gaertner v. Schmitt (1897) accident. 21 App. Div. 403, 47 N. Y. Supp. 521. the first day he was transferred to this

(1) Planers and similar machinery.— In one case where the evidence was that Brass Rolling Mills (1887) 66 Mich. an employee who had never worked at a 277, 33 N. W. 395. planer, but knew that a board was cut when it ran through the planer, and ployee in a mill, who, acting within the could have seen the knives if he had scope of his duty, is ordered by the forelooked, it was held that, even if it were assumed that the foreman was at fault for putting him to work without cautioning him, he was guilty of contributory negligence in putting his hand, ice is injured by his apron and jacket without looking, on the planer, to steady catching on the shaft, which is plainly himself, whereby his hand was injured visible and is seen by him, cannot recover by the knives. Gossens v. Mattoon Mfg. from his employer. Russell v. Tillotson Co. (1899) 104 Wis. 406, 80 N. W. 589. (1885) 140 Mass. 201, 4 N. E. 231. No

which alleged that the servant slipped revolving machinery .- (See also subd. (j), supra). An adult female employee, though she has only just gone to work and is unfamiliar with machinery, is presumed to understand without instruction the danger of getting her hands caught in cogwheels on the machine she is operating. Ruchinsky v. French (1897) 168 Mass. 68, 46 N. E. 417. A longshoreman, although inexperienced, cannot recover for an injury caused by allowing his hand to be caught in a winch. The Maharajah (1889) 40 Fed. 784. A motorman who, prior to his entering the employment, was held bound to appreciate, without close to a commutator which he was cleaning, the evidence showing that he had been at work three days after having had eight days of general instructions as to his duties. Burnell v. West Side R. Co. (1894) 87 Wis. 387, 58 N. W. 772 (demurrer sustained).

A female employee thirty-two years old, engaged in a factory, is chargeable with knowledge of the danger of attempting to lower the sash in the frame of a window behind a rapidly revolving struction cannot be maintained where fan, in another frame, slightly projecting into the room where she is engaged. Dillenberger v. Weingartner (1900) 64

(m m) Machinery with revolving rollan employee who had been for one year piling scraps in a rolling mill, but had clean the rollers from the wrong side new work. Kean v. Detroit Copper &

(n) Shafts and set screws.—An emman to go up a ladder standing against a belt box into which a revolving shaft runs at right angles, and nail a board on the box, and in performing the serv-(m) Cogwheels, gearings, and other duty was owing by an employer to a the servant's inexperience will not serve as an excuse for ignorance, where the dangerous conditions were such as should have been appar-

servant twenty-two years of age, to servant's hand was injured could be warn him of the danger of getting his seen, and it was making a loud noise). clothes, or a sheet which he carried in is obliged to pass, where such shaft was plainly visible at the time the servant entered the master's employ, eleven days before the accident, and he had, during that period, passed under the shaft two or three times every hour. Lemoine v. Aldrish (1900) 177 Mass. 89, 58 N. E.

hand kept upon a rope which is running through a sheave will be drawn into the sheave has been said to be one which, obvious to the most casual observer, or the veriest tyro in mechanics." Findlay v. Russel Wheel & Foundry Co. (1896)

108 Mich. 286, 66 N. W. 50.

(p) Belting.—A servant of ordinary intelligence is presumed to appreciate a stick, and the probability of its be- a log which is about to be raised and coming entangled in the broken edges placed between the ways of a pile driver and being splintered. Becker v. Baumgartner (1892) 5 Ind. App. 576, 32 N. presumed to be within the common ex-E. 786 (servant's eye put out by a perience of all men of common educaflying piece of the broken stick; allegation." De Lisle v. Ward (1897) 168 tion that plaintiff was ignorant of the Mass. 579, 47 N. E. 436. risk was held not to add to the strength of his complaint).

that the wheel of a punching machine it should have been for the work to be will not stop at the place at which it done. Marsh v. Chickering (1886) 101 should stop if in good order was pre-N. Y. 396, 5 N. E. 56. Where a ladder, sumed to be obvious to an employee who from one of the side rails of which a was a boiler maker by trade, and had piece some inches in length was broken

would know the danger").

chinery in motion is apparent even to a v. Murphy (1888) 115 Ind. 566, 18 N. common laborer. Stoll v. Hoopes (Pa. E. 30. 1888) 12 Cent. Rep. 553, 14 Atl. 658 (w) though she may have been only a few concealed unsoundness. N. E. 873 (top of cylinder by which factor of experience).

The risk created by the want of a the performance of his duty, caught in platform to stand on while a servant is a revolving shaft placed 4 feet above filling the oil cups on the shaft of an the floor, and under which the servant elevator is deemed to be obvious to anyone. Anderson v. Guineau (1894) 9 Wash. 304, 37 Pac. 449.

(s) Elevators.—The want of the cover which employers are required by the New York statute to place over elevators creates an obvious risk. Shields v. Robins (1896) 3 App. Div. 582, 38 N. Y. Supp. 214 (servant had had (o) Pulleys .- The danger that a twenty-one years' experience, but this element was not expressly adverted to in the argument).

(t) Other hoisting appliances.—The without instruction, "should have been danger arising from the use of hooks so defective in shape as to allow bales of cotton to fall is obvious even to an unskilled longshoreman. Recka v. Ocean S. S. Co. (1893) 3 Misc. 526, 23 N. Y.

Supp. 3.

(u) Pile drivers.—The danger from the perils of shifting a frayed belt with the failure to use guy ropes to control is "a matter of common knowledge, or

(v) Ladders.—A servant cannot recover for injuries due to the slipping (q) Punching machines. - The fact of a ladder not provided with hooks, as only just begun to operate this machine. off, slipped and swung round, thus al-White v. Sharp (1882) 27 Hun, 94 lowing the short rail to pass underneath (plaintiff had testified that "anyone the upper casing of a door above which the plaintiff was doing some repairs, he (r) Cleaning and oiling machinery in cannot recover for the resulting in-motion.—The danger of cleaning ma-juries. Jenney Electric Light & P. Co.

(w) Prise poles.—The fact that a (no instruction obligatory). If a female prise pole used for the purpose of lifting employee of mature years sees fit to put a turntable is not strong enough is one her hand into the recesses of a going which is deemed to be open and obvious machine, without knowing what she will to a servant assisting in the operation, meet, she cannot hold her employer an- where its weakness results merely from swerable for the consequences, even its insufficient size, and not from any Bohn v. Chidays in the defendant's employ. Robin- cago, R. I. & P.-R. Co. (1891) 106 Mo. ska v. Mills (1899) 174 Mass. 432. 54 429, 17 S. W. 580 (no reference made to

had had charge of a stationary engine, loosening gravel on a hillside for the and had stated that he was competent purpose of allowing it to slide down to be a railway fireman, but had no were held to be demurrable. Swanson actual experience of railway work, and v. Great Northern R. Co. (1897) 68 had never seen the process of "staking" Minn. 184, 70 N. W. 978 (court refused cars, it was held that the danger that to ascribe any decisive weight to an althe piece of timber used for this purpose might slip or break was one which tomed to the work); Reiter v. Winona he was presumed to understand without instruction. Watts v. Hart (1893) 7 N. W. 219. Wash, 178, 34 Pac. 423, 771. See however, § 395, note 1, subd. (t), infra.

that white lead is deleterious to those recover under a complaint the essence of who handle it in the process of manu- which is that he was injured by the colfacture is so widely known that a per-lapse of the unshored sides of a trench son who takes employment in a factory dug in gravel and sand. Vincennes cannot, it would seem, be held excusably Water Supply Co. v. White (1890) 124 ignorant of its properties. See Berry v. Ind. 376, 24 N. E. 747. (In the Christie Atlantic White Lead & Linseed Oil Co. Case [1901] 156 Ind. 172, 59 N. E. 385, (1898) 30 App. Div. 205, 51 N.Y. Supp. infra, it was declared, with regard to 602, where, however, there were other this decision, that the servant's inabilelements corroborating the conclusion ity to recover was affirmed with refer-

that the risk was understood.

court laid down the general doctrine mentioned in the complaint, but not that the law does not speculate upon specifically adverted to by the court.) degrees of knowledge in regard to the To the same effect is Swanson v. Lafayeffects of cold weather, and held that an ette (1893) 134 Ind. 625, 33 N. E. 1033. ignorant negro could not recover on the (The only comment passed upon this ground that his employer had directed decision in the Christie Case [1901] 156 him to assist in loading bales of cotton Ind. 172, 59 N. E. 385, infra, is that covered with ice and snow, in weather the complaint showed the danger to be of such unprecedented rigor that his as obvious to the laborer as to his forefingers became frost-bitten and had to man.) be amputated. Yazoo City Transp. Co. have been properly sustained in a case v. Smith (1900) 78 Miss. 140, 28 So. where it was alleged that the servant 807. But it seems scarcely proper to was injured while undermining a bank impute to a person of this description, of gravel and clay below the stratum of accustomed to a mild climate, the earth which fell upon him. Griffin v. knowledge which is supposed to be pos- Ohio & M. R. Co. (1890) 124 Ind. 326,

case the effect and operation of the force been correct.) In another case a comof gravitation and of a thaw upon a plaint was successfully demurred to, perpendicular bank of earth were held where the allegation was that the into be within the comprehension of an jury was received through the fall of a ignorant foreigner of ordinary capacity. stratum of "black, loose, and brittle Olson v. McMulllen (1885) 34 Minn. loam" which projected about 1 foot out-94, 24 N. W. 318. In another a verdict side a 6-foot stratum of gravel which for the plaintiff was set aside where the plaintiff was shoveling. Railsback v. injury was caused by the removal of a Wayne County Turnp. Co. (1894) 10 layer of clay from underneath a layer Ind. App. 622, 38 N. E. 221. But the composed of clay, sand, and stones in- most recent expression of opinion in termingled, the court being of opinion this state is to the effect that a common that no skill or science was required to laborer is not bound under all circumenable the servant to appreciate the stances to take notice of the liability of danger, and that it was apparent to the the unshored sides of a trench to fall in. commonest intelligence. Pederson v. and that his capacity for appreciating Rushford (1889) 41 Minn. 289, 42 N. such a risk must be determined with W. 1063. In two others, complaints reference to the specific facts. Upon which showed that the injury was re- this ground it was held that a com-Vol. I. M. & S.—66.

(x) Push poles.—Where a servant ceived by a section hand engaged in legation that the servant was unaccus-& St. P. R. Co. (1898) 72 Minn. 225, 75

The earlier Indiana cases are wholly unfavorable to the servant. In one it (y) Poisonous substances.—The fact was held that a common laborer cannot ence to the evidence, not to the plead-(z) Extreme cold.—In one case the ings; the workman's inexperience was A demurrer was also held to sessed by everyone in colder latitudes. 24 N. E. 888. (This decision was de-(aa) Action of gravitation on loosely clared in the Christie Case [1901] 156 cohering substances.—In one Minnesota Ind. 172, 59 N. E. 385, infra, to have plaint was not demurrable which al- v. Chicago & N. W. R. Co. (1881) 53 leged substantially that such an employee was set to work in a trench dug through 2 feet of compact earth mixed having been graded at that point by filling in; that the sides of the trench, digging of several large "bell holes," as a result of the want of bracing, caved in upon the laborer; and that he had no knowledge or opportunity to acquire knowledge of the danger. Ft. Wayne v. Christie (1901) 156 Ind. 172, 59 N. E. 385. In stating its conclusion the court observed that "whether the work of digging a trench is dangerous or otherwise would seem to depend on a variety of circumstances;" as, for instance, the In one Texas case it was held that a nature of the soil, the state of the servant, even though he has no special weather, the season of the year, the didrawn from this fact. Another fact for qualities of the upper and lower strata; the court could not decide, as a matter Tex. 96, 23 S. W. 642. of law, that the danger of caving in ments."

In Tennessee it has been held that an ignorant and illiterate negro laborer 15. must be taken to understand the danthe Minnesota cases, supra).

In Wisconsin it has been laid down

Wis. 661, 11 N. W. 24.

In South Dakota it has been held that there is no duty to warn a laborer with broken stone, and, underneath, that the sides of a trench dug in an through 4 feet of loose earth, the street embankment of made ground are more likely to cave in than the sides of a trench in natural soil, the line between although they were weakened by the the fill and the natural soil being perfectly plain, owing to a marked difference of color. Carlson v. Sioux Falls Water Co. (1895) 8 S. D. 47, 65 N. W. 419.

> A nonsuit has been granted in Rhode Island where a laborer was injured while shoveling sand at a bank which left an overhanging crust. Larich v. Moies (1894) 18 R. I. 513, 28 Atl. 661 (factor of experience not adverted to).

skill, is supposed to know that unsupmensions of the trench. It was also ported earth will fall, especially when pointed out that, while the work of exit is saturated with water; and recovcavation might be safe to the extent of cry was denied on this ground where justifying a workman in undertaking a member of a bridge gang, who had the employment, yet it might afternever dug a well, was injured by an acwards be rendered dangerous by lateral cident of this nature. Galveston, H. excavations, and that it could not be & S. A. R. Co. v. Lempe (1883) 59 said, as a matter of law, that the addi- Tex. 19. In another, when the side of tional risk thus created was assumed. a ditch gave way and allowed certain Nor could it be said that the deposit of timbers laid on the ground beside it to earth excavated, on the surface of the fall on an inexperienced laborer, it was ground near the trench, created so ob- held that the defendant was entitled to vious a peril that it was necessarily as- an instruction that, if the risk was as sumed by the plaintiff. It was for the open to the observation of the servant jury to declare what inference should be as to his foreman, it was assumed. It was said that no special skill was rethe jury to consider was the different quired to comprehend such a risk. Teras & P. R. Co. v. French (1893) 86

An employee who without compulsion which the nature of the soil created was goes upon a derrick standing beside a palpable. It seems impossible to recon-clay bank and in such a position that cile this and the earlier cases without he cannot escape contact with clay resorting to what an eminent English picked down by him cannot recover for judge once spoke of as "desperate refine- an injury caused thereby. Michaelson v. Sergeant Bluffs & S. C. Brick Co. (1895) 94 Iowa, 725, Appx., 62 N. W.

An employee, though inexperienced, ger that the sides of a ditch dug assumes the risk in going above an through soil which is principally com- overhanging gravel ledge and digging a posed of cinders may fall in. Brown v. ditch for the purpose of dislodging the Chattanooga Electric R. Co. (1898) ledge. Missouri, K. & T. R. Co. v. 101 Tenn. 252, 47 S. W. 415 (following Spellman (1896; Tex. Civ. App.) 34 S. W. 298.

In a case where the servant was that any workman of ordinary intellikilled by the fall of a bank in which a gence, whether experienced or not, is crevice had shown itself before the acpresumed to know that, when a bank of cident, the court said that "if it [the earth is undermined by removing its danger] was so patent that an ordinafoundation, it is liable to fall. Naylor rily observant person, whether miner or

not, would have discovered it, within fall is augmented. The risk of doing the time deceased was at work on the the work, however, was open to any obbank, then such opportunity to know servation. It needed no special knowlit would be held as knowledge." Al-

Any laborer on a farm is expected to know that the upper layer of a pile of ensilage will fall when it is undermined. Welch v. Brainard (1895) 108 Mich, 38, the extent of his own lifting capacity, 65 N. W. 667.

sumed to understand, without any spe-cannot recover where it appears that

run and thus surround to a greater or essary to lift a heavy tie. less extent any person who might be The risk that a pair of car wheels working in the bin. Bohn v. Have-which are being loaded on a flat car by meyer (1889) 114 N. Y. 296, 21 N. E. skids may slip back is assumed by a

402, Affirming (1887) 46 Hun, 557.
(bb) Leverage.—A servant is presumed to understand the operation of the force of leverage in its simpler manifestations. Stobba v. Fitzsimmons & C. Co. (1895) 58 Ill. App. 427; Romona Colitic Stone Co. v. Tate (1894) 12 Ind. App. 57, 37 N. E. 1065, 39 N. E. 200 For the control of the control o 529. For the facts in both these cases see § 335, subd. 9, ante.

(cc) Handling of heavy objects.— (See also subd. (aa), (bb), supra). To load an open flat car with lumber of uniform length, breadth, and thickness, by piling the same in parallel tiers one after another, "is to do work which common laborers can perform without more hazard to their own security than appertains to ordinary manual labor." Sims v. East & West R. Co. (1889) 84 Ga. 152, 10 S. E. 543. An inexperienced laborer who in piling ties in a box car ceases, at the direction of the foreman to hurry up and pile them on another, to block them in the usual manner, cannot recover for an injury caused by their falling upon him, on the theory that it was a case in which instruction should have been given. Brown v. Oregon Lumber Co. (1893) 24 Or. 315, 33 Pac. 557 (plaintiff had A laboring man thirty-four years old been at work only three weeks). The is presumed to know that, if a marble court said: "Necessarily, as the height of the tier increases, unless commensurate care is observed, its tendency to tical upon one side of a platform, in a

edge to discover it. The piling of ties dridge v. Midland Blast Furnace Co. is not a work in which any peculiar (1883) 78 Mo. 564. knowledge or experience is involved, but is a work in which all have the same opportunity of judgment."

Since everyone is presumed to know a recently hired employee in a mill, A servant who goes into the mouth who ruptured himself in trying to lift of an elevator bin to drag down cotton a truck wheel out of a hole in the floor seed which has lodged therein, is pre- into which he had allowed it to run, cial experience, the danger that, while the hole was necessary for drainage purhe is digging in the bottom of the bin poses and was in plain view. Ferguson the seed may slip and fall on him. v. Phænix Cotton Mills (1901) 106 Brown v. Miller (1901; Tex. Civ. App.) Tenn. 236, 61 S. W. 53. Compare 62 S. W. 547. Worlds v. Georgia R. Co. (1896) 99 An ordinary laborer in a sugar re- Ga. 283, 25 S. E. 646, where a comfinery cannot hold his employer liable plaint was held demurrable on the on the ground that he was not warned ground that it showed the cause of the against the danger that, while sugar injury to have been the servant's miswas being drawn from a bin, it would calculating the amount of strength nec-

> servant whose ordinary duties are those of a car washer. It is immaterial that his ignorance of English prevented him from taking advantage of a warning given by a fellow servant. Golwitzer v. Pennsylvania R. Co. (1889) 1 Monaghan, 72. The danger that a rail which is being loaded on a car may slip back in consequence of its striking upon a pile of snow upon the car is obvious. Hanley v. Grand Trunk R. Co. (1882) 62 N. H. 274.

A servant is bound to know that if a heavy iron plate is propped up by a stick which meets it at an acute angle, the stick is likely to slip on the smooth surface. Brown v. Brown (1888) 71 Tex. 355, 9 S. W. 261 (servant had been working six weeks, but this fact was not a material element).

The danger that an insufficiently secured brace which holds in place a heavy beam which is being raised to the perpendicular may give way under the pressure of the beam if it slips is presumed to be known to a servant, though he is inexperienced in carpentry work. ich in- Stuart v. New Albany Mfg. Co. (1896) given. 15 Ind. App. 184, 43 N. E. 961 (complaint held demurrable).

> slab 3 feet wide and 5/8 inches thick, which stands in a position nearly ver

ent to a "casual observer," or such as could be seen "at a glance" by anyone.3 It is also laid down that, where the conditions which caused the injury, although never actually seen by the servant before the accident, were open to deduction from what was constantly in his sight, he cannot recover. The effect of any other doctrine, it is said, would be to permit him to found a right of action "upon his ignorance of what every man of ordinary faculties, placed in the same circumstances and using his faculties in the usual way, would have appreciated, and which he therefore must be held to have appreciated."4

The obligation to use the other senses is equally imperative, though much less frequently referred to.5 But it is clear from the cases cited in note 1, supra, that the law imputes, even to inexperienced servants, a much larger measure of knowledge than that which is acquired by the mere exercise of the senses. The law supposes every adult to possess such ordinary intelligence, judgment, and discretion as will enable him to appreciate any obvious danger.<sup>6</sup> The master therefore has a right to assume that an adult employee possesses "that knowledge which is acquired by common experience;"7 that he knows everything which is "a matter of common knowledge or presumed to be within the common experience of all men of common education;"8 that he understands "those dangers which are the subject of common

wagon, is tilted very slightly as a result of his throwing his weight on the other side of the wagon and so depressing it, the effect of the tilting will be to make the slab fall towards him.

Motey v. Pickle Marble & Granite Co.
(1896) 20 C. C. A. 366, 36 U. S. App.
682, 74 Fed. 155.

682, 74 Fed. 155.

Any servant of full age is presumed 486.
to understand the liability of round 51 sticks of wood 4 feet long to slip and 72.)
fall from the hooks of an upright, exposed, endless chain, upon which they tice are held by the force of gravity only.

Jones v. Manufacturing & Invest. Co. it.
(1899) 92 Me. 565, 43 Atl. 512.

The danger that a heavy water pipe (189 may roll off a block while it is being was raised by a lever is presumed to be up-been

raised by a lever is presumed to be understood by every man of ordinary in-

telligence. Johnson v. Ashland Water Co. (1890) 77 Wis. 51, 45 N. W. 807. A servant injured by the fall of a heavy mass of iron from a hand cart which he was helping to wheel on some loose planks laid across a pit cannot recover where the conditions of the work were perfectly familiar to him. Chicago, B. & Q. R. Co. v. Merckes (1890) 36 Ill. App. 195,

<sup>2</sup> Ragon v. Toledo, A. A. & N. M. R. Co. (1893) 97 Mich. 265, 56 N. W. 612; Findlay v. Russel Wheel & Foundry Co. (1896) 108 Mich. 286, 66 N. W. 50.

<sup>3</sup> Stephenson v. Duncan (1889) 73 Wis. 404, 41 N. W. 337.

\* Goldthwait v. Haverhill & G. Street R. Co. (1894) 160 Mass. 554, 36 N. E.

<sup>5</sup> In McClafferty v. Fisher (1885; Pa.) 1 Cent. Rep. 571, 2 Atl. 60, it was held that a miner was affected with notice that gas was escaping from an oil well, when he could both smell and hear

In Thomas v. Missouri P. R. Co. (1891) 109 Mo. 187, 18 S. W. 980, it was held that the servant should have been guided to an appreciation of the danger by his sense of smell. For facts see § 403, note 1, subd. (e), infra.

<sup>6</sup> Luebke v. Berlin Mach. Works (1894) 88 Wis. 442, 60 N. W. 711.

<sup>7</sup> Ruchinsky v. French (1897) 168 Mass. 68, 46 N. E. 417.

\* De Lisle v. Ward (1897) 168 Mass. 579, 47 N. E. 436.

knowledge, or which can be readily seen by common observation."9 All servants, therefore, are presumed to be acquainted to some extent with the properties of matter and the operations of the laws to which it is subject. 10 To this generic conception are referable the decisions which proceed upon the hypothesis that a servant is, in some degree at least, bound to take notice of the dangers arising from the action of gravitation under various circumstances;11 from the insufficient strength of materials; 12 from slippery surfaces; 13 from the action of extreme cold;14 from unblocked frogs;15 from obstructions beside railway tracks; 16 from some of the conditions incident to the construction of railway rolling stock;17 from the want of railings to protect platforms and similar places of work; 18 from the operation of various kinds of moving machinery.19

It is highly instructive to compare a portion of the decisions cited in note 1, supra, with those which, as will be seen by referring to the following section, have been rendered in the servant's favor upon similar states of facts. Te define the precise grounds upon which the different conclusions were arrived at is, in many instances, virtually impossible.

395. Risks not deemed to be, as a matter of law, comprehended without special experience.— (See also cases cited in § 462, post.)—In many instances where the injured servant had had no experience, or virtually none, in dealing with conditions similar to those which he was required to encounter, it is deemed unwarrantable to take the case from the jury or override a verdict in his favor, although it may be certain that the risk to which the injury was traceable was one which he would have been conclusively presumed to appreciate, if he had been engaged for a longer time in discharging similar duties

<sup>o</sup> Smith v. Peninsular Car Works grees of intelligence that wheeled vehical (1886) 60 Mich. 501, 27 N. W. 662. cles go down hill with increasing speed <sup>19</sup> In McGowan v. La Plata Min. & Smelting Co. (1882) 3 McCrary, 393, 9 Fed. 861, the court said: "Within limits, the law will assume that everyone has knowledge of destructive forces in the world and the powers of the earth and air. Of such is the knowledge that comes to every man of sound mind, in the ordinary course of his life, that fire will burn; that water will drown; that one may fall off a precipice; and the like. Recently in this court it was said of one who mounted a push car on a railroad, and went down a steep grade to his hurt, that, knowing the grade, it was his own folly not to heed the law supra. of gravitation; because it is known to all men of sound mind and of all de-

if left to themselves."

More briefly it has been laid down that one who enters the service of another is bound to take notice of the ordinary and familiar laws of nature applicable to the subject to which the employment relates. Worlds v. Georgia R. Co. (1896) 99 Ga. 283, 25 S. E. 646.

See note 1, subd. (aa)-(cc), supra.

See note 1, subd. (e), (f), (w),

(x), supra.

13 See note I, subd. (j), (v), supra.

14 See note 1, subd. (z), supra.
15 See note 1, subd. (a), supra.
16 See note 1, subd. (b), supra.
17 See note 1, subd. (c), (d), (e),

is See note 1, subd. (g), supra.

19 See note 1, subd. (k), et seq., supra.

under similar circumstances, either for the defendant or for some other employer. In the subjoined note are collected a large number of decisions exemplifying this situation.2

danger attending the operation of a tical knowledge of the work in quesa certain service, or working in a partic-such knowledge. Baltimore & O. R. ular position, although obvious to per-Co. v. Stricker (1878) 51 Md. 47, 34 sons of experience and knowledge of the Am. Rep. 291. An instruction to the ciated by others on account of igno- a laborer injured by machinery, and rance or inexperience; and in the ap- his experience in the use of plication of the rules already adverted machinery, may be considered by to [as to assumption of risks], due rethe jury in an action by him for gard must be had concerning the intellithe injury, in respect to the point gence and experience of the person emwhether he was cognizant of the risks ployed in relation to the machinery or incurred by one working near it, is corimplement at or with which he is rerect. Huizega v. Cutler & S. Lumber quired to serve." Jenney Electric Light Co. (1883) 51 Mich. 272, 16 N. W. 643.

"The doctrine that a servant assumes all the dangers that are apparent to him when he enters the employment has no application . . . when it is apparent only to those possessing peculiar skill and knowledge in such matters." Eddy v. Aurora Iron Min. Co. (1890) 81 Mich. 548, 46 N. W. 17. "Risks and dangers that are apparent to the man of long experience and of a high order of 12 U. S. App. 260, 55 Fed. 943.

rule by which "the employee impliedly such dangers as are obvious and open to such risks as the employer knows, or which by the exercise of reasonable care he might have known, beforehand, that the employee by reason of his immaturity and inexperience, is ignorant of, or orado Midland R. Co. v. O'Brien (1891) such as the employer knows the em- 16 Colo. 219, 27 Pac. 701. ployee, without experience, cannot ap-

trial judge should distinguish, in his 766, 16 Sup. Ct. Rep. 618. instructions to the jury, between the An inexperienced switchman who is

"It may frequently happen that the position of a servant who has a praccomplicated machine, or of performing tion, and that of a servant who has no situation, is nevertheless not appre- effect that the age and intelligence of & P. Co. v. Murphy (1888) 115 Ind. 566, It is proper to instruct the jury that a servant assumes, besides the ordinary risks of his empoyment, those also which should have been observed by one ordinarily skilled in the employment. Western U. Teleg. Co. v. McMullen (1895) 58 N. J. L. 155, 32 L. R. A. 351, 33 Atl. 334. The following charge was held appropriate in the case of a servant who was wholly inexperienced in the use of machinery, and was killed owing to his clothes being caught by a intelligence may be unknown to the in-rapidly revolving shaft about  $1\frac{1}{2}$  inches experienced and ignorant." Bohn Mfg. in diameter: "The servant, knowing Co. v. Erickson (1893) 5 C. C. A. 341, the fact of machinery being in motion close by the place where he is work-Stated in language which has a more ing, may be entirely ignorant of the risk particular reference to the duty under he would incur by falling against or which the employer lies to communicate coming into contact with it. In such a information in cases where the servant case it is the duty of the master, not cannot work safely without it, this prin- only to exercise due care, but good faith, not work safely without it, this printoward the servant, and to inform him ciple takes the following form: The of the risks he undertakes." Pullman's rule by which "the employee impliedly Palace-Car Co. v. Harkins (1893) 5 C. assumes the risks of the service and of C. A. 326, 17 U. S. App. 22, 55 Fed. 932.

<sup>2</sup> (a) Railway tracks and appurteordinary observation does not embrace nances.—A laborer unskilled in railroad building is not necessarily chargeable with notice of the defective condition of a newly constructed roadbed, although he has engaged in its construction.

A locomotive engineer is not chargepreciate without instruction or warn- able with knowledge of the fact that a ing." Louisville, N. A. & C. R. Co. v. culvert under the roadbed of a railway Frawley (1886) 110 Ind. 18, 9 N. E. is not large enough to carry off the wa-594. ter which may at times be expected to Whenever the servant's inexperience seek a passage. Union P. R. Co. v. is a material element in the case, the O'Brien (1896) 161 U. S. 451, 40 L. ed.

It will be observed that, in a portion of these cases, the specific conclusion to which the servant's inexperience points is that his failure to observe the material conditions which created the danger did

will encounter. Fredenburg v. North-ern C. R. Co. (1889) 114 N. Y. 582, 21 N. E. 1049.

(b) Railway cars; construction and handling of.—An inexperienced brakeman is entitled to go to the jury where that he was not instructed as to the danger to do the service then required be disturbed where the evidence is that warning, unless that coupling was to be he was injured, while coupling cars of made in exactly the same manner as he different construction, four days after made the coupling on his employer's obtaining employment as a switchman; cars." Compare Reynolds v. Boston & that he had stated, when he was applying for employment, that he had had no § 253, note (8), ante. See, however, § experience in the work; and that not 394, note 1, subd. (c), supra. less than four weeks' service as a learner safely the various kinds of cars which ordinarily came into the yard. Louisville & N. R. Co. v. Miller (1900) 43 C. C. A. 436, 104 Fed. 124.

The fact that a brakeman accustomed that two cars which he was suddenly well as drawheads does not necessarily 22 S. W. 272. involve the conclusion that he appre-

ordered to couple cars in the nighttime ciated the peculiar dangers incident to at a place where there is a cattle guard an attempt by one inexperienced in should be warned as to the danger he handling cars of that construction to make the coupling. Illinois C. R. Co. v. Price (1895) 72 Miss. 862, 18 So. 415. "If it be argued," said the court, "that the appellee must have seen the drawheads and bumpers projecting from both cars when he went in to make the couphe is injured because he is not instruct- ling, hurriedly, (which cannot be said ed as to the dangers incident to coupling to be certainly proved), and that he saw cars with differently constructed coup- their unlikeness to any he had ever seen ling appliances. Louisville, N. A. & C. and used before, he was bound to take R. Co. v. Frawley (1886) 110 Ind. 18, 9 such obvious instrumentalities, and their N. E. 594; Illinois C. R. Co. v. Price dissimilarity to those he knew how to (1895) 72 Miss. 862, 18 So. 415; Rey-use in coupling, as ample warning of nolds v. Boston & M. R. Co. (1891) 64 the danger to which he was called to ex-Vt. 66, 24 Atl. 134; Louisville & N. R. pose himself, and he should have with-Co. v. Veach (1898) 20 Ky. L. Rep. 403, drawn, it is to be answered: (1) He 46 S. W. 493. The duty to instruct an may have seen the drawheads and bumpinexperienced servant is especially ers casually, and not observed them so strong, where the couplings are not only as to form any opinion touching their materially different from those in use construction or use. (2) He may have on the defendant's cars, but also from even observed them, and yet, in his those which are in general use on other ignorance and inexperience, he may have lines. Missouri P. R. Co. v. White supposed that the drawheads would not (1890) 76 Tex. 102, 13 S. W. 65. Combe driven back by the impending impact pare also Grannis v. Chicago, St. P. & of the cars as they came together, but K. C. R. Co. (1890) 81 Iowa, 444, 46 N. would remain fixed, and prevent the W. 1067. An inexperienced brakeman is bumpers coming together, as seems not not, as a matter of law, chargeable with impossible, since single drawheads are appreciation of the danger of coupling coupled with safety in the manner he a tender with a goose-neck to a freight employed in his attempt to couple the car with an ordinary coupler. Hunger-double drawheads in this case. Or (3), ford v. Chicago, M. & St. P. R. Co. he may have reasoned, as he had a right (1889) 41 Minn. 444, 43 N. W. 324. A to do, that his superior would not have verdict for the plaintiff on the ground sent him into an unaccustomed place of proper way of doing the work will not without giving him some instruction or M. R. Co. (1891) 64 Vt. 66, 24 Atl. 134,

The danger that a link in a drawhead was needed to qualify a person to handle may prove to be stuck, thus exposing a person engaged in coupling to the danger of having his fingers crushed, if he does not let it go before the cars meet. is in a sense obvious, but it is one as to which the railroad company is bound to to cars with single drawheads observed warn an inexperienced brakeman known to be ignorant of such danger. Bonner called upon to couple had bumpers as v. Moore (1893) 3 Tex. Civ. App. 416.

Where hand brakes are in use, and

not necessarily import culpability. Usually, however, the ultimate fact established is that a jury is warranted in finding that, although the material conditions themselves were visible to him, he did not

limber staffs, differing from each other only in the size of their staffs, and the limber ones are shown to be inherently dangerous in the hands of inexperienced brakemen who do not understand how to handle them, it is the duty of the railway company either to adopt the less dangerous kind, or, if not, to warn the inexperienced operator placed in charge of the more dangerous, of their dangers. Louisville & N. R. Co. v. Bin-ion (1894) 107 Ala. 645, 18 So. 75.

(c) Locomotives; construction and operation of.—See Bridges v. St. Louis, I. M. & S. R. Co. (1879) 6 Mo. App. 389, cited in § 397, note 1, subd. (b), infra, also this note, subd. (t), (w),

(d) Telegraph poles.—In a case where a lineman, while sawing through a telegraph pole, supported his weight by grasping the section above the place where he was sawing, and the pole, when the sawing was partly completed, suddenly broke off and allowed him to fall to the ground, it was held that neither the fact that he omitted to inspect the , pole for the purpose of ascertaining its soundness, nor the fact that he did his work in the manner described, can be said to show negligence, as a matter of law, where it appears that he had previously been accustomed to work on the ground, and had been assigned to this task without any instruction or warning. Western U. Teleg. Co. v. Burgess (1901) 47 C. C. A. 168, 108 Fed. 26.

An inexperienced employee who is ordered to dig a trench so as to shift a telegraph pole, without being notified that props are necessary to hold it in

App. 494.

held where the evidence sustains a find- front of the saw in its ordinary use are arch by which he was injured was apare held in contact with the table. The parent to an experienced mason, but not fact that objects which touch the opto a person not skilled in mason work. posite side of the saw will be affected in Gill v. Homrighausen (1891) 79 Wis. a different manner, and one attended 634, 48 N. W. 862. An unskilled labor- with danger, although easily understood er who had had nothing to do with the from explanation and readily learned by

some of them have stiff and others plans or construction of the wall of a cistern did not assume the risk of the fall of that wall. It cannot be presumed, from the fact that he was working near it, that he might have expected its fall, unless there is proof that he knew its real condition before it fell. Mulcairns v. Janesville (1886) 67 Wis. 24, 29 N. W. 565.

(f) Slippery surfaces.—The danger of slipping on a marble stairway is not deemed to be obvious to an employee who has been in the defendant's service ten days, where it was only after the stairway had been tested by actual use that the employer ascertained it to be dangerous. Kline v. Abrahams (1900) 48 App. Div. 522, 62 N. Y. Supp. 857.

(g) Saws.—A verdict will not be set aside which finds that a rapidly revolving saw placed under a bench used by the plaintiff, in such a position that he could not see it unless he lowered his eye to within 18 inches of the floor, was an appliance on which it was unsafe and improper to set an inexperienced man to work without giving him proper notice and reasonable instructions. v. Eyeleth (1890) 83 Me. 50, 21 Atl. 784.

The particular danger caused by the tendency of a board when warped to spring back is not, as matter of law, obvious to an inexperienced workman just beginning to use it. Wheeler v. Wason Mfg. Co. (1883) 135 Mass. 294. To same effect see Lemser v. St. Joseph Furniture Mfg. Co. (1897) 70 Mo. App. 209, where, however, the decision is broader, as, for aught that appears, the piece of timber which was thrown back was not warped.

In another case recovery was allowed an upright position, and that another for reasons thus explained: "The genemployee has been sent to fetch them, eral danger of contact with a circular may recover for an injury caused by the saw in operation is of course obvious. fall of the pole. East St. Louis Con- But the particular danger by which the necting R. Co. v. Enright (1893) 47 Ill. plaintiff was hurt is not one which is apparent. The saw teeth move with such (e) Masonry.—A judgment for the velocity that they are indistinguishable. plaintiff, a common laborer, will be up- Objects which come in contact with the ing that the danger of the fall of an not thrown upward, but by its action

possess that measure of skill and technical knowledge which would have enabled him to understand the consequences which might result from those conditions. A general analysis of the cases cited in note 2

experience, is not of itself plain and ob- so patent to a new employee that the vious, but is one of those obscure dan-master is absolved from the duty of ingers of which an employer should give struction. Bjbjian v. Woonsocket Rubwarning if he has reason to suppose that ber Co. (1895) 164 Mass. 214, 41 N. E. a workman who may encounter it in his 265. work does not know of this action of the

saws, and thus throw the operator's his instructions, to see if it was hot). hands upon them, should have been instructed as to this peculiarity. Chilson the jury to say whether the risk of

(h) Planers and similar machinery. ciated by a servant who had no knowl—Where the testimony justifies the inference that the knives of a planing machine were concealed from one doing the work assigned to an inexperienced employee, it is error to nonsuit him in an action to recover damages for an injury caused by his stepping into the knives while they were temporarily left without the protection of the hood which ordinarily covered them. Turner v. ciated by a servant who had no knowledge of machinery, and who was performing such duties that he had nothing to do with the operation of the shaft. Roth v. Northern Pacific Lumbering Co. (1889) 18 Or. 205, 22 Pac. 422. It cannot be said, as a matter of law, that a mere laborer charged with the duty of shoveling fat in the vicinity of an unguarded revolving shaft appreciated the risk of injury that would recovery on the ground that he should have known the danger of attempting to recovery on the ground that he should have known the danger of attempting to jury whether an inexperienced 'servant remove with his hand the shavings (a carpenter) injured while attempting which had accumulated under the plantoplace a running belt upon a pulley er, while the machine was in motion, the evidence being that the knives on the curred, and thereby assumed it. Deinner side of the planer by which his mars v. Glen Mfg. Co. (1892) 67 N. H. hand was cut off were concealed from 404, 40 Atl. 902. Whether the risk incivity by the fightly packed shavings, dent to shifting a helt with a stick understood the danger inview by the tightly packed shavings. dent to shifting a belt with a stick was Bennett v. Warren (1900) 70 N. H. 564, appreciated by a servant who was in-49 Atl. 105.

-While the fact that if the hands are so though he had worked for a long time —While the fact that if the hands are so though he had worked for a long time placed between the upper portions of reabout machinery, he had never had any-volving cylinders as to be in contact thing to do with belts, that he knew with the surfaces there is danger is obsolute to a man of ordinary intelligence after even a day's experience, a court man to perform the operation with a will not say, as a matter of law, that stick. McDougall v. Ashland Sulphite the increased danger arising from their Fibre Co. (1897) 97 Wis. 382, 73 N. W. having been left on one occasion further 327. apart by a coemployee of the plaintiff is

(j) Cogwheels and gearings.—An insaw, and is ignorant of this particular experienced employee who is set to work. danger." Hanson v. Ludlow Mfg. Co. without instructions, upon a boring ma-(1894) 162 Mass. 187, 38 N. E. 363. chine with uncovered cogs, does not, as chine with uncovered cogs, does not, as It is for the jury to say whether a a matter of law, assume the risk. servant having no experience in the use *Thompson* v. *Edward P. Allis Co.* of a saw of peculiar construction, dan- (1895) 89 Wis. 523, 62 N. W. 527 (arm gerous because pieces of timber were was caught in uncovered gearing, while liable to become wedged between the he was feeling the shaft, according to

(k) Shafts and set screws.—It is for v. Lansing Wagon Works (1901) 128 crossing a revolving shaft with two set Mich. 43, 87 N. W. 79. screws projecting therefrom was appreich. 43, 87 N. W. 79. screws projecting therefrom was appre-(h) Planers and similar machinery. ciated by a servant who had no knowl-

jured while doing so is a question for (i) Machinery with revolving rollers. the jury, where the evidence is that, al-

indicates that inexperienced servants have been held not to be necessarily chargeable with a knowledge of the risks incident to the handling of appliances of an unfamiliar construction (subd. b); the work

(m) Machinery for the treatment of Co. v. Eiler (1901) 22 Ky. L. Rep. 1641, cotton.—An employer is not, as matter 61 S. W. 8. of law, free from negligence in failing (o) Crushing machines.—A special to instruct an inexperienced employee in regard to the danger of removing clogs from a cotton-picking machine, without stopping the beater, where the picker boss had removed clogs without stopping the beater in the presence of such employee, and had directed him to put his hand in when the machine became clogged and pull out the clog, without telling him not to do it when the beater was in motion, and the internal construction of the machine could not be seen while the beater was running. De Costa v. Hargraves Mills (1898) 170 Mass. 375, 49 N. E. 735. A nonsuit is erroneous where the evidence is that an inexperienced servant was injured while cleaning a "picker" machine four days after he went to work, and that he had not been notified of the danger caused by the fact that the "beater" continued to revolve by its own momentum for of the machine had come to a standstill. Hightower v. Bamberg Cotton Mills 427. (1896) 48 S. C. 190, 26 S. E. 222. A master who directs an inexperienced employee to tie in a bolt attached to a cotton-gin, without warning him of the attendant danger, violates his duty, although the employee knows that the saws will cut him if he comes in contact with them. Greenville Oil & Cotton Co. v. Harkey (1899) 20 Tex. Civ. App. 225, 48 S. W, 1005. Here the elements of danger which, according to the court, the servant could not be assumed to have understood, were the risk of doing a solid mass, his hand went through the the work without stopping the machine, and the risk that the atmospheric disturbance produced by the movements of the gin-saws and brushes might draw a coat sleeve against the saws.

(n) Grinding machinery.—Where an employee unskilled in the use of machinery is assigned to the work of tending a grinding machine, at the bottom of which is a spout which occasionally N. E. 810. becomes clogged with the ground stuff (s) Other hoisting appliances.—which is discharged through it, he should Where the latch by means of which a

finding that the plaintiff, a common laborer, was assigned without instructions to the work of poking brickbats into a crusher, and was injured fitteen minutes afterwards, is not inconsistent with a general verdict against the defendant. Chicago Anderson Pressed Brick Co. v. Rembarz (1893) 51 Ill. App. 543, Affirmed in Barnes v. Rembarz (1894) 150 Ill. 192, 37 N. E. 239.

(p) Sugar-refining machines.—Where an inexperienced employee was set to work upon a rapidly revolving machine used in the refining of sugar, and was injured while cleaning it after the day's work was over, a verdict holding the employer liable was upheld on the ground that there was evidence tending to show that his agents put a servant to work "in a place of peculiar danger, of which he had no knowledge or experience, without informing him of the risks two or three minutes after all the rest or instructing him how to avoid them." O'Connor v. Adams (1876) 120 Mass.

> (q) Sausage machines.—Negligence is properly inferred where an employee in a packing house, who was ordered to perform the unaccustomed work of feeding a sausage machine with chopped meat, which was shoveled into a hopper about a foot in depth above the revolving knives, was not warned that a crust of meat was sometimes formed across the top of the receptacle, the consequence being that, when he was attempting to press down what appeared to be crust and came into contact with the knives. Richardson v. Swift & Co. (1899) 37 C. C. A. 557, 96 Fed. 699.

> (r) Elevators.—A jury is warranted in finding that a common laborer when put in charge of an elevator should be instructed as to the manner in which it is to be operated. Brennan v. Gordon (1890) 118 N. Y. 489, 8 L. R. A. 818, 23

be instructed as to the proper way coal bucket was closed and opened was of unclogging it, viz., by striking it with constructed on the scientific principle a heavy object, and warned against at- that a force pressing such a contrivance tempting to unclog it by running in his perpendicularly against a resisting sur-hand, and so running the risk of being face has a tendency to hold it against struck by the machinery. Standard Oil the surface, it was held that a common of adjusting of parts of machinery (subd. l); the action of concealed parts of machinery (subd. g, h, m, n); certain peculiar results or incidents in the operation of machinery (subd. h, m, n, q, u); the combustion of a certain kind of fuel (subd. z). The same note shows

angle made by the latch with the surface became slightly obtuse. Pennsylvania Coal Co. v. Kelly (1894) 54 Ill.

App. 622.

If a servant is inexperienced and ignorant of the approaches to a meal conveyor, and the apparent approaches to the same are such as are likely to lead him, on account of his inexperience and meal conveyor in a certain manner, and Co. (1896) 112 Cal. 244, 32 L. R. A. 524, the danger of ascending to it in that 44 Pac. 471. manner is not apparent to him on account of such ignorance and inexperience, roundhouse, with a limited knowledge of and the master's foreman knows or ought mechanical forces, who was injured by to know these facts, it is his duty to instruct and caution the servant sufficiently to enable him to comprehend the dangers, and to ascend to the conveyor safely by the exercise of proper care. Ft. Smith Oil Co. v. Slover (1893) 58 Ark. 168, 24 S. W. 106.

(t) Air suction caused by moving machinery.-The fact that a considerable suction is produced by a cooling fan is one not readily ascertained except by a person possessed of special knowledge, and a servant who is hired merely to oil such a fan should therefore be warned of the danger to which he will be exposed if he puts his arm in a place where it will be affected by the suction. Swift & Co. v. Fue (1896) 66 Ill. App. 651.

Compare § 399, note 1, subd. (q),

infra.

- (u) Hydraulic machines.—Whether a master is negligent in placing a servant at work at a "hydraulic draw bench," without instructing him as to the difficulty or impossibility of exactly centering the valves so as to entirely stop the motion of the piston, is a question for the jury in an action for injuries sustained by the servant, just after he had begun work, by the motion of the piston after it had apparently been stopped. Borgeson v. United States Projectile Co. (1896) 2 App. Div. 57, 37 N. Y. Supp.
- (v) Refrigerating machines. The tightening up of nuts on the generator of a refrigerating machine without reducing the pressure, when there is an which, by alighting on the blasting

laborer could not be presumed to know ammonia pressure of about 120 pounds the result which might follow if the which is increasing, is a dangerous work which a carpenter employed as a general laborer or handyman, but unfamiliar with and uninstructed as to the danger of the mode of operation necessary to preserve an equal strain on all parts of the generator, cannot be set to do without rendering the employer liable to him for injury resulting from an ex-plosion caused by his lack of skill. ignorance, to undertake to ascend to the Ryan v. Los Angeles Ice & Cold Storage

(w) Push poles.—A servant in a the coming together of two engines as a result of the breaking of a defective stick which was used to apply the power of one engine to the other for the purpose of turning the latter on a turntable, was not, as a matter of law, chargeable with a comprehension of the danger of operating the turntable in this manner. McDonald v. Chicago, St. P. M. & Q. R. Co. (1889) 41 Minn. 439, 43 N. W. 380. See, however, § 394, note 1, subd. (w), (x), supra.

(x) Linemen's spurs.—A "trimmer" employed by an electric company, who is inexperienced in climbing poles, is not, as matter of law, chargeable with notice of defects in spurs furnished him for that purpose, consisting in the spurs besing set at an improper angle to the shank, and being made of soft material, since the defect is not necessarily obvious to an inexperienced person. Indiana Natural & Illuminating Gas Co. v. Marshall (1898) 22 Ind. App. 121, 52

N. E. 232.

(y) Ice tongs.—Ice tongs are simple tools, but a court will not say, as a matter of law, that an unskilled laborer of ordinary intelligence should have known that they were defective in that their points were too blunt to take  ${\bf a}$ secure grip of the ice. Neubauer v. Northern P. R. Co. (1895) 60 Minn. 130, 61 N. W. 912.

(z) Furnaces.—A laborer in a quarry is not affected with knowledge that the furnace of the engine operating the hoisting apparatus is not so constructed as to prevent the escape of live cinders, that it cannot be declared, as a matter of law, that such a servant must be taken to have understood the operation of certain mechanical forces under special circumstances (subd. s, t, u, v, w); or matters

powder, may cause an explosion. Grant composition, was unusually likely to v. Drysdalc (1883) 10 Sc. Sess. Cas. 4th cave in, and that the plaintiff, by reason series, 1159.

An inexperienced fireman is not presouri, K. & T. R. Co. v. Walker (1894;

Tex. Civ. App.) 26 S. W. 513.

are thrust at once into a boiler furnace, of the law of gravitation, and is prethe draft will be stopped, and the gas formed by combustion will be prevented from passing off by the chimney, the mined, will cave in and fall. But the probable consequence being an explosion, is not an obvious risk nor one which it ticular embankment at which Olsen was can be said, as a matter of law, an inexperienced servant should understand. dangerous by reason of the character of La Fortune v. Jolly (1896) 167 Mass. the earth, and that this peculiar and ex-170, 45 N. E. 83.

the proprietor of a lime kiln to warn Olsen. an inexperienced laborer who is set to stone at the base is removed, and the mass above consequently subsides. Parkhurst v. Johnson (1883) 50 Mich. 70, 45 Am. Rep. 28, 15 N. W. 107.

(bb) Action of gravitation on various substances .- The danger incident to a position under a perpendicular bank of gravel which is liable to fall at any moment is not, as matter of law, apparent to an inexperienced laborer. Daly v. Kiel (1901) 106 La. 170, 30 So. 254 (servant should have been warned).

One employed to operate and oil the machinery of a steam shovel used to reof a bank of clay above the shale, where he is inexperienced in the work of excavation, and has nothing to do with the removal of the clay to prevent its falling. Alton Paving, Bldg. & Fire Brick Co. v. Hudson (1898) 176 Ill. 270, 52 N. E. 256, Affirming (1897) 74 Ill.

A complaint is not demurrable which alleges that the defendant's agent, in the exercise of the authority conferred upon him, ordered the plaintiff, without warning, into a place known to such of any careful observation. Quigley v. agent to be one of extraordinary danger, Bambrick (1894) 58 Mo. App. 192. by directing him to excavate earth from an embankment which, by reason of its engaged in excavating work is not, as

of his inexperience, was not aware of the danger to which he was exposed in sumed to know that the use of fine and undertaking the work. Thompson v. dirty coal may cause the flames to burst Chicago, M. & St. P. R. Co. (1883) 4 forth from the locomotive furnace. Mis- McCrary, 629, 14 Fed. 564. The court said: "It is true that, ordinarily, every person of mature years and com-The danger that, if too many shavings mon intelligence is bound to take notice sumed to be aware of the danger that earth in an embankment, when underamended complaint avers that the paremployed was peculiarly and unusually traordinary danger was known to Cavi-(aa) Lime kilns.—It is the duty of naugh, and was not communicated to

An inexperienced workman was not, work on the top of the kiln as to the as a matter of law, guilty of negligence danger of falling into the fire when the contributing to his injuries from the giving way of the side of a ditch which he was digging alongside a heavy timber, through the weight of such timber, where he did not in fact see the danger, and dug the ditch at the precise place marked out for it. Texas & P. R. Co. v. French (1893; Tex. Civ. App.) 22 S. W. 866.

A servant unfamiliar with the work of excavating tunnels is not bound to know that when soil is saturated with water it has less cohesive power than when it is dry. Quigley v. Bambrick (1894) 58 Mo. App. 192 (another elemove shale from an embankment is not, ment which operated in the servant's as a matter of law, chargeable with favor was that he was working in the knowledge of the danger of the falling dark, and therefore had no opportunities for observation).

> It cannot be held, as matter of law, that the extent of the cohesive power of the soil, counteracting the operation of gravitation on the sides of a funnel, and the manner in which that cohesive power is affected by the saturation of the soil with water, were facts constructively known to a servant who had never been engaged in the excavation of tunnels,-especially when the place where he worked was so dark as not to admit

A mason's helper who has never been

pertaining to the theory and practice of engineering or mechanical construction (subd. a, s, x, y); or certain properties of metals (subd. ff, gg); or the chemical properties of substances intended to

matter of law, chargeable with knowl- owing to the weakening of the emptied edge of the risk of the sides of a trench barrel and the spreading of the tier in collapsing by reason of the weakening which it is placed, patent to such a effect of the water which had been julining into it. Finn v. Cassidy (1901) to a few weeks of work. Livy, moline 165 N. Y. 584, 53 L. R. A. 877, 59 N. E. v. Scherman (1892) 50 Ill. App. 123, Affirmed in (1893) 146 Ill. 541, 34 N.

See also Ft. Wayne v. Christie (1901) 156 Ind. 172, 59 N. E. 385, as stated in § 394, note 1, subd. (aa), supra.

An inexperienced miner who has received no warning is not chargeable, as a matter of law, with a comprehension of the danger that an overhanging rock in a tunnel may fall. Hanley v. California Bridge & Constr. Co. (1899) 127 Cal. 232, 47 L. R. A. 597, 59 Pac. 577.

While every ordinarily intelligent man must be held to know that earth will fall if undermined, an inexperienced laborer may not readily understand how far he can go with comparative safety when removing the lower layers of a stone wall. Wolf v. Great Northern R. Co. (1898) 72 Minn. 435, 75 N. W. 702 (distinguishing the "Gravel Pit" cases, § 394, note 1, subd. aa).

The questions of an employer's negligence and his employee's assumption of risk are for the jury in an action against the former to recover for the latter's death, caused by being suffocated by bran falling on him in a bin in which he was shoveling the bran away from the sides and towards an aperture in the center, through which it ran, where the bin was dark, and the employee was not warned of the danger and risk incident to going into a bin for that purpose, fully known by the foreman under whose direction he was working, but not open and patent or ordinarily discernible by the use of one's senses, although a movable light appliance was furnished, to be carried into the bin, if the employee had never seen it in use, and did not know what was necessary in order to make it available. Lund v. Woodworth (1899) 75 Minn. 501, 78 N. W. 81.

The removal of the contents of a barrel above which are piled three tiers of barrels, each weighing 300 to 400 feet long, weighing 400 pounds, was be-pounds, is not an ordinary incident in ing effected by four persons carrying the the work of a laborer engaged to pile same, stepping from tie to tie). barrels in a pork-packing establishment: nor is the risk of a collapse of the pile, iron smokestack, and placing it in posi-

A common laborer, although chargeable with knowledge of the operation of the force of gravitation under ordinary circumstances, cannot be said, as a matter of law, to understand the risk incident to unloading from a car by the roller method a stone several tons in weight. Whether the stone under such circumstances will cause the car to tip up would depend largely upon certain conditions,-such as the gauge of the track, the width of the platform, the weight of the car, and the stone itself, and the like. The danger, therefore, is not obvious. Higgins v. Missouri P. R. Co. (1890) 43 Mo. App. 547.

(cc) Handling of heavy objects.— (See also preceding subd. ad finem, and subd. (ee) infra.) To require a gang of men to range themselves in line along a train of moving cars, and pick up from the ground and throw on a car rails weighing from 600 to 700 pounds each, running from one to another fast enough to be in position as the train passes,—especially without notifying a new and inexperienced man of the great hazard of the work,—is negligence. Palmer v. Michigan C. R. Co. (1892) 93 Mich. 363, 17 L. R. A. 636, 53 N. W.

It cannot be said, as a matter of law, that an entirely inexperienced man relying, as he has a right to do, upon the assumption that the master knows his duty to his employees and will fulfil it properly, is chargeable, on the day he begins work, with the knowledge that the method adopted by his foreman for removing rails from a bridge is not a reasonably safe one. Bonnet v. Galveston, H. & S. A. R. Co. (1895) 89
Tex. 72, 33 S. W. 334, Reversing (1895;
Tex. Civ. App.) 31 S. W. 525 (removal from a railroad bridge of iron rails 20

Whether the raising of an immense

be used as explosives, and the conditions under which other substances not designed for such use may produce an explosion (subd. hh, mm); or the poisonous properties of the fumes arising from certain sub-

skill or knowledge that a servant preis called upon to assist in pulling upon the rope of the hoisting apparatus, is entitled to instructions as to the dangers of the work, is a question for the jury. Consolidated Coal Co. v. Haenni (1893) 146 Ill. 614, 35 N. E. 162, Affirming (1891) 48 Ill. App. 115.

A common laborer who is assisting in hoisting a boiler which is being removed is not chargeable, as a matter of law, with the duty of inquiring whether the manner in which it is lifted and sustained is safe or not. Chicago Edison Co. v Moren (1900) 185 Ill. 571, 57 N. E. 773, Affirming (1899) so Ill. App.

The possibility that a plank 2½ inches thick, which is held in a horizontal position with one end on a wagon bed, so that a heavy barrel may be rolled on to it, preparatory to its being gradually depressed for the purpose of making an incline plane along which to low-er the barrel to the ground, may be pushed back by the movement of the barrel so far as to drop from the wagon together with the barrel, and thus injure the workman who is holding the plank, is not an open and glaring peril which is obvious to an ordinarily prudent person. Beard v. American Car Co. (1897) 72 Mo. App. 583.

A servant unaccustomed to such work is not, as matter of law, chargeable with knowledge of the fact that it is unsafe to handle piles with crowbars and pinchbars. Anderson v. Illinois C. R. Co. (1899) 109 Iowa, 524, 80 N. W. 561.

(dd) Operation of grindstones.—The down, and so bring the other end and to an employee who had been engaged in and fly before he was injured. Little-the factory as a common laborer for field v. Edward P. Allis Co. (1900) 177 eighteen months, and was injured the Mass. 151, 58 N. E. 692. first day after he was transferred to the Mich. 94, 42 N. W. 1078.

tion on a base prepared for it, is an The danger that a shed may fall owing operation which requires such special to the weight of dèbris and snow which is allowed to remain upon the roof is viously employed as a blacksmith, who not one of those which are deemed to be within common observation. Johnson v. First Nat. Bank (1891) 79 Wis. 414, 48 N. W. 712.

An ordinary laborer employed about a foundry, who, under the direction of the superintendent, climbed upon a plank 16 feet above ground, for the purpose of lifting an iron tank by means of tackles, the beam supporting which broke as he pulled upon the rope, causing the tackle to fall, striking and throwing him to the ground, is not, as a matter of law, chargeable with an appreciation of the risk, where the evidence is that he had had no experience which would enable him to form an opinion as to the weight of the tank to be lifted, the resistance it would encounter from the pressure of the soil around it, and the strength of the beam. Fraser & Chalmers v. Collier (1897) 75 Ill. App.

(ff) Liability of iron and steel\_to throw off splinters when struck .- The danger that chips might fly off from a steel chisel with a battered head, which was being used to cut a rail, was held to be appreciated by a trackman, in Fordyce v. Stafford (1893) 57 Ark. 503, 22 S. W. 161. The extent of servant's experience was not referred to but it may probably be inferred that he had been engaged for some time in the work.

The risk of being injured by a chip breaking from a piece of iron pipe which the plaintiff was holding against the head of a bolt to receive the blows of the hammer by which the bolt was being driven was held not to be, as matter of danger that the end of an iron bar on law, obvious to him, where the work was a grindstone on which it was being new to him, and there was no specific trimmed would be caught and turned evidence to show that he knew that the iron pipe was more brittle and liable to the hand which was holding it against break than metals ordinarily used, or the stone, was deemed an apparent one that he had seen any part of it break

The danger that a sliver may fly off work of operating the grindstone. from a claw-bar which is cracked and Melzer v. Peninsular Car Co. (1889) 76 battered at the edges is not obvious, as a matter of law, to a mere laborer in a (ee) Sustaining strength of materials. section gang. Booth v. Kansas City & -(See also subd. (d), (e), supra.) I. Air Line Co. (1898) 76 Mo. App. 516. stances (subd. nn); or the dangers incident to the transmission of electricity (subd. oo).

As regards the cases in which the servant's comprehension of the

ant as to the dangers of holding red-hot charged charge of dynamite was being rivets while they are being hammered unloaded with an iron spoon. The risk into boilers will be upheld where the of an explosion, under such circumevidence tends to show that he was igno- stances, was not obvious to a person of rant of the dangers of the work. Man- ordinary intelligence having little ex-nion v. Hagan (1896) 9 App. Div. 98, perience with dynamite. Grimatdi v. 41 N. Y. Supp. 86 (poruon of rivet Lane (1901) 177 Mass. 565, 59 N. E. broke off and entered servant's eye). 451.

(gg) Elastic properties of copper wire.—It cannot be presumed, as a mat- for a few weeks as a shoveler at a mine ter of law, that the danger from the sud- is not chargeable, as matter of law, den recoil of a trolley wire when it is with knowledge of the fact that dynacut is known to an inexperienced man in mite becomes extra-hazardous if it is such a sense that his employer is free exposed to the weather for a consider-from negligence in failing to inform able period (here two months). Myrhim as to the proper manner of cutting berg v. Baltimore & S. Min. & Reduc-and removing the wire. Walker v. Lake tion Co. (1901) 25 Wash. 364, 65 Pac. Shore & M. S. R. Co. (1895) 104 Mich. 539 (dynamite was struck by a fellow servant and exploded).

(hh) Explosives, use of.—In a case where the servant injured by an explosion in a mine was apparently an inexperienced laborer, as he had been hired to work either in the mine or on the the jury that it is the employer's duty, before using a highly dangerous explosive, to ascertain and make known to his employees the dangers to be reasonably apprehended from its use. Bertha Zinc Co. v. Martin (1895) 93 Va. 791, 22 S. E. 869.

Negligence is predicable of the failure to notify a workman who is not a miner and knows nothing about dynamite or other explosives, of the danger that dynamite may explode from overheating or from the jarring produced by machinery. Mather v. Rillston (1895) 156 U. S. 391, 39 L. ed. 464, 15 Sup.

Ct. Rep. 464.

Negligence is a warrantable inference the explosives. where a man not employed to perform that particular service was ordered, without instructions, to warm a quantity of dynamite, and was injured by the explosion. Lofrano v. New York & Mt. V. Water Co. (1890) 55 Hun, 452, 8 N. Y. Supp. 717.

Where the plaintiff's work in stone with notice of the danger. Bannon v. quarries had consisted in removing the Lutz (1893) 158 Pa. 166, 27 Atl. 890. Where the plaintiff's work in stone stone after a blast had been made, and he had no knowledge that a blow or a generated by heated metals.—(See also spark would cause dynamite to explode, § 397, note 1, subd. (h), infra.) A he cannot be held to be guilty of conmaster is not, as matter of law, free tributory negligence, as a matter of law, from negligence in omitting to instruct

A verdict finding the employer guilty in not going to a safe distance while a of negligence in not instructing a serv-hole in which there was an undis-

A workman who has been employed

A common laborer who has had no experience in or knowledge of the use or danger of explosives employed for loosening frozen ground which is to be excavated for the roadbed of a railroad dumps, it was held proper to instruct is entitled to assume that the representative of his employer will not put him to work with a pick in a place where a blast has been set off, without taking proper precautions to guard against the consequences of a part of the blast being left unexploded, and warning him of the danger to be apprewarfing him of the danger to be apprehended from this source. Burke v. Anderson (1895) 16 C. C. A. 442, 34 U. S. App. 132, 69 Fed. 814, distinguishing Minneapolis v. Lundin (1893) 7 C. C. A. 344, 19 U. S. App. 245, 58 Fed. 525, and Corneilson v. Eastern R. Co. (1892) 50 Minn. 23, 52 N. W. 224, where the injured servants were experienced and hired for and engaged in the use of

> (ii) Explosive gases.—A servant who had begun work as assistant stillman about two months before he was killed by an explosion of the gas which issued from the manhole of a refining still when the cover was removed was held not to be, as matter of law, chargeable

> (jj) Explosions resulting from steam

risks arising from the action of gravitation (subd. bb) was held to be a question for the jury, it is clear that, in some instances, the special conditions involved furnish an adequate differentiating element by

if it is brought into contact with rust is not one which can be appreciated is therefore for the jury, where a servant in a foundry, after only a few weeks' experience, was ordered to pour molten metal into molds which were

metal while in that condition would explode upon coming into contact with rust. Hall v. United States Radiator Co. (1900) 52 App. Div. 90, 64 N. Y.

Supp. 1002.

The explosive power of hot slag when cast into water is not presumed to be comprehended by an ordinary workman without special training or experience. McGowan v. La Plata Mining & Smelting Co. (1882) 3 McCrary, 393, 9 Fed. 861.

Compare Kiras v. Nichols Chemical Co. (1901) 59 App. Div. 79, 69 N. Y. Supp. 44, where the same doctrine seems

to be taken for granted.

It is conceded that even an educated man would not be aware of the danger of an explosion from the contact of slag with water or ice. Ribich v. Lake Su-perior Smelting Co. (1900) 123 Mich. 406, 48 L. R. A. 649, 82 N. W. 279.

The danger of putting damp leaden dross into a kettle of molten lead is not, as a matter of law, obvious to a servant who has merely been engaged for three months in melting lead and dipping it out of the kettle, and who has never seen any dross melted during that period. Redmund v. Butler (1897) 168 Mass. 367, 47 N. E. 108.

(kk) Explosions of masses of molten metal.-The tendency of a "boil" of molten iron to explode when punctured is one which is latent as to an inexperienced person. Holland v. Tennessee Coal, I. & R. Co. (1890) 91 Ala. 444, 12 L. R. A. 232, 8 So. 524. The court said: "The evidence tended, in some degree, to show two distinct elements of danger

a common laborer as to the danger plaintiff's intestate was engaged when which arises from the expansive force the injury was suffered—one open to of steam generated by the fall of molten ordinary observation, and capable of belead upon a sheet of ice. Smith v. Pening measured and judged of by men of insular Car Works (1886) 60 Mich. no special knowledge or instruction in 501, 27 N. W. 662. the premises; and the other latent in The fact that molten iron will explode character, with nothing which could be it is brought into contact with rust seen and understood by the unskilled and uninstructed to give warning of its without some scientific skill and special presence, or suggest means of avoiding knowledge. The employer's negligence it. The 'boil' of iron while its lower part had sunk down considerably-21 or 3 feet, may be—into the earth, yet protruded above the surface, and was visible to those engaged in cutting the rusty, but was not informed that the trench. It was common knowledge, appreciable by inexperienced as well as experienced persons, that, if the ditch was open entirely up to the melted mass, its bottom being below the lowest estimated point of the 'boil,' the iron would immediately flow into and along the trench, thus imperiling those who should be in there at the time. This was the open and unobscured danger, which was sought to be guarded against by leaving a wall of earth between the trench and the 'boil,' of from 8 to 12 inches thick, the purpose being to break down this wall by piercing it with a long crowbar after the laborers had left the trench. Of such a patent danger there was no duty on the defendant to give the employees warning. The other peril arose from the fact, supported by a tendency of the evidence here, that a boil' of iron, upon being punctured and having its shell broken, bursts, and throws out molten metal in all directions—'explodes,' as some of witnesses stated as to this one, though this term was said to be inapt and inaccurate by others. Of this peril—the danger of the flying molten iron—resulting from unseen and unappreciated conditions and forces, the inexperienced man would know nothing by the exercise of his senses. It was a state of things which would not address itself to his comprehension, and of which he could only come to a knowledge by being instructed in regard to it."

(ll) Explosions caused by the contact of water with potassium .- That the danger of throwing water on potassium is not presumed to be known to persons not possessed of expert knowlincident to the work upon which the edge is apparently taken for granted in

which to distinguish the decisions from those to the opposite effect, which are cited in § 394, note 1, subd. (aa), supra. But an examination of the cases in which the servant was allowed to recover in spite of the absence of this element renders it extremely difficult, if not

(mm) Explosions caused by the contact of water with burning grease .- A feet him with notice of the latter danman employed as an ash wheeler in an ger. Neither is there anything in the engine house is not chargeable with employment of a common laborer that knowledge of the fact that the conse- presupposes any scientific knowledge, quence of suddenly turning a stream of

fumes are poisonous if inhaled, it canthem is so open and obvious to a comto have voluntarily assumed the risk to justify a presumption that a com-as one incident to his employment. mon laborer has by experience acquired Wagner v. H. W. Jayne Chemical Co. a knowledge of its attendant dangers. (1892) 147 Pa. 475, 23 Atl. 772 (de-Without some such previous knowledge, to the danger without warning). The the fumes of nitric acid, would not be court said: "It is a well-settled rule open and obvious, and the laborer could understanding, are or ought to be open Brewing Co. (1888) 22 W. N. C. 33, a and obvious. This is a reasonable rule, case in which the servant was injured for when a man seeks employment by a jet of ammonia, on the ground that in any particular department, or learning, as the case may be, for the the time he was ordered to return to performance of the duties which he pro-poses to assume, and such experience or as it had been, thereby impliedly adlearning necessarily brings a knowledge mitting the existence of some danger. fails, the rule itself ceases to have any he entered the room, the real state of application. And therefore, while a facts being apparent to the dullest apphysician would have no ground of comprehension, he was properly deemed to plaint if his health should be permahave assumed the risk. nently impaired by reason of exposure, A laborer who is injured by the poiat the call of a patient, to a contagious sonous fumes exhaled from Paris green or infectious disease, he might recover after he has been engaged for only five damages for the slightest injury suffered days in stirring up the constituents in in consequence of a defect in the floor a vat may recover on the ground that of the house which he was invited to he received no instructions as to the enter, unknown to him, but which was danger of the process and the precauknown or ought to have been known to tions which should be taken to avoid Vol. I. M. & S.—67.

Hill v. Meyer Brothers' Drug Co. his patron; and this because there is (1897) 140 Mo. 433, 41 S. W. 909. nothing in the science of medicine, in which he professes to be learned, to afpresupposes any scientific knowledge, water on a burning building in which there is a large amount of grease will probably be a dangerous explosion. Swift & Co. v. Creasey (1900) 9 Kan. App. 303, 61 Pac. 314.

(nn) Poisonous funcs The law of acids, or that poisonous fumes are likely to be evolved in a manufacturing process in which nitric acid is used; swift & Co. v. Creasey (1900) 9 Kan. App. 303, 61 Pac. 314. such as a knowledge of the properties App. 303, 61 Pac. 314. presume that such laborer either pos-(nn) Poisonous fumes.— If chemical sesses or professes such knowledge. experts differ as to whether certain And, although some of the work required to be done in the manufacture not be that the danger of exposure to of dinitro-benzole may be mere drudgery, it cannot be said to be of such ormon laborer that he should be deemed dinary character in its surroundings as fendant not free from negligence, as either scientific or experimental, the matter of law, in exposing the servant dangers, if any there be, of exposure to of law that an employee will be deemed not, with propriety, be deemed to have to have assumed all the risks naturally assumed such risks unknown to him as and reasonably incident to his employ- are naturally and reasonably incident ment, and to have notice of all risks to his employment:" The court distinwhich, to a person of his experience and guished Beittenmiller v. Bergner & E. of there the plaintiff knew the danger to either industrial or intellectual ac- which he was exposed, having previoustivity, he thereby represents himself to ly tested it, and retreated, and that the be qualified by the necessary experience superintendent merely assured him, at of the ordinary risks of the employment. As the plaintiff must have observed that But when the reason of the rule this statement was not true as soon as

impossible, to avoid the conclusion that there is, upon the facts, a real conflict of opinion between the courts in respect to the degree of knowledge which is imputable to the servant under such circumstances. For other similar decisions with respect to risks of an analogous nature, see § 399, infra.

396. Risks of which a comprehension has been imputed, as a matter of law, to servants having special experience.—Under certain exceptional circumstances, the servant's previous experience in the given employment may be the occasion of his drawing false inferences with respect to the actual conditions which exist. His experience is then a positively misleading element, and tends strongly to show that he was not guilty of negligence in failing to appreciate the particular

L. R. A. 351, 33 Atl. 384.

An unskilled workman employed to dig post holes and assist in general 66 Pac. 76.

In the two following cases, the defendant was not the plaintiff's employer; but they may usefully be cited for purposes of illustration:

injury. Fox v. Peninsular White Lead pany, was chargeable with notice that & Color Works (1891) 84 Mich. 676, the insulation of certain electric wires 48 N. W. 203. "It is not claimed (00) Action of electricity.—The case that the deceased had any more knowl-(60) Action of electricity.—Ine case that the deceased had any more known is for the jury, where a workman who edge of electricity or its effects than has been in the employ of a telegraph such as is possessed by persons of avercompany about one month is injured age intelligence. He knew that there by a current of electricity which passes is such a force carried by wires and from an electric-light wire suspended on used in driving cars and lighting streets the same pole as a telegraph wire which and houses, and that the wires in questhe is handling. Western U. Teleg. Co. tion were used for that purpose; but v. McMullen (1895) 58 N. J. L. 155, 32 he supposed, as is the common understanding, that the insulating material with which such wires are covered is placed there for the purpose and with street work should not be ordered to the result of making them safe. He had ascend a pole and scrape an electric no knowledge of the fact, as this recwire without being instructed as to the ord discloses, that wires are used for danger to which he would be exposed the transmission of electricity, which, if it was carrying a current of electric- on account of the high voltage carried, ity. Tedford v. Los Angeles Electric cannot be insulated at any reasonable Co. (1901) 134 Cal. 76, 54 L. R. A. 85, cost so as to make them safe, and that the insulating material sometimes used thereon affords no protection from injury. Nothing can, therefore, be claimed in this case on account of any jury. poses of illustration:

Constructive knowledge of the effect of moisture in destroying the insulation there is no pretense that he knew the of an electric-light wire is not imputed wires were in fact dangerous. to a dishwasher at a hotel. Nor has These wires were visible, insulated, and such an employee such an interest in to all appearances perfectly harmless. the sufficiency of the insulation of elec- There was nothing in their appearance tric-light wires that he is chargeable to warn the deceased of the great force with negligence in failing to notice that being carried over them, or that there such insulation was defective at any was any danger in coming in contact particular spot. Giraudi v. Electric with them. The danger was a hidden Improvement Co. (1895) 107 Cal. 120, and secret one, and the insulation of 28 L. R. A. 596, 40 Pac. 108.

the wires deceptive. The familiar rule In Perham v. Portland General Electric Co. (1897) 33 Or. 451, 40 L. R. A. place of known or apparent danger and 199, 53 Pac. 14, the court, in discussing the contention that the plaintiff, a carticle of the contention that the plaintiff, a carticle of the contention that the plaintiff and the contention that the plaintiff and the contention that the plaintiff and the content of penter in the service of a railway com- tion here, because there was in fact no

risk which caused the injury. Obviously, however, experience is a factor which, as a general rule, militates against the conclusion that the servant's ignorance of the risk in question was excusable.2 That conclusion has been deemed unwarrantable, and the inability to recover affirmed, as a matter of law, in the cases collected in the note below.<sup>3</sup>

apparent danger, but, on the contrary, (1894) 163 Pa. 253, 29 Atl. 907. be dangerous."

(pp) Hydraulic pressure.—A common in the ground. laborer in a slaughter house was held not to be, as a matter of law, charge- entiating significance of the fact that able with knowledge of the danger of the injured servant was experienced in going into a sewer hole and undertak- the work in which he was engaged ing single handed to wash it out with a hose in which the water was under a pressure of 80 pounds to the square inch, the evidence being that, with such a pressure, it required three men to (servant who had been working as a manage it properly. Diezi v. G. H. car repairer for some months did not Hammond Co. (1901) 156 Ind. 583, 60 put out a flag). N. E. 353.

(qq) Ships.—An employer is not, as whether or not his employer ever told a matter of law, free from negligence him how to operate a machine, or towards his employee, an "oiler" on a warned him of its danger, is not prejuferryboat, who, while assisting, as ordered, in putting a freight boat into operated the machine for three years. commission, sustained injuries from McCarthy v. Mulgrew (1898) 107 Iowa, falling into an open hatchway which 76, 77 N. W. 527.

Was invisible because of the darkness, a (a) Railway tracks and appurtewas invisible because of the darkness, <sup>3</sup> (a) Railway tracks and appurtent he being wholly unacquainted with, and nances.—A helper of a railroad hostler not informed as to, the construction of assumes the risk incident to the insufnot informed as to, the construction of a freight boat and with the custom to leave the hatchways open when a boat reave the natchways open when a boat is out of commission. Brown v. Ann Arbor R. Co. (1898) 118 Mich. 205, 76 N. W. 407.

As, where the dangerous conditions

consist in the unusual construction of an appliance, and that construction is so uncommon that a servant of long experience in the manipulation of such appliances may well have had no oppor-

an unguarded one. Reese v. Hershey 950. An experienced brakeman who is

so far as the deceased—a nonexpert— Trainor v. Philadelphia & R. R. Co. could ascertain from an examination, (1890) 137 Pa. 148, 20 Atl. 632, it was the wires were entirely safe and in perheld that the danger that a pole not fect condition. He had a right, there- supported by guys or set in the ground, fore, to believe that the place was safe, but merely held in place by a pile of and to assume that the defendant com- coal around it, may fall at any moment pany had exercised due care and cau- during the time that the removal of the tion to prevent injury to him, and had coal is going on, is not a danger which not placed on the bridge, in such a po- is patent to one who is ignorant of the sition that he would likely come in confacts, and whose experience has been tact with them, wires which it knew to that such poles are, as a rule, either held in place by guys or securely set

> <sup>2</sup> An instruction explaining the differshould be given when the evidence indicates that he had had such experience. Gulf, C. & S. F. R. Co. v. Wittig (1896; Tex. Civ. App.) 35 S. W. 857 (servant who had been working as a

> Refusal to allow an employee to state

ficient depth of an ash pit into which he goes under an engine for cleaning the ash pan, where its depth and nature and the amount of space and all the dangers arising from its condition are known to him both by observation and experience. Clay v. Chicago, B. & Q. R. Co. (1894) 56 Ill. App. 235.

Obstructions (b) abovetracks.—An experienced brakeman is presumed to understand the risk to tunity of becoming acquainted with one which an employee whose duties require of that particular kind. See *Missouri* him to be on the top of a high car is *P. R. Co.* v. *Callbreath* (1886) 66 Tex. exposed by reason of the fact that that 526, 1 S. W. 622. A boy who has been accustomed to caboose, and is run under a low bridge work with a guarded machine should be in that position. Maher v. Boston & A. instructed if he is directed to work R. Co. (1893) 158 Mass. 36, 32 N. E.

In many of the cases cited, the fact that the injured person possessed a certain degree of technical skill and knowledge unquestion-

tracks.—A brakeman experienced in to couple the double deadwoods without construction work, who is injured by noticing how they differed from the cars striking against a tree close to a temporary track running through a for-inevitable that he had gone heedlessly est, while he is on a construction train in the performance of a duty requiring using the track, cannot recover. Man-

on an open car, and the open cars were whole train will be. To notify him spe-

There the court thus discussed the lia- protected by no notice. it seems impossible to give to the coup- stands before it." ler any better or more effectual notifi-

familiar with the situation of an over- ference from those belonging to the dehead bridge, and knows that he cannot, fendants than their very form neceseven on the top of an ordinary car, sarily gives of itself. The difference is stand upright while passing under it, very marked and striking, and it is is properly nonsuited where his own eviquite impossible to couple the double dence shows that he stood with his back deadwoods, or to approach them for the to the bridge while the train was appurpose with any degree of attention, proaching it, upon a car which, from without observing it. This is so its appearance, he ought to have recog- whether the coupling is done in the nized as being of more than ordinary daytime or in the nighttime; for in the height. Rock v. Retsoff Min. Co. night every switchman has his lantern (1891) 40 N. Y. S. R. 556, 15 N. Y. with him, or should have it on all occasions. If, therefore, a switchman were to declare that he had attempted great care, and that he had not allowed ning v. Chicago & W. M. R. Co. (1895) his eyes to inform him what was before 105 Mich. 260, 63 N. W. 312. his eyes to inform him what was before him. Moreover, the business of the road A skilled engineer cannot recover for was of itself a notification that many an injury caused by striking his head differences requiring attention in coupagainst a bridge while leaning out of ling were to be encountered by the the cab of his engine, on the ground switchmen and brakemen. The Michithat he should have been notified that gan Central is a great common way for this engine was 6 inches wider than the cars of all the railroad companies those to which he was accustomed. Bel- of the country, and every man in the Liors v. Pennsylvania & N. Y. Canal & employ of the defendant, if he has orR. Co. (1893) 157 Pa. 51, 27 Atl. 685. dinary intelligence, is perfectly cogniA conductor of a street car is chargezant of the fact. He knows, too, that
able, as a matter of law, with comprethe cars of the several railroad and hension of the risk of standing upon transportation companies differ, and the running board of an open car in that at one time or another all these such a position as to be struck by a differences may appear in the cars he car upon the adjoining track, which may be called upon to couple or unwas 37½ inches distant from the track couple. Every train is likely to have on which his car was standing, where several kinds, and he cannot assume, as he had been a conductor for nine years, he passes from one to another, that the although he had never before worked two will be alike, much less that the wider than the closed ones. Fletcher v. cially of the differences would not only Philadelphia Traction Co. (1899) 190 be troublesome and expensive, and often-Pa. 117, 42 Atl. 527 (no duty to intimes, as above explained, confusing, struct). (d) Railway cars; construction and tion, for any man capable intelligently operation of .- An experienced brake- of performing the duty would be no man is presumed to understand the dan-wiser after the notice than before; and ger of coupling cars with double dead a man who would not heed the informa-woods. Michigan C. R. Co. v. Smithson tion the very nature and course of the (1881) 45 Mich. 212, 7 N. W. 791, business would impart to him would be The best nobility of the railroad company: "We tice is that which a man must of neceshave had produced for our inspection, sity see and which cannot confuse or on the argument, a model of the double mislead him; he needs no printed pladeadwoods which caused the injury, and card to announce a precipice when he

To the same effect, see Kohn v. Mccation of their presence, and of the dif- Nulta (1893) 147 U. S. 238, 37 L. ed. ably constitutes the differentiating element on which the decision hinges. With regard to others it is scarcely possible, after comparing

150, 13 Sup. Ct. Rep. 298 (double dead-ference. Hulett v. St. Louis, K. C. & woods of unusual length caused injury to a servant who had had two months' experience in coupling, and was therefore not "inexperienced"); Northern P. R. Co. v. Blake (1894) 11 C. C. A. 93, 27 U. S. App. 190, 63 Fed. 45 (brakeman of seventeen years' experience was denied recovery where foreign cars with double deadwoods were passing daily over the road); Boland v. Louisville & N. R. Co. (1894) 106 Ala. 641, 18 So. 99, Reaffirming (1893) 96 Ala. 626, 18 L. R. A. 260, 11 So. 667 (no obligation to instruct a brakeman familiar with couplings of the ordinary type, with regard to the obvious danger incident to the handling of cars with double buffers); Chicago, B. & Q. R. Co. v. Curtis (1897) 51 Neb. 442, 71 N. W. 42 (held that a brakeman who has been working seven years for a company which uses cars with single deadwoods is bound to know that foreign cars equipped with double deadwoods are constantly coming on to his employer's lines).

It is error to direct a jury to find a railroad company guilty of negligence on the ground of failure to instruct a brakeman specially as to the danger of coupling cars with double deadwoods, where evidence has been given which tends to show that the plaintiff had had five years' experience. Hughes v. Chicago, M. & St. P. R. Co. (1891) 79 Wis. 264, 48 N. W. 259.

An experienced brakeman is chargeable, as a matter of law, with a knowledge of the risk that the drawbars of two cars may slip and pass each other when they come together on a sharp curve, and thus render it dangerous for him to attempt to couple them while standing on the inside of the curve. Tuttle v. Detroit, G. H. & M. R. Co. (1887) 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166.

If the coupling links and pins used by a railway company are not as strong as they should be, their insufficient strength is a fact presumed to be known to an experienced brakeman. Illinois C. R. Co. v. Jones (1882) 11 Ill. App. 324. But quære as to the soundness of

this decision.

An experienced brakeman cannot recover for an injury caused by his miscalculating the actual difference between the heights of two drawheads, he (servant fell through opening on tresbeing aware that there was some dif- tle, and was dragged by a car).

N. R. Co. (1878) 67 Mo. 239.

No recovery can be had for an injury received by an experienced brakeman, who while he was uncoupling a pusher engine from the rear end of a box car which was used as a caboose according to the common practice of the defendant, but which had no platform guarded by a railing, was thrown off by the jerk which accompanied the taking up of the slack by the draft engine, such a jerk being a well-known incident under such circumstances. Davis v. Baltimore & O. R. Co. (1893) 152 Pa. 314, 25 Atl.

A brakeman of experience is bound to appreciate the perils arising from the use of brakes of an obviously peculiar construction. Philadelphia & R. R. Co. v. Hughes (1888) 119 Pa. 301, 13 Atl.

A freight handler with three years' experience, part of whose duty it was to hook up the door of a certain freight car, and who, on the occasion when he received the injury, had looked to see that the door was all right, was held to be chargeable with knowledge of an obvious defect in one of the hooks, which caused the door to fall when the car vibrated in the course of loading it. Cassady v. Boston & A. R. Co. (1895) 164 Mass. 168, 41 N. E. 129.

Where an experienced brakeman knew that it was the custom of his employers to haul cars on the line, and it was part of his duties to make up a train and check every car, it was held that he could not recover for injuries caused by going at night on to a partially burnt box car, the condition of which, though apparent, he had failed to notice after the car had been in the train an entire day. International & G. N. R. Co. v. Story (1901; Tex. Civ. App.) 62 S. W. 130.

The risks incident to working at the coupling of cars on a trestle with a descending grade, down which the cars to be coupled were sent after being "kicked" across scales and weighed while in motion, such cars being apt to acquire considerable speed and imperil persons on the trestle, were deemed to be obvious to a servant accustomed to the work. Woods v. St. Paul & D. R. Co. (1888) 39 Minn. 435, 40 N. W. 519

them with the decisions collected in § 394, supra, to avoid the conclusion that this fact carries no really controlling weight, and that

Locomotives; construction and operation of .- An experienced locomotive engineer is chargeable with an appreciation of the risk incident to op-erating a locomotive with a pilot so high about the rails that it is likely to cause the engine to run over an animal on the track, instead of throwing it off. Fordyce v. Edwards (1895) 60 Ark. 438, 30 S. W. 758 (1898) 65 Ark. 98, 44 S. W. 1034.

An experienced engineer operating a hard-riding locomotive apt to jar and sway is chargeable with knowledge of the increased hazard in going out on the running board while the engine is in motion. Southern P. R. Co. v. Johnson (1895) 16 C. C. A. 317, 44 U. S. App. 1, 69 Fed. 559.

The risk caused by using for switching purposes an ordinary road engine was held to be comprehended by an experienced yard hand in Young v. Boston & M. R. Co. (1898) 69 N. H. 356, 41 Atl. 268. A similar decision is rendered in Gulf, C. & S. F. R. Co. v. Schwabbe (1892) 1 Tex. Civ. App. 573, 21 S. W. 706, where the extent of the plaintiff's experience is not stated. Apparently he had had some; if not, the decision can scarcely be correct.

Culf, C. & S. F. R. Co. v. Williams apolis International Electric Co. (1897) (1888) 72 Tex. 159, 12 S. W. 172. 68 Minn. 18, 70 N. W. 796.

An experienced railroad employee who Co. (1897) 80 Fed. 260.

There can be no recovery where a in a building, after he has worked on brakeman familiar with his duties was injured because he failed to look at a risk of working by standing on a shelf car which he was about to couple, and so did not notice that its load projected. It is continually moved Wabash, St. L. & P. R. Co. v. Deardorff (1883) 14 Ill. App. 401. A brakeman Bothe (1893) 117 Mo. 475, 22 S. W. with four months' experience is chargeable with knowledge of the danger incident to coupling cars loaded with lumber projecting over the ends. Lothrop v. Fitchburg R. Co. (1890) 150 Mass. braces to support it, since the manner of its construction is as obvious to him as to the employer and he is equally brakeman familiar with his duties was three others exactly like it, assumes the as to the employer, and he is equally capable of judging as to its sufficiency. Poznanski v. Szczech (1897) 71 Ill. App. 670.

An employee who has had no special experience in handling shingles but has been engaged for thirty years in sawmills, is presumed to comprehend that a plank 16 feet long, braced to the roof of a house with three or four shingles is not sufficiently strong to bear the weight of three men and about 200 shingles. Daniel v. Forsyth (1898) 106 Ga. 568, 32 S. E. 621.

The liability of a mullion of a window in a flat roof to break under the pressure required to remove the old putty is an obvious danger to a glazier directed to go on the roof and replace a pane of glass in the window. Saunders v. Eastern Hydraulic Pressed Brick Co. (1899) 63 N. J. L. 554, 44 Atl. 630.

A skilled workman cannot recover for an injury caused by the giving way of a floor, where he has had an opportunity of seeing how the floor itself and its foundation were constructed. Ryan v. Porter Mfg. Co. (1890) 57 Hun, 253, 10 N. Y. Supp. 774.

An experienced carpenter who without making any examination stands on (f) Hand cars; construction and op- a box handed to him by his vice prineration of.—There is no duty to instruct cipal, who to his knowledge has made a section man of several years' experi- no examination thereof, assumes the ence as to the danger that a light hand risk of the box not being strong enough car may be derailed if it is run rapidly. to bear his weight. Soutar v. Minne-

A freight handler of twenty-one goes upon a hand car with knowledge months' experience cannot recover for that a fast train is due and expected injuries caused by the breaking of a and has the right of way assumes the grain-car door which was being used as risk of injury. Wright v. Southern R. a platform for the transfer of freight (g) Weight—sustaining structures.— from one car to another, the evidence being that he himself and his colaborer, An experienced carpenter employed by without any express instructions from the hour in side-boarding an air shaft a superior, had selected the door in questhe action would in any event have been declared not to be maintain-In others, while it may be impossible to draw any absolutely

tion and tested its sufficiency, and that that "a slight jar would cause them to he had fully as thorough a knowledge fall," and stooped down to count the as anyone of the capacity of such platforms and the accidents which might tion of first ascertaining whether they happen in using them. Pennsylvania were likely to receive such a jar. Hoth Co. v. Lynch (1878) 90 Ill. 333. A v. Peters (1882) 55 Wis. 405, 13 N. W. brakeman who uses a gang plank for 219. Where a servant who had for five the purpose of unloading a car assumes the risks caused by the want of hooks establishments similar to that of the the risks caused by the want of hooks establishments similar to that of the or spikes to hold it in place, where he defendant's paper mills and for some is an experienced railroad employee, the three months with defendant, before the unloading has always been done in the injury, was accustomed to use in his same manner, and he is familiar with work a pine board pivoted by a bolt at it. La Pierre v. Chicago & G. T. R. Co. one end, and resting loosely at the other

although he has never been warned, continuous enlargement of the pivot with the knowledge that, if boards of hole resulting from the abrasion of the unequal length are piled with their ends wood when the board was swung round, uneven at the front side of the pile, and by the probability that the board some of the boards will project over would slip on the plate, if by leaning the others at the other side, and he can- over it he subjected it to lateral presnot recover for an injury caused by the sure. Relyea v. Tomahawk Pulp & breaking of an unsupported end of a Paper Co. (1901) 110 Wis. 307, 85 N. board while he was standing on it. W. 960. Campbell v. Dearborn (1900) 175 Mass. 183, 55 N. E. 1042.

subd. (v), infra.) spilled thereon; that in passing over Ill. App. 504. such a spot, otherwise perfectly safe, 507, 58 N. E. 718.

The danger that a plank resting on 13 Atl. 65. The court said: greased iron rails will slip under per-ligence which the plaintiff imputes to sons who are engaged in moving heavy articles while standing on it, and that was sought and allowed in the court those persons may consequently be precipitated to the ground, is deemed to be tiff, when he was sent to carry the lumobvious to any of them who are familiar ber, that a circular saw was a dangerous with the method of work. State use machine, and the failure to provide the of Hamelin v. Malster (1881) 57 Md. saw with an attachment called a 287. A complaint is demurrable where spreader. As to the first of these, it shows that the plaintiff went between it must be remembered that the work piles of scantling so slippery with snow Nuttall was asked to do was simply that

(1894) 99 Mich. 212, 58 N. W. 60. on a smooth iron plate covered with An employee who has worked in a grease, he is presumed to understand lumber yard for ten years is chargeable, the risk to which he was exposed by the

An employee who has worked three years in a sawmill is presumed to un-(h) Slippery surfaces .- (See also derstand the dangers which may arise A verdict for the from the freezing of condensed steam plaintiff should be set aside where the so as to form a layer of ice on the rollevidence shows that he was a man of ers. Peterson v. Sherry Lumber Co. ordinary intelligence; that he had been (1895) 90 Wis. 83, 62 N. W. 948. A employed in defendants's tin-plate fac-servant familiar with the work, who tory for several months; that he was was injured by a block of ice which ran familiar with the premises, and knew of off a skidway in a packing house, canthe custom of applying sawdust to the not recover. East St. Louis Packing & floor to absorb oil which was frequently Provision Co. v. McElroy (1888) 29

(i) Saws.—Negligence is not imputin search of a hook which should have able to a master failing to notify an exbeen supplied him, he slipped, and fell perienced employee that a circular saw into an open vat of boiling oil, and that was dangerous, where the latter, while the place where the oil was spilled was supplying wood to the man in charge of exposed, and the sawdust and open vat the saw, was injured by being struck in plain view. Hattaway v. Atlanta by a piece of wood caught in it. Dela-Steel & Tin-Plate Co. (1900) 155 Ind. ware River Iron-Ship Bldg. & Engine Works v. Nuttall (1888) 119 Pa. 149, "The negthe defendant, and for which a recovery below, is the failure to inform the plaincertain inferences upon this point (see general remarks in § 392, ante), a collation of the authorities renders it either very doubtful

this saw was operated. All that could years' experience is chargeable with jury from a flying stick, but that durstrips may come into contact with an ing many years no such accident had unguarded circular saw used by him. happened in the defendant's works. Tenanty v. Boston Mfg. Co. (1898) 170

posterous."

one who may be operating it. Missis- when injured, and its dangers were apsippi River Logging Co. v. Schneider parent to a casual observer. Hogele v. (1896) 20 C. C. A. 390, 34 U. S. App. Wilson (1892) 5 Wash. 160, 31 Pac. 743, 74 Fed. 195. The court thus laid 469. down the law: "If, however, it may be experience in the business; certainly by pended. Everhard v. Diamond Match one in the exercise of that ordinary Co. (1899) 98 Fed. 555. care that the law casts upon the servthe utmost care accidents would occur. Co. (1896) 67 Minn. 79, 69 N. W. 630. He knew that material striking the re-

An employee, after working for three

of a bearer of burdens; work which is edger to prevent boards or fragments done by cheap and unskilled labor. He from being thrown back. Peterson v. was a mechanic, and had for weeks been Sherry Lumber Co. (1895) 90 Wis. 83, working in the same room in which 62 N.W. 948. An employee of several have been told him by way of warning knowledge of the risk that a strip of was, that there was a possibility of in- board left after sawing off the other That the omission of such a warning to Mass. 323, 49 N. E. 654. After three a mechanic under the circumstances of months' experience in operating a saw, this case was a failure in duty on the a servant will be deemed to understand part of the employer is simply pre- the risk created by the fact that there was no guard behind it to keep blocks of There is no obligation to instruct an wood away from it, and no shield in employee who has worked during six front of it to prevent such blocks from seasons in sawmills and for the defend-being thrown against the operator. ant six months, that a board lying on United States Rolling Stock Co. v. Chadthe dead rollers may be shoved forward wick (1889) 35 Ill. App. 474. A servand to one side by another board com- ant cannot recover for personal injuries ing from the live rollers, and that if received in the use of a "hand edger" it is thus brought in contact with a in a sawmill, where he had been workrevolving circular saw close by it may ing in the mill for more than a year, be thrown off the saw, and injure any- and upon this machine for four months

A complaint is demurrable which assumed that there was failure of duty shows that the employee, after working here by the master with respect to the for six months in operating a band saw, safeguard, its absence was an open, ob- allowed his hand to come in contact vious fact. That it was wanting should with it while looping up a cord from have been observed by one of even slight which an electric drop light was sus-

No action can be maintained by an ant. The defendant in error was a man experienced employee in a sawmill, who, of mature years. He had had some six in removing the sawdust which was clogyears' experience in this business. He ging the sawdust carrier below a saw was of ordinary intelligence and was no running at a high speed, and extending novice. He knew the operation and the in an unguarded condition several inches use of every piece of machinery em- below a table on which it was placed, ployed. He knew that the service was placed his hand in contact with such a dangerous one, and that even with saw. Anderson v. C. N. Nelson Lumber

A servant thirty-five years old, with volving saw would be hurled with great fourteen years' experience in machinery, force towards the operator. What warn-assumes the danger of letting down a ing from the master could have given saw 4 feet in diameter, cracked 3 inches him better instruction than he had,— from the outside, on a large iron plate, instruction acquired by the experience for the purpose of cutting it in two. of six years in the vicinity of dangerous machinery?"

Erdman v. Illinois Steel Co. (1897) 95 Wis. 6, 69 N. W. 993. Wis. 6, 69 N. W. 993.

An employee of nine years' experience years in a sawmill with a machine who, with full knowledge of the work-called an "edger," assumes the risk of ing of a machine at which he is emthe improper location of the iron band or guard placed above the saws of an hard and soft wood, continues in such whether that fact is a material one, or very probable that it is immaterial. It is apparent, therefore, that in a large proportion of the

employment after a change in the character of the plates in which a saw runs Hoyle v. Excelsior Steam Laundry Co. from hard to soft wood, assumes the (1894) 95 Ga. 34, 21 S. E. 1001. risk incident to the use of such plates. Freeman v. Dennison Mfg. Co. (1899) a woman of full age, whose hand was 40 App. Div. 99, 57 N. Y. Supp. 478.

(j) Planers and similar machinery.— of a drying machine in a steam laundry,

The risk of having the hand caught by was not in need of any instructions, revolving knives in a planing machine where the machine was similar to those while it is being oiled is a danger patwhich she had been handling for two ent to a servant who had been working years. A fortiori is such an assumption for ten months on other planing mawarrantable where the person in charge chines of a different construction, and of the machine questioned her as to for two months on the one in question. her familiarity with it before starting Arkadelphia Lumber Co. v. Bethea it, and watched her operate it, until (1892) 57 Ark. 76, 20 S. W. 808. satisfied that she was a skilled operator.

five years' general experience, and has 37 Atl. 342. been three months in the employment Where the where he is injured, the risk resulting of a drying machine is increased or difrom the absence of a guard to prevent minished by raising or lowering a the hands of the operator from being weight, a servant who has been operatthrown against the knives of a jointer ing the machine for nineteen months is by the reaction of the pieces of timber presumed to be capable of understandis deemed to be obvious. Guedelhofer ing the effect of this process, and canv. Erusting (1899) 23 Ind. App. 188, 55 not recover if, on a certain occasion N. E. 113.

prehension of the risk of having the ure to notice that the distance between fingers cut by the knives of an unthe rollers was greater than it was beguarded "jointer" working along a slot fore he ceased work. Standthe v. Swits in a table, where he had worked at Conde Co. (1900) 53 App. Div. 500, 65 other machines for sixteen years, and at N. Y. Supp. 942. a planer of the same kind for a week some years before the accident. Rudd eighteen months in various industrial v. Bell (1887) 13 Ont. Rep. 47.

by her hands being drawn between the stain v. Washington Mills Co. (1893) rollers of the machine. Doolittle v. 157 Mass. 538, 32 N. E. 908. Pfaff (1900) 92 Ill. App. 301. The fail- An employee who has had over two ure to instruct cannot be relied on as years' experience in working a snuff a ground of action, where an employee, mill is presumed to comprehend the after working about three weeks, was danger arising from the jumping move-injured while assisting to put a new ment of the rollers, which occurs when covering cloth on the upper roller of the tobacco is wetted. Johnson v. Devoe an ironing machine. Connolly v. El- Snuff Co. (1898) 62 N. J. L. 417, 41 dredge (1894) 160 Mass. 566, 36 N. E. Atl. 936. 469. It is not negligent to omit to warn an adult female employee who has been in a spindle used in making steel cores working several months in a laundry, to be employed in casting iron water and has been engaged for two months in pipes is obvious to a man of ordinary cleaning a revolving cylinder, that, if comprehension who has been engaged in a part of the cloth which she wraps similar work for several months. around her hand while she is doing this Dougherty v. West Superior Iron & work is allowed to hang down it is Steel Co. (1894) 88 Wis. 343, 60 N. W. likely to be taken up by the cylinder and 274.

To an employee who has had four or Keenan v. Waters (1897) 181 Pa. 247,

Where the space between the rollers when he returned after a temporary ab-An employee is chargeable with com- sence, he was injured owing to his fail-

Where a servant has been working for employments, some of them requiring (k) Machinery with revolving rollers. the operation of machinery, there is no -A woman who has been employed for obligation to instruct him as to the danthree and a half months in a laundry, ger of having his fingers caught between and for one month on an ironing ma- the rollers of a "jigger" and the cloth chine, cannot recover for injuries caused which is being wound about it. Rich-

The risk of having the arm caught

cases cited, the precise evidential significance attached to the element of experience cannot be gauged with any precision. Under such cir-

rollers in a rolling mill, who steps on Mfg. Co. (1897) 169 Mass. 574, 48 N. a tub near the rollers and slips off upon E. 842. A machinist will be presumed them, cannot recover. Shaw v. Sheldon to know that the collar of any shaft (1886) 103 N. Y. 667, 9 N. E. 183.

a machine with an unboxed gearing, a servant is chargeable with a comprehenN. E. 576; Keats v. National Heeling sion of the risk of being injured by that Mach. Co. (1895) 13 C. C. A. 221, 21 gearing. Collins v. Laconia Car Co.
U. S. App. 656, 65 Fed. 940.
(1895) 68 N. H. 196, 38 Atl. 1047. A

The danger of being caught by a set two weeks the particular machine which the machine was stopped, and it was machinery, but has worked near a shaft caught in a gearing a few inches away in a factory. Rooney v. Sewall & D. from the lever. Foley v. Pettee Mach. Cordage Co. (1894) 161 Mass. 153, 36 Works (1889) 149 Mass. 294, 4 L. R. A. N. E. 789. 51, 21 N. E. 304.

ceived on the day that the servant be-

age understanding assumes the risk of necessary," his glove catching on the set screw of a the purpose of taking the reel from the worked in other establishments of the

A skilled workman, foreman of the block. Donahue v. Washburn & M. used on his master's premises may be (1) Cogwheels and gearings.-To an kept in place by such a common device adult who has worked many years round as a projecting set screw, and cannot machinery, the risk created by uncov-recover on the theory that he should ered gears in a sawing machine is pre- have been warned as to the danger to sumed to be obvious. Williams v. J. G. which he was exposed by being put to Wagner Co. (1901) 110 Wis. 456, 86 work near a shaft on which there was N. W. 157. After working one year on such a screw. Goodnow v. Walpole Emery Mills (1888) 146 Mass. 261, 15

machinist who had had five years' gen-screw in a shaft visible when the shaft eral experience, and had operated for is at rest, but not when it is in motion, is not one of those with regard to which injured him, was held unable to recover there is a duty to instruct a servant where, without looking, he put out his who has been a sailor for many years, hand to take hold of the lever by which and has never handled or had charge of

A servant who had worked for a long In a case where the injury was re-time in mills cannot recover for an injury caused by his apron and jacket gan to operate the machine in question, catching on a revolving shaft while he but it appeared from the evidence that was standing on a ladder beside it to he had been doing various jobs in con-replace a board on the belt box into nection with the machinery in the same which it ran. Russell v. Tillotson establishment for several years, it was (1885) 140 Mass. 201, 4 N. E. 231. held that negligence was not predicable Holmes, J., said: "The plaintiff does of the omission to instruct him that not pretend that he was ignorant of the cogwheels in plain sight were uncov-danger of a revolving shaft, nor that ered, or that if he got his hands in the the order to him carried any prohibicogs he would be hurt, or that if he at- tion to put the ladder in such position tempted to grasp a lever near the cogs as he might deem best, nor that there without looking he was liable to be in- was anything in the form of it to hurry jured. Wilson v. Massachusetts Cot- him or disturb his judgment; but simton Mills (1897) 169 Mass. 67, 47 N. ply that he had not sufficient intelli-E. 506. An experienced employee who gence—for that is what it comes to—to has worked for four months in a room see that he was less likely to come in in which a loom having unprotected contact with the shaft if he had the gearing is situated assumes the risk of barrier of the belt box between him and injury from being pushed against such the shaft; or, if he took a worse place, gearing by a person passing him in the to keep away from the danger which he aisle. Goodridge v. Washington Mills knew. As it is not suggested that he Co. (1893) 160 Mass. 234, 35 N. E. 484. was a man of manifest imbedility, we (m) Shafts, set screws, etc.—An exthink that the foreman was entitled to perienced workman not shown to have assume that the plaintiff would protect been under full age or of less than aver- himself by whatever precautions were

In a case where a rope which a servmachine used for reeling wire, while ant was carrying was caught in a shaft, reaching in his hand to get the wire for and it appeared that he had previously cumstances it seems scarcely worth while to subject these decisions to an analysis of the same kind as that attempted in the two preceding

same kind as the defendant's, and that Chicago & W. M. R. Co. (1893) 98 for two days before the accident he had Mich. 222, 57 N. W. 118. been engaged in work which gave him an opportunity of ascertaining the con-recover for an injury sustained through ditions, and that a coservant had a defective windlass, where he was of warned him of the danger, it was held full age, had been to sea on vessels of that the defendant was entitled to an the same kind for many years, and was instruction that, if the risk was a per-familiar with that kind of a windlass, manent, visible one, the servant could and observed it and its condition before not recover. Stone v. Oregon City Mfg. entering upon the voyage. Anderson v. Co. (1870) 4 Or. 52. The danger of be-Clark (1892) 155 Mass. 368, 29 N. E. ing caught by a friction clutch pulley 589. on a rapidly revolving shaft, while a belt is being adjusted, is presumed to be who was mortally injured by a blow reunderstood by a servant whose duties ceived from the revolving handle of a are to look after the machinery and windlass, defective because it has no make the necessary repairs, and who ratchet, but which he endeavored to has been working about a year in mills stop, was guilty of such negligence and of the same kind as the defendant's. voluntary assumption of an obvious risk Illinois River Paper Co. v. Albert as will bar a recovery by his personal (1893) 49 Ill. App. 363.

his hand, received while he was reach- time, although the precise work in ing out to stop his spinning mule when which he was engaged was not familiar the electric lights had gone out, where to him. Cunninghum v. Lynn & B. he had worked for defendant for four Street R. Co. (1898) 170 Mass. 298, 49 months, during which time the electric N. E. 440. lights had gone out several times. Kel-

Mass. 128, 58 N. E. 182.

(o) Machinery operating vertically. her hand caught by a fan inserted in the —A servant who has been operating a frame of a window, while she was atstamping machine for three years is tempting to lower the sash. Dillenpresumed to understand any obvious berger v. Weingartner (1900) 64 N. J. risks which result from the manner in L. 292, 45 Atl. 638. which it is constructed. *Toomey* v. *Donoran* (1893) 158 Mass. 232, 33 N. E. 396 (servant had worked for three years on a machine with no guard to prevent the descent of a headblock).

holding a piece of gas pipe against it, and the gas pipe and his hand were drawn between the stone and a "rest" drawn between the stone and a "rest" Bartley v. Howell (1901) 82 Minn. 382, extending across and in front of the 85 N. W. 167. stone and on which the gas pipe rested, (t) Steam pressure.—An employee of he cannot recover if the evidence shows that he had long been familiar with the work. Smith v. Beaudry (1900) 175 Mass. 286, 56 N. E. 596.

shop for four years as a machinist as- the glass tube of the oiler to burst from sumes the risks of using an emery the pressure upon it from within, and wheel, arising from such obvious deall the danger resulting therefrom. feets as that it is not properly encased, Fuller v. New York, N. H. & H. R. Co. that it is made of an inferior kind of (1900) 175 Mass. 424, 56 N. E. 574. stone, that it has no rest, and that it is As the effect of steam pressure is a run at an excessive speed. Breig v. matter of common knowledge, an em-

(q) Windlasses. - A seaman cannot

An employee in a car repair shop, representative tor his death, where he (n) Spinning mules.—An experienced was a man of mature years and experispinner cannot recover for injuries to ence, and had worked in the shop some

(r) Ventilating fans.-No action can ley v. Calumet Woolen Co. (1900) 177 be maintained by a female employee who, after six months of service, had

(s) Automatic starting of machinery. -An experienced employee who knows that a lever on the machine at which he is working is liable to slip when there is a jar, and to throw the machine into (p) Grinding machines.—Where a gear and set it in motion, cannot recovservant was "truing" a grindstone by er for an injury resulting from such an occurrence while he is loosening a screw on the machine with a wrench.

a railroad company, who had been a locomotive fireman for six months, and had run a stationary engine before that time, must be taken to be familiar with An employee who has worked in a the action of steam, and the liability of sections. It cannot be said that they have established any definite doctrines, except, perhaps, in respect to a few of the more frequently

ployee in charge of a boiler, one of all events, but no specific reference is whose duties was to keep the blow pipe made to this element. in order, is presumed to have underorder to clean it, informed him that there was only one thread on the pipe, and that it was barely caught in the elbow, and was instructed by him to replace it in the same condition. Mackey v. Newberry Furnace Co. (1899) 119 Mich. 552, 78 N. W. 783.

An experienced engineer who, without ascertaining the condition of the stop-cock between the boiler and a supply pipe, proceeds to remove the pipe while steam is up, is negligent. Bischoff v. St. Paul Bethel Asso. (1901) 82 Minn.

105, 84 N. W. 731.

who represented that he possessed the requisite experience to perform such work, and saw and knew the conditions surrounding him, cannot recover for an injury sustained by falling into the combustion chamber, in which were hot ashes and burning soot. Westville Coal Co. v. Milka (1897) 75 Ill. App. 638.

Ladders.-An experienced mechanic who mounted a ladder standing upon the floor of a factory, and was thrown from it to his injury, by reason of its slipping from beneath him, is guilty of contributory fault in failing to observe the absence of spikes to hold it in place, since the defect was open and obvious. Borden v. Daisy Roller Mill Co. (1898) 98 Wis. 407, 74 N. W.

(w) Bars for lifting, etc .- A machinist of twenty years' experience is pre-sumed to be aware that a pinch bar ist of twenty years' experience is presumed to sumed to be aware that a pinch bar be understood by a skilled employee. may slip upon a rail, if its heel becomes peterson v. Sherry Lumber Co. (1895) dull. Holt v. Chicago, M. & St. P. R. 90 Wis. 83, 62 N. W. 948.

Co. (1896) 94 Wis. 596, 69 N. W. 352. (bb) Action of gravitation upon values a claw-bar slips while a section hand is putting a spike, and strikes years' experience, excavating at bottom the head he cannot recover. here presumably had some experience at resorted to, to break down the bank,

(x) Push poles .- A brakeman entirestood the risk of the parting of the blow ly familiar with switching cars and pipe as the steam was turned into it, at with push poles used in that business the point where the vertical section en- cannot recover from his employer for tered the elbow connecting it with the personal injuries received in the use of horizontal section, the result being that a push pole of green wood, 8 feet in the horizontal section flew up and length, only 5 inches thick at the larger struck him, where a common laborer end and 3 inches thick at the smaller who, shortly before the accident, had end, and not iron bound in any way, disconnected the pipe at the elbow in which he picked up and placed on the engine, and at the place of the accident threw from the engine and picked up and used in the work in which he was injured. Maul v. Queen Anne's R. Co. (1899) 1 Penn. (Del.) 561, 42 Atl. 990.

(y) Kettles.—An experienced employee in a candy factory, well acquainted with a furnace used therein, which has no rings belonging to it and is not adapted for the use of kettles of different sizes, is guilty of contributory negligence in not observing the obvious risk that a ring belonging to another furnace, selected by him and laid on the (u) Furnaces. — A boiler inspector furnace in use, may cling to the kettle to represented that he possessed the full of melted sugar, and fall to the floor while he is removing the kettle, or the equally obvious fact that this had happened in this particular instance. Barnard v. Schrafft (1897) 168 Mass. 211, 46 N. E. 621.

(z) Action of electricity.—An employer is not bound to instruct an experienced lineman as to the danger of handling live electric wires. Junior v. Missouri Electric Light & P. Co. (1895) 127

Mo. 79, 29 S. W. 988.

The fact that the upper switch of an electric lamp is wanting is obvious to an experienced lineman. Wray Southwestern Electric Light & Water Power Co. (1897) 68 Mo. App. 380.

(aa) Condensation of steam.—The danger of working in a mill where steam from a leak is so abundant as to make it difficult to see is presumed to

him in the head, he cannot recover. of a frozen sand bank, assumes the risk Louisville, E. & St. L. Consol. R. Co. v. of injury by its falling down upon him, Allen (1893) 47 Ill. App. 465 (servant where he knows that blasting has been recurring situations and conditions. In much the larger number of instances they are, as precedents, valuable merely by way of analogy.

and the danger of its falling is open and and four years in the night gang, obvious. Larsson v. McClure (1897) and is thoroughly familiar with all the 95 Wis. 533, 70 N. W. 662 (plaintiff adsurroundings. Casey v. Grand Trunk mitted that "he did not look to see"). R. Co. (1894) 68 N. H. 162, 44 Atl. A bricklayer engaged in building a 92. sewer in a trench in which the bracing was done after consultation with him, rily prosecutes the work of sinking a must be held to have assumed the risk shaft in a mine assumes the risk of a of the caving in of the bank at a point cave-in while timbering the shaft, where where the sheathing was not driven he knows more of the shaft and the down to within 2 or 3 feet of the bot-character of the ground than his emtom of the trench, caused by the perco- ployer, and believes that it can be timlation of water, aided by the jar of a bered before it will cave in. Stiles v. blast, where he had had experience in Richie (1896) 8 Colo. App. 393, 46 Pac. such work, and where he returned after 694. the explosion, looked at the bank as he (cc) Handling of heavy objects.—passed down into the trench, and was (See also subd. (gg), infra.) Where just resuming work when it fell upon a workman who has been engaged for a trench dug where there was a layer of tion that he cannot escape from it into quicksand underneath layers of hard (1898) 62 N. J. L. 30, 41 Atl. 364 consequent upon such action. Gulf, B. (court expressly referred to the fact & K. C. R. Co. v. Hernandez (1898; that the inexperience of the servant was relied on by his counsel). A laborer who has previously worked at quarrying stone, mining, and digging unprovided with any stops or barriers wells cannot recover for an injury caused by the collapse of an unshored trench 13 feet deep. Walker v. Scott (1901; Kan.) 64 Pac. 615, Reversing (1901; Kan.) 64 Pac. 615, Reversing (1901) of the time inside, and who had rolled The danger that an unshored trench logs with a cant hook, though not on to four feet deep may cave in is presumed to be appreciated by an employee who has been engaged for three years in laying service pipes and taking up street. ing service pipes and taking up street from the nature of his employment mains. Foley v. Grand Rapids Gas- a section foreman is presumed to have light Co. (1901) 127 Mich. 671, 87 N. a full appreciation of the danger of W. 53. A railway company is not lia- handling a heavy body like a rail with W. 53. A railway company is not harmanding a nearly body like a rail with ble for the death of a shoveler caused insufficient appliances, and he cannot by the falling of a bank of earth upon recover if, in trying to straighten the him, where he has been for a year enrail without the proper implement, it gaged in the same duties, and the ordinary method of work has been to under
\*Co. v. Bradford\* (1886) 66 Tex. 732, 59 mine the bank and allow it to fall to Am. Rep. 739, 2 S. W. 595. the bottom of the excavation. Rasmus-sen v. Chicago, R. I. & P. R. Co. (1884) experienced in handling freight in a 65 Iowa, 236, 21 N. W. 583. warehouse, is chargeable with knowl-

ing coal at night in an uncovered coal across an uneven floor a millstone yard, from the falling away of a frozen which, on account of the bulge on one crust of soft coal overhanging the coal of its surfaces, is heavier on that side. bank, is assumed by an employee who Walsh v. St. Paul & D. R. Co. (1880) has worked four years in the day gang, 27 Minn. 367, 8 N. W. 145.

An experienced miner who volunta-

him. Curley v. Hoff (1899) 62 N. J. considerable time in unloading logs L. 758, 42 Atl. 731. A servant experimentary on to a skidway removes the rienced in excavating work was held to obstacle which holds a log in its place understand as well as his employer the on a car, and thus sets it rolling todanger incident to being in an unshored wards him while he is in such a positrench dug where there was a layer of tion that he cannot escape from it into

The risk of injury to a person shovel- edge of the dangers involved in moving

## 397. Risks not deemed to be, as a matter of law, within the comprehension of servants having some experience.— In the note below are

A carpenter of ten years' experience to do, cannot recover for an injury cannot recover for an injury due to the caused by the bale of goods, which falls fact that one end of a beam slipped into from the cargo piled behind him, this

a lumber company, who had been at work for three weeks, could not recover for injuries caused by the fall of an unusually long piece of lumber from a truck to which it had not been bound as it should have been. Hazlehurst v. Brunswick Lumber Co. (1894) 94 Ga. 535, 19 S. E. 756.

That the moving by hand of heavy and unwieldly pieces of iron, on their edges, requires care to prevent their manifest to an employee who has been engaged in work of the same general character, though the pieces of iron are larger and heavier than usual. Cunningham v. Ft. Pitt Bridge Works (1901) 197 Pa. 625, 47 Atl. 846.

A servant who has had experience in handling heavy objects, and, while engaged with others in unloading by hand heavy iron beams from a wagon on which he has helped to load them, is injured by one of them in a manner not explained by the evidence, is presumed to know as much about the danger as anyone. Nephew v. Whitehead (1900) 123 Mich. 255, 81 N. W. 1083.

It is not negligence for one superintending the handling of a heavy stone, to fail to give specific instructions to experienced workmen to be careful not to get their hands or feet under the stone as they are letting it down. La Belle v. Montague (1899) 174 Mass. 453, 54 N. E. 859. The insecure posiits edge without props is presumed to be known to a servant engaged in the er's yard: and he cannot recover for injuries caused by its falling on him when he was about to attach the "dogs" to it.

Salem Bedford Stone Co. v Hall

Salem Bedford Stone Co. v Hall Salem Bedford Stone Co. v. Hobbs (1894) 11 Ind. App. 27, 38 N. E. 538. An experienced longshoreman who

stead of pulling it, as he would prefer 202, 54 N. E. 534.

the mortise prepared for it so far that being a risk which he is presumed to the other end slipped off of its supcomprehend. O'Connell v. Clark (1897) port, and, falling upon a scaffold, broke it down. Smith v. Tromanhauser (1895) 63 Minn. 98, 65 N. W. 144. ence assumes the risk that a chock on It has been held that an employee of a truck which he is taking down an inclined gangway may give way and allow a barrel loaded thereon to fall. Mc-Campbell v. Cunard S. S. Co. (1891) 36 N. Y. S. R. 852, 13 N. Y. Supp. 288. (dd) Inflammable and explosive gases.-The danger that naphtha used in making a varnish may be exploded by the heat of a furnace in an adjoining room is presumed to be understood by a skilled workman fully acquainted with the process of manufacture. Hauk falling on the workmen, is deemed to be v. Standard Oil Co. (1899) 38 App. Div. 621, 56 N. Y. Supp. 273. A servant who has worked for a year and a half in a petroleum refinery is presumed to have acquired sufficient knowledge of the nature and properties of the oil to understand that it's products are capable—especially under a condition of great heat—of generating explosive gases, and that it is unsafe to bring fire into contact with those gases when they are being evolved. Benfield v. Vacuum Oil Co. (1894) 75 Hun, 209, 27 N. Y. Supp. 16 (no duty to instruct). No action can be maintained for the death of an experienced miner killed by an explosion due to his carrying a lighted lantern past an oil well from which he could smell and hear gas escaping. McClafferty v. Fisher (1885; Pa.) 1 Cent. Rep. 571, 2 Atl. 60.

An employer is not liable for injuries to an employee, sustained while painting the inside of a tank with black varnish, through the ignition of the fumes tion of a large stone left standing on of the varnish from a torch held by a fellow workman, where the employment had continued for twelve years, and it

certain work is chargeable with knowledge of the inflammability of the dust obeys an order to get into a position incident to such work, if it is a matter where he can push a draft of goods to- of common knowledge. O'Reilly v. wards the middle of the hatchway, in- Bowker Fertilizer Co. (1899) 174 Mass.

(ff) Explosives; use of. — A servant familiar with the incidents of blasting jured while assisting the other laborers rock with dynamite is presumed to un- to lift a hand car off the track when a derstand that occasionally some of the train was approaching, the defendant is charges remain unexploded in the broken pieces of rock. Staldter v. Hunting-ton (1899) 153 Ind. 354, 55 N. E. 88.

A servant who has been employed in various mines for two years, and in defendant's mine for three months, is presumed to understand the extent of the danger incident to using as a tamping bar a piece of gas pipe plugged with wood. King v. Morgan (1901) 48 C. C. A. 507, 109 Fed. 446.

Since an experienced miner who for extra compensation undertakes to draw the pillars and stubs at a cross-entry in a mine has at least as much knowledge as his employer as to the danger of the fall of rocks from the roof when blasting, he assumes the risk thereof. Watson v. Kansas & T. Coal Co. (1893) 52 Mo. App. 366. A servant who, after having been engaged for a considerable time in a mine, goes to work upon a narrow roadway in a mine above a precipice about 75 feet high, in the business of blasting down and carting away under a precipice immediately above him, assumes the risk that the fall of rocks shaken loose by the blasting may knock him off from such roadway. Bennett v. Tintic Iron Co. 1893) 9 Utah, 291, 34 Pac. 61.

An employee who for several months has been engaged in tramming or filling cars with ore in a cut or stope of a mine, and who knows of frequent blastings and that loose rock and ore often fall from the roofs and sides, assumes the risk of such an occurrence while he is engaged in erecting a scaffold. Paule v. Florence Min. Co. (1891) 80 Wis. 350, 50 N. W. 189.

(gg) Insufficiency of the number of servants in a given instance.—As a carpenter is presumed to know something by experience about the weight of timber and the capacity of a certain number of men to handle it, he cannot recover for injuries received while he was helping to load a heavy piece on a car with a gang of four men, his own testimony being that he thought this number sufficient. Bryan v. Southern R. Co. (1901) 128 N. C. 387, 38 S. E. 914. A servant who had been engaged for a long time in such work was held capable of judging the number of employees necessary to perform safely the work of unloading rails from a push car. Southern Kansas R. Co. v. Drake (1894) 53 Kan. 1, 35 Pac. 825.

In a case where a section man was inentitled to an instruction that the plaintiff cannot recover if the weight of the car and the number of men necessary to handle it were open and patent to common observation. St. Louis, A. & T. R. Co. v. Lemon (1892) 83 Tex. 143, 18 S. W. 331 (experience not specifically mentioned here, nor, so far as appears, relied upon).

The risk caused by the insufficient number of servants assigned to the task of hoisting a heavy timber was held to be patent to a laborer in a bridge-repairing gang. Texas & P. R. Co. v. Rogers (1893) 6 C. C. A. 403, 13 U. S. App. 547, 57 Fed. 378. In this case the servant's experience was not expressly adverted to, but it may perhaps be, inferred, from the duties in which he was engaged, that he had had some experience. At all events it is difficult to concede that a raw workman can be charged, as a matter of law, with the possession of the knowledge here imputed.

(hh) Operation of mines.—(See also subd. (bb), (ff), supra.) The danger of working in an insufficiently timbered shaft is imminent and obvious to an experienced miner,-especially after he has been once injured by a falling stone. Morbach v. Home Min. Co. (1894) 53 Kan. 731, 37 Pac. 122.

A servant who has worked in the defendant's mine tour months, and in mines similarly constructed for ten years, accepts all such risks as may result from the manner in which the tunnel which serves as an exit from the mine is constructed, and from the system on which the empty and loaded cars are operated therein; and he cannot recover for an injury received in attempting to climb on to a loaded car on one track to escape being run over by a train of empty cars on the other track, which, to his knowledge, might pass at any moment. Forbes v. Boone Valley Coal & R. Co. (1901) 113 Iowa, 94, 84 N. W. 970.

An experienced coal miner having sole charge of the ventilation of the mine. and who knows better than any other employee the character and location of wooden buildings at its entrance, and the danger of smoke being carried into the mine in case of their burning, assumes the risk of being suffocated thereby. Coal Creek Min. Co. v. Davis (1891) 90 Tenn. 711, 18 S. W. 387.

collected some cases in which the ignorance of experienced servants was held to be excusable.1

An examination of these cases shows that, if we except such cases as that in subd. (a) of the note, which is preferably referred to the consideration that the accident was due to conditions which rarely occurred, the rationale of all the decisions cited is that the particular kind of technical knowledge acquired by the servant was not of such a character that the only reasonable inference was that he was competent to understand, and should have understood, the risks created

Co. (1885) 65 Iowa, 737, 23 N. W. 148, the attention of the servant to the posthe court thought that an experienced sible existence of seams in this particuminer was chargeable with knowledge of lar stone. But Stockmeyer knew that the want of some system to prevent the fact from his general knowledge of the escape of cars on the grades in the en- character of the quarries. It was a fact tries, but reversed the judgment for the of which he was bound to take notice.

plaintiff on another ground.

(ii) Quarries.—In Recd v. Stock manifest to him." meyer (1896) 20 C. C. A. 381, 34 U. S. (jj) Erection wedges, and, while so engaged, a piece broke off and fell upon him. The court in discussing the question whether the circumstances required a warning said: "The only possible concealed risk arose from the presence of seams in the stone in the quarry. Stockmeyer was no novice in this work. He was a man of mature age, of ordinary intelligence, and for several years had been employed in v. Mullen (1895) 60 Ill. App. 497. and about quarries. His testimony (kk) Demolition of structures.—No shows beyond contention that, for some cause of action is stated by a declaration two months during his previous employment by Reed, he had worked at chanquarries in the neighborhood, and that the stone was liable to break by reason of the seams during the progress of the work of channelling and of cutting out the stone. He did not, it is true, know of seams in this particular block of stone; nor could Drehoble or the defendant in error know; and for the like reason,—that it was covered with earth and dust. He, however, knew the fact that seams existed in stone throughout the quarries, and the danger therefrom, and had equal opportunity with the master and Drehoble of ascertaining the existence of seams in this particular stone, for he, with Drehoble, had been at work upon it prior to the injury. All the warning that could have been required of the master, or of the vice prinoperation of.—The necessity for uniting

In Heath v. Whitebreast Coal & Min. cipal acting for the master, was to call No warning could make the danger more

(jj) Erection of buildings.-An em-App. 727, 74 Fed. 186, the plantin work to enced workman engaged in the constitution split stones in a quarry by means of tion of a building, of temporary consplit stones in a quarry by means of tion of a building, of temporary constitution, and while so engaged, a piece ditions incidental to construction, and against which such workman should be upon his guard. Beique v. Hosmer (1897) 169 Mass. 541, 48 N. E. 338. The fact that a roof will be in an insecure condition up to the time when a certain piece shall have been put in place is presumed to be known to one familiar with the construction. Campbell

framed upon the theory that it was negligence to direct a laborer accustomed nelling stone; that he knew generally of to such work to take down a scaffold the existence of seams throughout all the fourteen years old, without having an examination made to see whether the operation could be safely performed. The presumption is that he understood what was necessary to be done in order that the work might be safely executed. Wright v. Dunlop (1893) 20 Sc. Sess. Cas. 4th Series, 363 (demurrer sus-

tained).

(11) Work on ships .- (See also subd. (0), (cc), supra.) Handling the line at the bow of a tug is a risk assumed by a man employed to do general work on the deck, although he has never pre-viously handled any line but that at the stern. Williams v. Churchill (1884) 137 Mass. 243, 50 Am. Rep. 304. See also § 404, infra.

by the conditions which caused the injury. It is evident, therefore, that these decisions are, in the last analysis, illustrations of the same class of situations as those exemplified in § 395, ante.

## C. MINORITY AS A DIFFERENTIATING ELEMENT; SIGNIFICANCE OF.

For other cases bearing upon the extent of the knowledge which is imputed to minor servants, see §§ 249, 348, ante, and chapter xxv., post.

398. Generally.— It has already been shown (§ 291, ante), that, where the injured servant is a minor, the defense is not aided by the

a car furnished with an ordinary coupler matter of special skill to determine how to one furnished with a "Miller" coupler much wear such a wheel will stand. is not such a common occurrence that Bridges v. St. Louis, I. M. & S. R. Co. even an experienced brakeman who has (1879) 6 Mo. App. 389. never observed such an occurrence can be said, as a matter of law, to know that the lateral motion of which a "Miller" coupler is capable will sometimes cause it to slip past an ordinary coupler, and thus allow the two cars to come together. Russell v. Minneapolis & St. L. R. Co. (1884) 32 Minn. 230, 20 N. W. 147.

(b) Construction and operation of locomotives.-Where an engine having too high a pilot was derailed by a collision with a horse, it was held to be for the jury to say whether the engineer, an experienced employee, understood the risk of such an eventuality. Fordyce v. Edwards (1895) 60 Ark. 438, 30 S. W. 758.

As a locomotive engineer is not presumed to have knowledge of defects in his engine which arise from its being constructed on wrong mechanical principles, it is not error, in an action for his death caused by the derailment of the locomotive, to refuse to charge the jury that, if they believed that the engine was topheavy or unequally balanced, that the boiler was unduly elevated above the rails, that such condition of the engine was the proximate cause of deceased's death, and that the defective condition of the engine was open to observation, they should find for defendant. Galveston, H. & S. A. R. Co. v. Smith (1900) 24 Tex. Civ. App. 127, 57 S. W. 999.

The fact that a locomotive wheel was open to the inspection of a fireman, and arrly dangerous, will not defeat his sumed the risk of putting terra cotta action for an injury due to the defect, coping on a wall without having it since he is not an expert, and it is a bound together with iron ties, or were Vol. I. M. & S.—68. was so worn as to be more than ordin-

(c) Weight-sustaining structures. -Although an employee had been accustomed to work on the "traveler" containing the engine and other appliances by which the girders for an elevated rail-way trestle were hoisted, and may have seen that it was constantly being moved forward on the trestle before the span on which it was to rest was properly braced and bolted, he was not, as matter of law, chargeable with knowledge of the danger that, while the "traveler" was being moved forward, its weight might communicate a swaying movement to the imperfectly secured span and cause it to fall. Davidson v. Cornell (1892) 132 N. Y. 228, 30 N. E. 573.

A carpenter of ordinary skill is not chargeable, as matter of law, with knowledge of the fact that hemlock boards g of an inch in thickness are unfit to use for the supports of a scaffold in cold wet weather, inasmuch as such timber becomes very brittle when exposed to rain and frost. Twomey v. Swift (1895) 163 Mass. 273, 39 N. E. 1018.

One engaged on the construction of a scaffold between piers in a river, for the erection of a bridge, though an efficient laborer, is not, as matter of law, chargeable with a comprehension of the risk of collapse of the scaffold from improper driving of the piles and bracing of the structure. Pursley v. Edge Moor Bridge Works (1900) 56 App. Div. 71, 67 N. Y. Supp. 719, Affirmed in (1901) 168 N. Y. 589, 60 N. E. 1119.

(d) Masonry.--Whether plaintiffs as-

presumption which is entertained in respect to an adult, that those who enter any given employment appreciate the ordinary risks which it involves. Speaking more generally and without reference to this particular class of risks, it may be said that the fact of minority increases, to a greater or less extent, the probability that his faculties of observation and comprehension are more limited than those of the typical person of ordinary intelligence, whose supposed capacity for appreciating dangers furnishes the juridical standard by which the existence or absence of obligatory knowledge is tested. The obvious effect of this consideration, when viewed in relation to the commonlaw system of jury trials, is that the range of circumstances under

say whether a man who, before hiring himself to the defendant, had worked for about a year in the picker room of pulleys in the shop were secured to the a cotton mill, but who testifies that he knew nothing of the internal construction of a picker, should have been instructed as to the risk of removing clogs of cotton from the machine while the it is also in evidence that the picker boss had, in his presence, removed clogs without stopping the machinery, and had thus set an example which it might have been dangerous for the plaintiff to fol-low. De Costa v. Hargraves Mills (1898) 170 Mass. 375, 49 N. E. 735.

A servant who is familiar with machinery as an operator, but has no technical knowledge of its properties such as is possessed by a mechanical engineer, is not chargeable with knowledge of the danger of running a grindstone at a certain high rate of speed. Helfenstein v. Medart (1896) 136 Mo. 595, 36 S. W. 863, Affirmed in Banc in 136 Mo. 619, 37 S. W. 829, Affirmed on Rehearing in 136 Mo. 619, 38 S. W. 294.

Whether a workman of average intelligence, who, after working off and on for two or three months in positions which gave him an opportunity of becoming acquainted with shafting, was

not in the exercise of ordinary care, is lacing a parted belt by standing on a question for the jury, where there is platform suspended beneath a rapidly evidence that they knew nothing about revolving shaft, and holding one end of any irons, and relied entirely on the belt so that it formed a loop around foreman, and were not familiar with the shaft, with no special instructions kind of terra cotta they were using, other than "to hold the heft of the belt which projected more than that they off the shaft," and to "be sure and hold had been accustomed to, although there it on the plain piece of shaft." should is evidence that they were of more than do so would render the belt liable to ordinary skill and experience as masons. do so would render the belt liable to Gibson v. Sullivan (1895) 164 Mass. "crawl" towards the pulley, or should 557, 42 N. E. 110 (part of coping fell). have inferred the existence of project-(e) Machinery.—It is for the jury to ing set screws in the hub of a pulley, not easily seen in the dim light, from his knowledge of the manner in which other shafting,-is a question for the jury in an action against the employer for the death of the employee, caused by being snatched from the platform by the belt, which wound around the hub of the pulbeater was in motion,—especially where ley on each side of and over the set screws. Lintott v. Nashua Iron & Steel Co. (1899) 69 N. H. 628, 44 Atl. 98.

(f) Elevators.—In a case where an employee was injured by an elevator falling to the bottom of the elevator well, owing to its having been overloaded, it appeared that he was never informed as to how much the elevator would carry, or that, if overloaded, the ropes supporting it would slip in the grooves and the elevator would fall, but that he had been running a similar elevator. that he had been running a similar elevator for seven years, and knew the office of its various parts. It was held that a request for an instruction that there was no sufficient evidence that plaintiff did not assume the risk of the injury he sustained was properly re-fused, such a risk not being within the comprehension of any servant not a mechanic. Sullivan v. Thorndike Co. (1899) 175 Mass. 41, 55 N. E. 472.

(g) Action of gravitation on various directed for the first time to assist in substances.—A common laborer working

which obligatory knowledge can be imputed, as a matter of law, is more restricted in cases where the injured person was a minor, than · in those where he was of full age, at the time when the cause of action arose. In this respect the element of minority operates in precisely the same manner as that of inexperience.

The hypothesis is that a minor is inferior to an adult as respects both the ability to obtain material information and the ability to draw deductions from such information as may be obtained.1 But an examination of the decisions collated in the next section shows very clearly that it is the latter description of inferiority which is most frequently the real differentiating factor in the case. That is to say,

in a trench where he was told to work, to be justified in finding that u case in and having no discretion as to where which instructions as to the danger he should stand, had a right to rely should have been given was established upon the inspection of the shoring and by evidence which showed that plaintiff's of the condition of the sides of the intestate, an experienced molder emtrench, made by his superiors after each played by defendant, after completion of blast before allowing the workmen to his regular work, under direction of the again enter the trench, and was not, as superintendent and foreman, who were a matter of law charged with the decire experienced molders went to where they a matter of law, charged with the deci- experienced molders, went to where they sion of the question whether there was had arranged defective castings, and danger, although it is also in evidence started to fill holes therein with molten that he had worked a good deal in metal, when an explosion occurred, trenches; that he knew the nature of the caused by rust and damp in the holes, soil and the depth of the trench; that injuring intestate, who had never done blasting was done to remove rock from or seen such work before, and did not the bottom, and that small quantities of know of the effect of rust or damp thereearth frequently fell from the sides. can. Coan v. Marlborough (1895) 164 Mass. (206, 41 N. E. 238.

considerable experience in working in with an order of his superintendent to trenches was guilty of negligence in get on and hold down a timber transworking in a deep and unshored trench, ported on a truck, with its narrow sides the sides of which caved in upon him, at the top and bottom, had had sufficient was held to be a question for the jury in experience to enable him to comprehend

digging a ditch under the direction of a Gagnon v. Seaconnet Mills (1896) 165 superintendent does not, as a matter of Mass. 221, 43 N. E. 82. law, assume the risk from the existence of cracks in the earth causing the ditch sonal injuries to a minor employee from to cave in, in the absence of evidence a defective machine, that he was bound showing that cracks like the one in quest to see patent and obvious defects, and tion are liable to occur in digging and assumed all risks thereof, and was guilty blasting out trenches for sewers, and, if of contributory negligence in continuing so, how frequently, and whether he to work when he should have known of should have anticipated it. McCoy v. such defects in the machine, was prop-Westborough (1899) 172 Mass. 504, 52 erly refused as calling for the applica-N. E. 1064.

(h) Explosions resulting from steam plicable where minority and inexperigenerated by heated metals.—(See also ence are not factors. Blumenthal v. § 395, note 1, subd. (ff), ante.) In Craig (1897) 26 C. C. A. 427, 55 U. S. Dyer v. Brown (1901) 64 App. Div. 89, App. 8, 81 Fed. 320.
71 N. Y. Supp. 623, the jury was held

(i) Methods of handling heavy objects.—Whether an employee who was Whether an employee who had had injured by reason of his compliance Bartolomeo v. McKnight (1901) 178 the risk, is a question for the jury, Mass. 242, 59 N. E. 304. where he had worked at logging a few An experienced workman engaged in months in each winter for several years.

> <sup>1</sup>An instruction in an action for pertion to a minor's conduct of the rule ap

the inference that the danger created by certain conditions, as well as the conditions themselves, was known to the servant, is less readily drawn where he is a minor than where he is an adult.2

The epithet "obvious," or one of its equivalents, is quite frequently used to designate and characterize the risks which a minor is conclusively presumed to understand.<sup>3</sup> So, also, it is sometimes said that the mere fact of infancy is of no importance, where the dangers from which the injury resulted were of such a kind that they were as obvious to the senses of a boy as to those of a man.<sup>4</sup> But in view of the fact

În Louisville & N. R. Co. v. Boland (1892) 96 Ala. 626, 18 L. R. A. 260, 11 So. 667, it was said: "The duty of the master in cases of latent defects, to explain, is the same whether the servant be a minor or an intelligent adult; the difference being, however, that as great diligence in observing and comprehend-ing the dangers is not to be expected of the young and inexperienced."

A servant may ordinarily be expected to know when his tools need repairs, but in the absence of experience and instruction a lad cannot be expected to know intuitively, or as fully as his experienced master; and it is reasonable that he should be warned against such deteri-Y. Supp. 585.

to other employments does not constithe particular nature of the perils to 17, 43 Am. Rep. 264 [patent]. which he will be exposed. Nadau v. 'O'Keefe v. National Folding Box & White River Lumber Co. (1890) 76 Wis. Paper Co. (1895) 66 Conn. 38, 33 Atl.

120, 43 N. W. 1135.

Where the danger to which the injury

<sup>2</sup>The supreme court of Missouri con- was due was not necessarily obvious, sidered the doctrine to be well settled by and some reflection and judgment were the authorities "that, although the manneeded to appreciate the consequences of chinery, or that part of it complained a defect, the defendant is not entitled, of as especially dangerous, is visible, yet in an action by a minor servant, to a if, by reason of the youth and inexpericharge that if the injured person had ence of the servant, he is not aware of knowledge of the defective condition of the danger to which he is exposed in opthe appliance in question there can be erating it or approaching near to it, it is no recovery. McCarragher v. Rogers the duty of the master to apprise him of (1890) 120 N. Y. 526, 24 N. E. 812 (dethe duty of the master to apprise him of (1890) 120 N. Y. 526, 24 N. E. 812 (dethe danger, if known to him." Dow-fective car). In a case where a youth ling v. Allen (1881) 74 Mo. 13, 41 Am. of eighteen was injured by an unblocked Rep. 298. guard rail, it was held improper to charge the jury that the plaintiff's knowledge of the fact that there was no blocking was knowledge of the attendant danger. Davis v. St. Louis, I. M. & S. R. Co. (1890) 53 Ark. 117, 7 L. R. A. 283, 13 S. W. 801.

The evidence of the plaintiff—a minor of seventeen working as a brakemanthat he was not informed of the dangers incident to the business, and of a coemployee that he did not explain the nature of the danger to the plaintiff, is sufficient to sustain a finding that the employment was dangerous. Texarkana & Ft. S. R. Co. v. Preacher (1900; Tex. Civ. App.) 59 S. W. 593.

In the following cases the servant was oration of them as endangers his safe- held chargeable with knowledge of the ty,—especially when it is of such a narisks described by the words in brackture as requires instruction to arrest ets: Williamson v. Sheldon Marble Co. his attention or excite his apprehension. (1893) 66 Vt. 427, 29 Atl. 669 [appar-Heavey v. Hudson River Water Power rent]; Crowley v. Pacific Mills (1889) & Paper Co. (1890) 57 Hun, 339, 10 N. 148 Mass. 228, 19 N. E. 344 [obvious]; Supp. 585. Downey v. Sawyer (1892) 157 Mass. The mere general knowledge possessed 418, 32 N. E. 654 [obvious]; Buckley v. by a minor that when he engages in a Gutta Percha & Rubber Mfg. Co. (1889) given employment he will be exposed to 113 N. Y. 540, 21 N. E. 717; Crown v. certain dangers which are not incident Orr (1893) 140 N. Y. 450, 35 N. E. 648 [plain and obvious]; Toledo, St. L. & tute that full appreciation of the dan- K. C. R. Co. v. Trimble (1893) 8 Ind. gers which will absolve the master of App. 333, 35 N. E. 716 [open and obthe obligation of instructing him as to vious]; Fones v. Phillips (1882) 39 Ark.

587.

that the capacity of minors is a variable quantity (compare next section), it is manifest that, in the present connection, these vague epithets are even less serviceable for purposes of differentiation than they are in cases where the injured person is an adult.

399. Cases illustrating the capacity for appreciating dangers, which is imputed to minor servants.—If the mental and physical capacity of minors for ascertaining dangerous conditions and estimating the extent to which they affect his personal safety could be assumed to be, in the language of mathematics, a constant quantity, as it is, theoretically at all events, in the case of adults, it would be feasible and proper to arrange the authorities with reference to the predicaments indicated by the section headings used under the preceding subtitle. But as the significance attributed to minority varies considerably according to the actual age of the servant, and it is therefore necessary to take into account many degrees both of natural intelligence and of acquired knowledge, conjoined in an endless series of different combinations, classification on these lines is manifestly an impossibility. The difficulties of arrangement are still further augmented by the fact that, speaking generally, minor servants are less able than adults to take advantage of the opportunities of observation which they may have obtained in the course of their employment,—though it must be admitted that there is little or nothing in the cases which bears upon this precise aspect of their obligatory knowledge. Upon the whole, therefore, it would seem that the only course open to a commentator is to exhibit the views of the courts by bringing together in a single note all the decisions which involve the question whether or not the servant was chargeable with an appreciation of the risk to which his injury was due. In doing this it will be necessary to anticipate to some extent the doctrines illustrated in the two following subtitles. For the purpose of facilitating comparison, the decisions are distributed into groups similar to those found in the other extended notes to this chapter.1

636, 33 N. E. 1021.

held the company liable for an omission ger was itself a question of fact." to instruct a youth of eighteen years
who had been injured, after working
four months as a brakeman, through
having his foot caught in an unblocked

to instruct a youth of eighteen years
(b) Obstructions above railway tracks.

—A minor brakeman who had passed
under an overhead bridge daily for three
weeks before he was struck by it was

1(a) Defective railway tracks.—The guard rail. Davis v. St. Louis, I. M. & risk of the derailment of a construction S. R. Co. (1890) 53 Ark. 117, 7 L. R. train operating on an unfinished track A. 283, 13 S. W. 801. The court is deemed to be appreciated by a youth nineteen years of age who engages in the work of delivering ties. Evansville & the knowledge of the fact that the R. R. Co. v. Henderson (1893) 134 Ind. sarily imply knowledge of the at-A verdict has been sustained which tendant danger. Knowledge of the dan-

400. Effect of cases discussed.—The only general principle which it seems possible to extract from the decisions in which an appreciation

v. Pacific R. Co. (1872) 50 Mo. 302.

The question whether a servant who Wis. 305, 83 N. W. 473.

§ 291, note (5), ante.

the ends of which iron rails project, Fla. 535, 22 So. 792. where it is customary for rails to so There is no error in permitting a where it is customary for rails to so There is no error in permitting a project. *McIntosh* v. *Missouri P. R. Co.* minor brakeman to testify that, up to (1894) 58 Mo. App. 281. It has been the time of injury complained of, he had held that there is no duty to instruct a never observed that cars or engines were minor of sixteen when he is assigned to constructed with double deadwoods. The new duty of catching and climbing Louisville, N. A. & C. R. Co. v. Frawley on moving cars. Worthington v. Go-forth (1899) 124 Ala. 656, 26 So. 531.

In Yeager v. Burlington, C. R. & N. City, C. & S. R. Co. (1893) 117 Mo. 405, R. Co. (1894) 93 Iowa, 1, 61 N. W. 215, 22 S. W. 1081, the duty of going with a a verdict was held to have been properly pushcar down a grade to fetch a load of directed for the defendant, where are up-tips was prepaying the same "coff the

instructed youth of nineteen years who, simplest character," and the trial court to the knowledge of the company's offi- was held to have rightly directed a vercers, had had no previous experience, dict for the defendant, where a boy sixwas injured on the day he began work, teen years of age was injured in perwhile attempting to mount a moving car forming that duty, although the accident

by the sideladder.

It is error to direct a verdict for a defendant railway company, where a youth who has received no instruction is injured on the day he begins work, while said, as a matter of law, to know of the engaged in the performance of such a peril to which he is exposed where he is dangerous duty as the making of a sent up to a platform on which there are "kicking switch." Williams v. South & boards liable to turn over, where he has

held to have assumed the risk. Devitt North Ala. R. Co. (1890) 91 Ala. 635, 9

So. 77.

In an action by an employee seventeen was struck by a steam pipe extending years old for personal injuries received over a track while he was standing on while coupling cars, it is a question for the top of a car should have appreci- the jury whether the service is so danated the risk is for the jury, where the gerous and its danger so obscure, or the evidence is that he was about sixteen plaintiff's information so limited or years old, and had been hired about six mind so immature, as to render it proper months before the accident to serve as to give him instructions. Atlanta & W. errand boy, and to act as brakeman, if P. R. Co. v. Smith (1894) 94 Ga. 107, he had time, on cars switched to the de 20 S. E. 763. (The report does not state fendant's buildings; that he had never what experience the plaintiff had had.) before worked round railway station or Whether a lad seventeen years old emcars; and that he had passed this pipe ployed as a brakeman should have been about a dozen times, but never when he instructed in the duty of coupling cars is was on the top of a car. Renne v. a question for the jury. Sims v. East & United States Leather Co. (1900) 107 West R. Co. (1889) 84 Ga. 152, 10 S. E. 543. A jury is justified in finding that (c) Construction and operation of it was negligent to omit to give instrucrailway cars.—In several cases it has tion where a minor of seventeen embeen held that minors hiring themselves ployed as a messenger in a railway office out to do such work must be taken to was ordered to couple cars. Texarkana appreciate the risks incident to coupling & Ft. S. R. Co. v. Preacher (1900; Tex. cars under ordinary circumstances. See Civ. App.) 59 S. W. 593. A jury is warranted in finding that a boy of fourteen A brakeman over twenty years of age who had been employed to put together who has been working in a yard for one vegetable crates, and was then transyear, and has been engaged in switching ferred to the work of pushing cars on a for two months, is presumed to under- side track, should have been instructed stand all the ordinary risks of the serv- as to the dangers incident to the latter ice, such as that of coupling cars over kind of work. Camp v. Hall (1897) 39

held that there is no duty to instruct a never observed that cars or engines were

directed for the defendant, where an un- ties was pronounced to be one "of the occurred on the same day that he began

> (e) Weight-sustaining structures.—An employee sixteen years old cannot be

of the risk has been imputed, as a matter of law, to minor servants is that which we find briefly formulated in a Kentucky case, viz., that a

never been sent there before, and is not risk and danger of the slipping of the cautioned in regard to the danger. Mul- block on the greasy floor, the result belin v. California Horseshoe Co. (1894) ing that his hand is involuntarily 105 Cal. 77, 38 Pac. 535. See also next thrown into the cylinders of a chopping

intelligence who slips on a slippery In Williamson v. Sheldon Marble Co. plank which surrounds a vat, and falls (1893) 66 Vt. 427, 29 Atl. 669, a verdict into it, while he is lowering certain ma- was held to have been rightly directed terials into the coloring fluid, cannot re- for the defendant where a boy of sixteen cover on the ground that he was not years (experience not stated) had been instructed as to the dangers of his work. killed through the "apparent" danger of

Whether a boy sixteen years old who subd. (jj), infra. has been engaged in the same work for caused by his falling into a mill race, in one month and a half of twenty-one while he was propelling a rickety wheel-barrow across a narrow foot bridge, was circular saw before entering the defendheld to be a question for the jury in Luebke v. Berlin Mach. Works (1894) 88 pened on the tenth day after he began Wis. 442, 60 N. W. 711. But in a later work, it was held that he could not recase involving somewhat similar circumstances it was held that a servant eighten years old, of ordinary intelligence, the hand of a workman pressing against assumed the risk of injury from wheelacing dirt over a timber 10 inches wide and knows, is liable to be thrown up and 10 or 12 inches from the ground, in a back, will be carried against the saw.

of reasonable intelligence and judgment niture Mfg. Co. (1886) 63 Mich. 478, 30 for one of her age, who is entirely fa- N. W. 109. The case should be taken miliar with the conditions, as a result from the jury where a youth eighteen of six months' work for the defendant, years old, who had acquired some knowlassumes the risk of continuing in service edge of mechanics during his employas a cook in a kitchen, the floor of which ment in a pulp mill and his apprenticeis covered with pieces of board placed ship to a plumber, is seeking to recover over steam pipes in the form of an in- on the ground that he should have been verted V. extending 5 inches from the instructed as to the danger of allowing floor, as the danger of falling over such his fingers to come in contact with a an obstacle is open and manifest. Her- buzz planer. Such a danger is obvious old v. Pfister (1896) 92 Wis. 417, 66 N. to a much younger boy. W. 355.

block 14 inches square and 5 inches in he has to reach in the course of his emthickness, placed on a wet, greasy, and ployment is assumed by a lad eighteen slippery floor by himself, assumes the years old who had been instructed how

subdivision. machine. Cudahy Packing Co. v. Mar-(f) Dangerous gangways.—A servant can (1901) 54 L. R. A. 258, 45 C. C. A. over seventeen years old and of ordinary 515, 106 Fed. 645.

Bessey v. Newichawanick Co. (1900) 94 slipping on a sheet of ice which had Me. 61, 46 Atl. 806. formed on a rock in a quarry. See also

(i) Saws. — (See also several months can recover for injuries infra.) Where a servant who was with-caused by his falling into a mill race, in one month and a half of twenty-one 10 or 12 inches from the ground, in a back, will be carried against the saw, wheelbarrow whose axle did not run is obvious. Wilson v. Steel Edge Stamptrue, his own testimony being that he ing & Retinning Co. (1895) 163 Mass. knew that if he lost his balance, and the 315, 39 N. E. 1039. A youth nineteen barrow ran off, he was liable to fall. years of age who had for three years Casey v. Chicago, St. P. M. & O. R. Co. been operating machinery, and had been (1895) 90 Wis. 113, 62 N. W. 624 (no running a certain split saw for three duty to instruct). The earlier case was days when his hand was injured by comreferred to, apparently only for the gen- ing into contact with it, is presumed to eral rule laid down in it, no attempt have appreciated all the ordinary danbeing made to reconcile the decisions. gers accompanying its use, and cannot (g) Floors.—A girl sixteen years old, recover damages. Prentiss v. Kent Fur-Alaska Refrigerator Co. (1894) (h) Slippery surfaces.—A minor who Mich. 276, 58 N. W. 999. The danger of for four weeks has been working on a contact with a circular saw over which

minor who has reached years of discretion is bound to take notice of the ordinary operation of familiar natural laws, and to govern him-

(1898) 87 Md. 729, 41 Atl. 65.

throw blocks of wood, was such negli- W. 605. gence as to render the employer liable

to do the work, and had worked three running was "pretty risky," and that he years in other factories. Schliermann had not previously performed such work, v. Hammond Typewriter Co. (1895) 11 although he had some knowledge of the Misc. 546, 32 N. Y. Supp. 748. A boy existence of the saw and had had con-of sixteen who has had sufficient experi-siderable experience in working in sawence at other factories to enable him to mills. Egan v. Sawyer & A. Lumber Co. understand the working of a buzzsaw (1896) 94 Wis. 137, 68 N. W. 756. A cannot recover for an injury to his hand verdict finding the foreman of the deon the ground that he should have been fendant negligent in omitting to instruct instructed as to its use. Ogley v. Miles, a youth of nineteen suddenly called upon (1893) 139 N. Y. 458, 34 N. E. 1059. A to fill the place of the regular operator, youth of seventeen years who is injured as to the dangers of an "edger" saw, will because he attempts to adjust a piece of not be disturbed, although it appears rubber in a vise without moving it back that he had been working for a considfrom a saw, where the danger is per- erable time close to the saw, in trucking fectly obvious and he has been warned to and carry off the lumber which was look out for his fingers, is guilty of such trimmed by it. James v. Rapides Lumcontributory negligence as to prevent re- ber Co. (1898) 50 La. Ann. 717, 44 L. R. covery, even though he has not been fully A. 33, 23 So. 469 (in this case, it should warned of the danger. Burke v. Thom- be noted that the court expressly deson Meter Co. (1892) 45 N. Y. S. R. clared that the plaintiff's minority was 272, 18 N. Y. Supp. 436. In a case not an element in the conclusion arrived where a youth eighteen years old who at, as he was apparently a full-grown had held himself out as being competent man, and there was no evidence tending to do ordinary work, and had been for to show that the defendant was aware of three months engaged in piling wood in his minority). Where a youth seventeen a sawmill, was injured on the first day years old who has had an experience of that he was set to work upon a circular several years in sawmill work is injured saw, owing to the fact that the want of a day and a half after beginning to use two teeth caused it to jump, it was held a circular saw in a manner which he dethat he could not recover. Michael v. clares to be unfamiliar, it is for the jury Stanley (1892) 75 Md. 464, 23 Atl. 1094. to say whether he knew or ought to have A boy fifteen years old who, after work known of the particular danger incident ing four months in the same room to such use. Hanson v. Ludlow Mfg. with a certain saw, stumbles and comes Co. (1894) 162 Mass. 187, 38 N. E. 363. into contact with it, while carrying A verdict against the employer was alpieces of timber, cannot recover. Jour-lowed to stand, where he had failed to neaux v. E. H. Stafford Co. (1899) 122 instruct as to the dangers of a circular Mich. 396, 81 N. W. 259. The danger of saw a youth of seventeen years who had sawing a plank with a circular saw is had no experience in the use of such a presumed to be appreciated by a boy of machine. Smith v. Irvin (1889) 51 N. fourteen, where he has used it three or J. L. 508, 18 Atl. 852. An inexperienced four times, and admits that he knew employee of seventeen does not, as matthat, if his hands touched it, they would ter of law, understand the risk of using be injured. Hettchen v. Chipman a "bolting saw" without a carriage attachment, after using it three weeks Whether or not failure to warn a boy without such attachment, where none of nineteen employed in a sawmill, of had been on it at any time while he used the danger from a circular saw set in a the same. Olmscheid v. Nelson-Tenney table over which he was required to Lumber Co. (1896) 66 Minn. 61, 68 N.

Whether an employer is negligent in for the loss of the boy's fingers from failing to instruct a boy sixteen years of coming in contact with the saw, is for age unfamiliar with machinery, as to the jury upon evidence that the saw ex- the dangers of removing a tub placed tended above the top of the table about underneath a rapidly revolving saw to 3 inches, and was partially covered with catch the scraps and sawdust which felsawdust, and ran very swiftly, being from it is a question for the jury. Barg scarcely visible, and that throwing v. Bousfeld (1896) 65 Minn. 355, 68 things over the table when the saw was N. W. 45. An inexperienced boy of fifteen, even after he has been told how to ing still and when in use, and that he saw blocks by means of a circular saw, knew all about its location and use, and without a saw-rest, is not, as matter of worked about it every day. He himself law, chargeable with knowledge of the testified that he knew the jointer was special danger that a block may bound there; that, if he came into contact back and force his hand under the saw, with it he would be injured; and that if if the block is not pushed squarely he had looked at it he would have against the saw. Jarvis v. Coes known whether it was running or still. Wrench Co. (1900) 177 Mass. 170, 58 N. A boy of fifteen years who has been E. 587. A boy fourteen years of age, engaged for several weeks in pushing injured on the first day he went to work, wooden rails against revolving knives is by the contact of his hand with a buzz-charged with knowledge of the danger of saw, was held unable to recover in Mc-permitting his hand to come under them. Cann v. Mathison (1895) 12 Misc. 214, Bohn Mfg. Co. v. Erickson (1893) 5 C. 33 N. Y. Supp. 263. But quære as to C. A. 341, 12 U. S. App. 260, 55 Fed. 943. the correctness of this case.

few inches of a rapidly revolving saw is planer," in the use of which he has had a work of too great hazard to require no practical experience except such as he any servant to do, however skilful or has acquired on a few previous occasions experienced, and the danger is not one during the period of two months which which a minor can be said to appreciate has elapsed since he entered the employin such a sense as to charge him with ment, will not be set aside. Verdelli v. assuming the responsibility for an in- Gray's Harbor Commercial Co. (1897) jury received in obeying an order to 115 Cal. 517, 47 Pac. 364. adjust a belt under such circumstances. In Fones v. Phillips (1882) 39 Ark.

youth nineteen years old who has been been instructed as to the proper manner engaged for three weeks in the work of of operating a planer, but was injured carrying off dressed lumber after it has on the third day after he began work, passed through a planer cannot recover through allowing his hand to come into for an injury to his hand, resulting from contact with the knives while he was re-

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fall upon the machine. Rikel v. Ferguage, after two and a half months of exson (1889) 25 N. Y. S. R. 960, 5 N. Y. perience in the use of it.

Supp. 774, Affirmed in (1889) 117 N. Y. The danger of permitting one's finger 658, 22 N. E. 1134. In Palmer v. Hartobe caught in a tuft of hay about to rison (1885) 57 Mich. 182, 23 N.W. 624, pass between the knives of a hay-cutter a case of injury to a boy of sixteen, is perfectly apparent to a servant of caused by contact of his hand with re-twenty years, without instruction, even volving knives of a jointer, it was held though he has never done any work of that a verdict for the defendant had the same description before the day rightly been directed, for the reason that when the injury is received. Stuart v. no notice or warning could have helped West End Street R. Co. (1895) 163 him. The evidence showed that he had Mass. 391, 40 N. E. 180. worked in the shop where the jointer was located for two weeks previous to ing his fingers caught between the cylinreceiving his injury, and had seen the ders of a "skiving machine," and thus machine in which the accident occurred drawn against the knife, was imputed to every day during the period, both stand- a boy of sixteen who had been told that

A verdict in favor of a minor of eight-Putting a belt on a pulley within a een who is injured in handling a "pony

Nelson Mfg. Co. v. Stoltzenburg (1895) 17, 43 Am. Rep. 264, the court reasoned upon the assumption that it was for the (j) Planers and other cutting machin-jury to say whether recovery could be ery.—(See also subd. (x), infra.) A had by a boy of fourteen years who had its contact with the knives, while he is moving chips, a position which required putting a hood in position. *Crown* v. him to work with his back to the ma-Orr (1893) 140 N. Y. 450, 35 N. E. 648, chine, and which involved a danger as to Reversing (1893) 71 Hun, 613, 24 N. Y. which he had received no caution. In Adams v. Clymer (1893) 1 Marv. (Del.) A youth seventeen years of age who 80, 36 Atl. 1104, it was left to the jury has worked several years in a carriage to say whether the manipulation of a factory and two months on a planer is pony-planer with knives running at the presumed to appreciate the danger that, rate of 3,500 to 4,500 revolutions a minin attempting to walk on boards piled ute involved dangers which were latent alongside the planer, he may slip, and so as respects a youth sixteen years of

A comprehension of the danger of hav-

and that he must look out about his Mass 476, 59 N. E. 73. Pratt v. Prouty (1891) 153

subd. (x), infra.

In a case where also subd. (x), infra.) a youth of seventeen had been engaged the defendant had been properly diished products of a machine, and was in- Co. (1890) 58 Hun, 381, 12 N. Y. Supp. jured the first day he was set to work 188, (1892) 131 N. Y. 631, 30 N. E. 236. on the machine itself by some uncovered gearing, it was held that the risk was working at a machine for two days, and apparent. Cunningham v. Bath Iron Works (1899) 92 Me. 501, 43 Atl. 106.

A verdict has been held to rightly directed for the defendant where a servant sixteen years old was injured by coming into contact with moving cogwheels the same day that he began work. ber Mfg. (
Downey v. Sawyer (1892) 157 Mass. N. E. 717.
418, 32 N. E. 654.

had worked in another paper mill for two years, five weeks of which he was and that he was caught in the machine rendered. (1900) 107 Wis. 216, 83 N. W. 360.

machine having unguarded cogwheels assumed the resulting risk, where he had clothing caught in it. worked for several months in the same days after he had been transferred to Carpet Co. v. O'Keefe (1897) 25 C. C. No specific reference was made by the court to the experience obtained before the transfer to the new work, and, apparently, recovery was denied independently of this element.

An employer may properly assume

if he got his fingers in he would be hurt, Silvia v. Sagamore Mfg. Co. (1901) 177

In a case where an uninstructed boy Mass. 333, 26 N. E. 1002. See also thirteen years old was injured, after three months' work, by placing his hand (k) Cogwheels and gearings.—(See where it came into contact with moving cogwheels, it was held that a verdict for for one month in carrying away the fin- rected. White v. Witteman Lithographic

A boy twelve years old who has been is injured by contact with a cogwheel while putting into place a cylinder bebe longing to the machine, cannot recover on the theory that he should have been instructed as to the dangers of the operation. Buckley v. Gutta Percha & Rubber Mfg. Co. (1889) 113 N. Y. 540, 21

In another case it was held that no A paper cutter in defendant's mill in-negligence was predicable of the failure jured by being caught in an unguarded to instruct a boy twelve years of age gearing in a machine was held unable to after he had worked for two months in gesting in a machine was master that he the room with the cogwheels. Ciriack had worked in another paper mill for v. Merchants' Woolen Co. (1888) 146 two years, five weeks of which he was Mass. 182, 15 N. E. 579. The verdict employed as a paper cutter; that he was having been set aside there was a second sixteen years old, and understood the trial upon a somewhat different theory, danger of working around machinery; and another verdict for the plaintiff was This was sustained (151 while changing his clothes, preparatory Mass. 152, 6 L. R. A. 733, 23 N. E. to going home. Helmke v. Thilmany, 829) on the ground that the case was for the jury, because the master was An employee sixteen years old who has aware that the boy possessed less than worked sufficiently long to become ac- average intelligence, and had sent him on quainted with the conditions cannot re- an errand requiring haste, to a dimly cover for an injury caused by his slip- lighted place, where the cogwheels were ping from a box on which he was stand- likely to catch his clothes, and because ing, and so coming into contact with a the plaintiff, although he had worked in cogwheel. Fitzgerald v. Elsas Paper Co. the room which contained the cogwheels, (1900) 30 Misc. 438, 62 N. Y. Supp. 597. and was undoubtedly familiar with them It has been held that a boy fifteen in a general way, had never worked so years of age who undertook to operate a near them as to have had occasion specially to consider the risk of getting his

A female employee of less than twenroom with the machine, but was injured, ty-one years (precise age not stated), owing to the absence of the guards, two who had been working "some time" on a machine (not specified, but apparently the work of feeding it. E. S. Higgins for cutting), was held to understand the risk of contact with it. Oszkościł v. A. 220, 51 U. S. App. 74, 79 Fed. 900. Eagle Pencil Co. (1889) 25 Jones & S. 217, 6 N. Y. Supp. 501, Affirmed in (1890) 119 N. Y. 631, 23 N. E. 1145.

In Rummel v. Dilworth P. & Co. (1890) 131 Pa. 509, 19 Atl. 345, 346, the plaintiff was a lad of about seventeen years, having very little acquaintance that even a boy of fourteen years need with the business or its dangers. He not be told that, if he puts his fingers went into the employ of the defendants into gearing, they will be crushed on Tuesday, and was injured on Friday

of the same week. He was employed as the train, except at the point over which Smithville Mfg. Co. (1861) 29 Conn. 548. Rummel had to reach to open and close reasonably necessary to protect him from (1895) 91 Wis. 637, 65 N. W. 374. injury." In Coombs v. New Bedford a master negligent in not instructing a once before been employed, caught his boy of fourteen, injured the second day clothes in cogs while he was removing after he began work in a very noisy slabs, it was held that he could show the room, his duties requiring him to break changes made in the arrangements of strands of hemp at intervals, an opera- the mill as bearing upon his want of tion which brought his hands very close familiarity with them when hurt. Huito the cogs of another machine very close zega v. Cutler & S. Lumber Co. (1883) to the one he was working with. Ac- 51 Mich. 272, 16 N. W. 643. cording to the court in Ciriack v. Mer- The following instructions formulated chants' Woolen Co. (1888) 146 Mass. in Coombs v. New Bedford Cordage Co. in this case was the short time the were expressly approved in Sullivan v. servant had been at work.

(1890) 76 Wis. 120, 43 N. W. 1135, a ployers and employees," in a case inverdict for the plaintiff was upheld, in a volving facts similar to the above case where the injury was received only "Upon the new trial of the case at bar, on the ground that the owner of a saw- fendants had the legal right to run their mill who hires an inexperienced youth machinery without fencing or boxing it, nineteen years of age to do work which unless by so doing they exposed persons requires him to keep moving along a nar- in their employment, or other persons row alley-way only 19 inches in width, who came upon the premises by their with revolving cogwheels behind him, is procurement or invitation, to danger of

jured by an uncovered cogwheel, while parent, the jury should be satisfied that attempting to replace a roller in a flax- the plaintiff had reasonable notice of the scutching machine, should not be non-peril to which he was exposed, and, unsuited, where he testifies that he had derstanding it, chose to undertake the never worked round the machine before employment which exposed him to it, he the day of the accident, that he received cannot recover; but that if, on the other no instructions as to the proper manner hand, they should be satisfied that the of handling it, and that, having been defendants knew or had reason to know suddenly called upon to put the roller in the peril to which he would be exposed, its place, he did this in the same way and did not give him any sufficient or that he had seen his fellow servants do reasonable notice of it, and if he, without it. Vicary v. Keith (1873) 34 U. C. Q. B. 212.

The question whether a boy ten years a "drag-down," but was hurt while per- of age who was injured by being caught forming the duties of a "roller," in open- in uncovered machinery after having ing and closing the gate between the first worked for three weeks had a sufficient and second pairs of rollers. The cog- understanding of the hazard of the emwheels by which the rollers were moved ployment to bar his recovery was held to were covered along the whole length of be a question for the jury in Hayden v.

Evidence that there was a shadow over the gate. If they had been covered at the box of a wheel which a boy sixteen that point the accident could not have years of age was examining when his happened. The court said: "In view of hand was drawn into the wheel is adthe youth and want of experience in the missible as part of the res gestæ, and as business on the part of Rummel, it was a fact to be considered in determining necessarily a question for the jury whether the boy observed, and therefore whether his employer had sufficiently assumed, the risk, and whether the maswarned and instructed him about the ter was negligent in not guarding the dangers of the employment, and how to wheel and in not warning the plaintiff of avoid them, or had done all that was danger. Kucera v. Merrill Lumber Co.

In a case where a youth sixteen years Cordage Co. (1869) 102 Mass. 572, 3 old, on the twelfth day after beginning Am. Rep. 506, it was held proper to find to work again in a mill in which he had

The following instructions formulated 182, 15 N. E. 579, the controlling factor (1869) 102 Mass. 572, 3 Am. Rep. 506, India Mfg. Co. (1873) 113 Mass. 396, as In Nadau v. White River Lumber Co. "carefully guarding the rights of emfive days after the servant began work, the jury should be instructed that the debound to warn him as to the nature of which they gave no sufficient notice; the perils to which he will be exposed. that if, by the fact that the cogs were A boy twelve years of age who is in- in sight, and the danger from them apany negligence on his own part, from inexperience or reliance upon the directo him in this action."

191, 48 N. Y. Supp. 376 (injured after Fitzhenry v. Lamson (1897) 19 App. working about one hour). A girl seven- Div. 54, 45 N. Y. Supp. 875. teen years old, of ordinary intelligence, It is for the jury to say whether a girl girl sixteen years of age who has been ers to which he was feeding paper working for two weeks in a laundry, sheets. Gordon v. Reynold's Card Mfg. and for three days at a mangle, cannot Co. (1888) 47 Hun, 278.

recover for injuries caused by catching Whether instruction should have been the rollers as a result of that wrinkling. Walsh v. Commercial Steam Laundry Co. (1895) 11 Misc. 3, 31 N. Y. Supp. 833. A girl fifteen years old and of ordays' work with the machine, to under-

who is injured by having her hand laundry, has received no instructions as to the dangers of the work, will not entitle her to recover, where, at the time of the accident, she had been feeding the machine for a period of six weeks. *Hickey* v. *Taaffe* (1887) 105 N. Y. 26, 12 N. E. 286 (held that plaintiff should have been nonsuited).

tions given him, failed to perceive or ap- first day she was assigned to the duties preciate the risk, and was injured in in question, was not, as matter of law, consequence, they would be responsible guilty of contributory negligence in failing to understand that a piece of blanket (1) Mangles and ironing machines.— which had been partially torn loose from (See also subd. (x), infra.) There is a mangle which she was feeding, was no duty to warn an inexperienced girl liable to catch her hand and draw it into seventeen years of age as to the danger the machine, where the evidence shows of injuring her hands by bringing them that the injury was due to the want of into contact with the rollers of a mangle. repairs, and not to the ordinary dangers O'Hare v. Keeler (1897) 22 App. Div. incident to the operation of the machine.

employed to work at a mangle, is charge- of fourteen years, hired to feed paper to able with a knowledge of the risk of her a mangle in a paper mill, should have hand being caught between the heated been instructed how to perform the work cylinders of the mangle. Greef Bros. v. of carrying off the paper, to which duty Brown (1898) 7 Kan. App. 394, 51 Pac. she was transferred two weeks after en-926 (accident occurred two days after tering the service. Allen v. Jakel she began work). Recovery has been de- (1898) 115 Mich. 484, 73 N. W. 555. In nied to a girl sixteen years of age whose another case a minor eighteen years old hand was caught between the rollers of who had been working round the maa mangle after she had been working chine for three months was held chargetwo weeks in the laundry, and for three able with an appreciation of the danger or four days on the mangle itself. A of having his hand drawn between roll-

her hand in the rollers of the mangle. given is a question for the jury, where Jones v. Roberts (1894) 57 Ill. App. 56. an inexperienced girl of fifteen was called Since the wrinkling of the canvas which away from the particular branch of the surrounds the rollers of a mangle is a employment in which she was engaged, constantly recurring obvious defect con- and had her hands caught in the rollers nected with the daily use of the machine, of an ironing machine, on the first day a female operative sixteen years old who that she operated it. Coffee v. Phillips has worked six months in the laundry (1897) 21 Misc. 663, 47 N. Y. Supp. and six weeks on the mangle assumes the 1105, Distinguishing Hickey v. Taaffe risk of having her hand drawn between (1887) 105 N. Y. 26, 12 N. E. 286, supra, on the ground that the servant there had acquired some experience.

The case is for the jury where an inexperienced girl fifteen years of age who dinary intelligence is presumed, after ten was put at work passing linen through the rollers of a machine which usually stand the risk of having her hand caught had a guard before it to prevent the between the roller and jacket of a man- operator's hand from getting caught, but gle operated by her. Groth v. Thomann was not guarded at the time of the ac-(1901) 110 Wis. 488, 86 N. W. 178. cident, was given no warning, and, supcident, was given no warning, and, sup-The fact that a girl fourteen years old, posing that the rollers were too close together to permit her hands to go bedrawn between the ironing rollers in a tween, allowed one of her hands to get caught. Levy v. Clark (1899) 90 Md. 146, 44 Atl. 990.

In Grizzle v. Frost (1863) 3 Fost. & F. 622, where a girl of sixteen was injured by the rollers of a machine for carding hemp, Cockburn, Ch. J., left the determination of the employer's responsibility to the jury, charging them as follows: A girl of fourteen who had worked in "I am of opinion that if the owners of a laundry ten days, but was injured the dangerous machinery, by their foreman, employ a young person about it quite infendant was negligent because he failed experienced in its use, either without to tell the plaintiff, a young man proper directions as to its use, or with twenty years of age, that the revolving directions which are improper and which cylinders or rollers onto which he had are likely to lead to danger of which the been feeding wheat and sweepings from young person is not aware, and of which the mill floor, for six months, in order they are aware—as it is their duty to that it might be pulverized to flour, take reasonable care to avert such dan- would be dangerous to the hands if they ger, they are responsible for any injury came in contact with them." which may ensue from the use of such machinery." This ruling was never to understand, without any special skill questioned in any court of review.

A boy eighteen years old is presumed to understand, without any special skill or experience, that if he gets his fingers

rollers.—There is no duty to instruct a be caught thereby, and that, if they are youth nineteen years old and of ordinary caught, they will be injured. Roth v. intelligence as to the obvious danger of S. E. Barrett Mfg. Co. (1897) 96 Wis. getting his fingers squeezed while feeding 615, 71 N. W. 1034. scrap rubber into a machine containing two revolving cylinders about ½ to ¾ ing corn stalks to the rollers of a maof an inch apart. Sullivan v. Simplex chine for extracting the pith put his
Electrical Co. (1901) 178 Mass. 35, 59 hand between two sets of rollers in an
N. E. 645, holding that the fact of the attempt to remove a stalk that had
master's vice principal having told the jammed, the result being that his hand boy that he might use his fingers to press was crushed, it was held that the failure down the rubber did not relieve him of to warn him of the danger of so doing his duty to safeguard himself.

After having operated a kneading ma- Johnson (1899) 89 Ill. App. 100. chine for three years, a youth of eight-een is presumed to appreciate the danger worked for three years with a machine of being injured by slipping and falling with revolving iron rollers placed within against the rollers. McCarthy v. Mul- 3/4 of an inch of each other is presumed grew (1898) 107 Iowa, 76, 77 N. W. to appreciate the risk incident to its use. 527.

A servant nineteen years old is presumed to appreciate, without instruction, a danger so "open to the senses" as telligent boy of fifteen years warning that of putting his hand between the that his hand, if inserted too far berollers used to flatten boiler - plates, tween a belt of felting and a hot cylinder where, although he has only just begun over which it runs, will be drawn in and to operate the machine, he has been brought into contact with the cylinder. dict for plaintiff set aside).

In a case where a box on which an inexperienced boy of fourteen years was ployed on a "drier" machine five or six standing while he fed a "cake-crusher" weeks, who understands the danger of slipped or turned under him, and the getting his hands drawn in the machine, arm which he threw out to save himself knows that if they are drawn in they was caught in the rollers, it was held to will be burned, and that cloth of various be a question for the jury whether he ap- sizes frequently passes through the mapreciated the danger, and failed to use chine, in which he knows that there are the caution appropriate to the circum- tears of various sizes and shapes, that stances. Emma Cotton Seed Oil Co. v. there are liable to be holes also in the Hale (1892) 56 Ark. 232, 19 S. W. 600.

twenty years, was set aside in Nugent v. hand was caught in a hole and drawn Kauffman Mill Co. (1895) 131 Mo. 241, into the machine, where others testify 33 S. W. 428, where, after working for that the holes frequently occur. Shine six months near machinery with moving v. Cocheco Mfg. Co. (1899) 173 Mass. rollers, he allowed his hand to be drawn 558, 54 N. E. 245. between them. The court said: "It

(m) Other machinery with revolving into the rolls of a straw cutter they will

Where a boy of sixteen who was feedwas not negligence. Marsden Co. v.

McCarthy v. Mulgrew (1898) 107 Iowa, 76, 77 N. W. 527.

A master is not bound to give an in-

It is not negligence to omit telling a seventeen-year old boy of more than usual enterprise and intelligence, emcloth, although he testifies that he had A verdict for the plaintiff, a youth of seen no holes in the cloth, and that his

A master is, as a matter of law, free would be a thing of folly to say that de- from negligence in failing to give instructions to a youth who has worked E. 1066, on Second Appeal (1901) 178 for six months on a machine substan- Mass. 9, 59 N. E. 454. tially the same as that which causes the ter, in reference to the danger of injury four and a half days' experience in debetween a roll of cloth and one of the cover for injuries resulting from his

contact with revolving rollers was self- 86 N. W. 662. evident to anyone who used his senses, tion of defendant seems plausible; but when we consider the fact that the surknowledge of the principles of mechanics, who, while knowing and seeing that rollers. plaintiff, yet we are not prepared to say, 751. as matters of law, that the defendant without being told."

(n) Shafts and set screws. -- (See also his work, although his attention had not the belt onto the tight pulley). been particularly called thereto. Demers v. Marshall (1899) 172 Mass, 548, 52 N. without experience and to whom the

A servant of nineteen years with some injury, and nearly one month on the lat- experience as a factory workman, and from allowing his hands to be caught fendant's mill, was held unable to recylinders between which it has to be clothes being caught in a set screw while passed. Crowley v. Pacific Mills (1889) he was operating a machine driven by 148 Mass. 228, 19 N. E. 344 (verdict for the shaft, the evidence being that the defendant should have been directed). nature of his work had been explained In Kaillen v. Northwestern Bedding to him by the foreman, and that he had Co. (1891) 46 Minn. 187, 48 N. W. 779, noticed that the shaft was not moving the contention of defendant was that the smoothly. Kreider v. Wisconsin River danger of allowing the hand to come in Paper & Pulp Co. (1901) 110 Wis. 645,

An intelligent boy of seventeen years and that, in the exercise of ordinary in accustomed to working about machinery telligence, the plaintiff, a boy fourteen cannot recover for injuries received and a half years old, ought to have while leaning over a revolving shaft and known that if his hand came in contact drawing up buckets from a lower floor, with the rollers it would be drawn in. by his loose shirt catching upon the The court said: "At first sight the posishaft. Kelly v. Barber Asphalt Co. shaft. Kelly v. Barber Asphalt Co. (1892) 93 Ky. 363, 20 S. W. 271.

A verdict against a master who omitface of the rollers was smooth, and the ted to give an inexperienced servant sevspace between them very small, we think enteen years old special instructions as it not improbable that there may be a to the danger of coming into contact great many boys, and even men of or- with a set screw will not be disturbed. dinary intelligence, without experience Keller v. Gaskill (1894) 9 Ind. App. 670, with machinery, and with a limited 36 N. E. 303, Second Appeal (1898) 20 Ind. App. 502, 50 N. E. 363.

It is not a conclusion of law from the the rollers drew in wool compressed al- fact that a servant seventeen years old most to the thinness of paper, would yet, who had been working three weeks belike this boy, fail to realize or appreciate fore the accident was aware of the exthat they would suddenly compress and istence of a set screw on a revolving draw in, as quickly as it came in the shaft, and was "sprightly" for one of his slightest contact with them, an object years, that he was aware of the risk and like the hand or fingers, many times danger of passing over the shaft while it thicker than the aperture between the was in motion. Dowling v. Allen (1881) . . . While the facts do not 74 Mo. 13, 41 Am. Rep. 298, (1885) 88 make out a very strong case for the Mo. 293, (1890) 102 Mo. 213, 14 S. W.

(o) Belting.—The danger involved in owed this boy no duty to caution him as attempting to remove an inking roller to the danger of allowing his hand to from a printing press by getting within come in contact with these rollers, and the frame of the press, while the belt that he ought to have understood this through which motion is communicated to the machine is revolved on the loose pulley and the shifter left unsecured, is subd. (x), infra.) An employee eight- open and obvious, and therefore preeen years old who had been working for sumed to be appreciated, without any inthree weeks in the machine shop where structions, by an employee seventeen he was injured, and had previously been years old, after he has been working operating weaving machines to which round the machine for several months power was communicated by shafting, and has removed the rollers several was held to have assumed the risk from times. Levey v. Bigelow (1893) 6 Ind. a projecting set screw as a part of the App. 677, 34 N. E. 128 (roller came into machinery with which he had to do in contact with the shifting lever and threw

To let a young man of seventeen years,

foreman has given erroneous instruc- v. Sawyer (1891) 153 Mass. 485, 27 N. tions, undertake the work of lacing a E. 6, the court was "unable to discover broken belt without stopping the shaft in this case any ground on which it can over which it hangs, is negligence. be held that the defendants are liable," Archbald v. Yelle (1897) Rap. Jud. Queunder the following state of evidence. bec, 6 B. R. 334.

ployed in a spinning room was injured and of at least ordinary intelligence, and by the parting of a belt, the fact that had been in the employ of the defendants she was present when the ends of the about a month. Up to the forenoon of belt were laced would not impute knowl- the day before the accident, he had been edge that the belt was laced in an un- attending to cards in the carding room safe manner, and hence would not show of the defendants' mill. He was then that she assumed the risk of such acci- set to work to help tend the machine on dent. McGar v. National & P. Worsted which he was injured, the accident oc-

w verdict absolving from the charge of to touch it when in motion. This was contributory negligence a youth fourteen repeated to him by the man who was years of age who, without instructions, running the machine. He himself testihad been put to work only a few days be- fied that he knew the machine was danfore the accident, in close proximity to a gerous when it was going, and that it revolving shaft from which hung a loose was going at the time of the accident. belt, the result being that his foot was During the day and more that he worked caught in the belt and whirled round the on the machine, he helped to clean it a shaft.

instruction which permits the jury to the warning and instruction which he find for a minor servant over fourteen had received. He had to sprinkle the years of age and with six months' ex- wool with oil before it was put into the perience, provided they find that he was machine, and this made the floor very directed to go up a ladder and put a belt slippery, so that, as he testified, he had on a pulley without being notified of the to walk carefully. It was a part of his danger of doing so. It cannot be assumed that a person of that age and floor as it was blown out of the machine, that experience is incapable of forming and put it back, so that it would go a judgment as to the risks of such an through the machine again. The open-

by a pulley made of rags, the ends of Two or 3 inches inside of it was a large that an employee fifteen years old who the time of the accident he was gatherchinery, and has never worked near the the machine, as he testified, that if he pulley, is, as matter of law, chargeable being caught while holding a belt on the the injury complained of resulted. pulley to assist in its repair. Dodd v. Bell (1897) 15 App. Div. 258, 44 N. Y.

Supp. 198.

(1898) 25 App. Div. 121, 49 N. Y. Supp.

The plaintiff at the time of the accident Where a girl seventeen years old em- was somewhat over sixteen years of age, Mills, (1901) 22 R. I. 347, 47 Atl. 1092. curring about the middle of the forenoon In Cleveland Rolling Mill Co. v. Corof the next day. He was told by the rigan (1889) 46 Ohio St. 283, 3 L. R. man who set him to work on it that the A. 385, 20 N. E. 466, the court affirmed machine was a dangerous one, and not number of times, and had therefore the (p) Pulleys.—It is error to give an knowledge thus acquired, in addition to duty to gather up the wool from the act. Greenway v. Conroy (1894) 160 ing out of which the wool came was Pa. 185, 28 Atl. 692. about 2 feet from the floor, and was 4 The danger of one's sleeve being caught feet horizontally by 1 foot in height. which are left loose, is not so obvious revolving cylinder with teeth in it. At has had no experience in handling ma- ing up wool from the floor so near to slipped he would go into it. He did slip, with a comprehension of the risk of and his arm went into the opening and

A bright boy seventeen years old employed to spread wool, and cautioned against allowing his hand to be caught (q) Grinding machines.—The failure in the teeth of a revolving roller, asto warn a new employee about fifteen sumes the risk in that respect, where years of age as to the danger of putting there is no hidden danger and the maher hand into the interior of a chocolate- chine is simple in construction and grinding machine in which scrapers were operation, although he has only worked revolving may be properly found to be on the machine a few days before the negligence. O'Connor v. Barker & Co. accident occurs. O'Connor v. Whittall (1897), 169 Mass. 563, 48 N. E. 844.

A verdict has been set aside, which (r) Carding machines.-In Tinkham found a master negligent in failing to it his arm, was drawn between the App. Div. 554, 67 N. Y. Supp. 504, rollers. Truntle v. North Star Woolen-Mill Co. (1891) 57 Mill Co. (1891) 57 Mill Co.

(s) Cotton pickers.—In De Souza v. Stafford Mills (1892) 155 Mass. 476, 30 N. E. 81, the court held that, upon the whole case, a verdict for the defendant should have been directed, where the plaintiff, who was a foreigner nineteen years old, speaking no English, and had been working only sixteen days, had his hand drawn into the roller of a beater picker and mutilated by the beater, which revolved at a high rate of speed behind the rollers. Since this danger was obvious, and the plaintiff also knew that the beater revolved in close proximity to that it is not a breach of duty to omit to give instructions as to elements of danger which may be appreciated by a period of experience in the work.

(t) Machinery operating vertically. who employs a boy between fourteen and fifteen years of age at a steam-power punching machine is guilty of negligence of complaint held proper). in failing to notify him that, if he keeps boy began work). The failure of a stool, which he placed in a tilted posi-enter the cylinder. Addicks v. Christoph tion, slipped on the floor, where the (1899) 62 N. J. L. 786, 43 Atl. 196. condition of the floor and the danger 182, 1105.

instruct a minor fifteen years old who chine for stamping numbers on brass had been working four days at the time plates, and his evidence showed that he when he was injured through allowing had operated similar machines before, his shirt sleeves to rest on the rough and was aware that, as long as he kept surface of the card cloth on the revolv- his foot on the lever for throwing the ing cylinder of a carding machine, the machine into gear, it would continue to

Mill Co. (1894) 57 Minn. 52, 58 N. W. he was unfamiliar with the work and was injured on the second day after he began work, was held to understand, as well as an adult, the danger of having his hand caught under a stamping machine. O'Keefe v. Thorn (1899) 2 Monaghan, 73, 16 Atl. 737.

A girl sixteen years old in the habit of using a card-cutting machine, the knife of which has a tendency to stick, and descends when she places her foot on the treadle, cannot recover for injuries sustained by the descent of the knife, where she has been in the defendant's service for six years and has been operating the machine for six months. the rollers, the principle was applicable Reardon v. New York Consolidated Card Co. (1884) 19 Jones & S. 134.

Whatever danger is incident to the work of removing the margins cut from person of the plaintiff's age after a brief calendars by a knife applied by hand and suspended by a slowly operating counterpoise weight is presumed to be A jury is justified in finding that one apparent to a bright boy of fourteen years. Malsky v. Schumacher (1894) 7 Misc. 8, 27 N. Y. Supp. 331 (dismissal

An inexperienced boy sixteen years of his foot on the treadle, the press will age who had his hand caught under the keep coming down and going up, and to plunger of a brick-moulding machine, tell him how to take his work from the was allowed to recover in Chicago Anderpress after it is punched. Armstrong v. son Pressed Brick Co. v. Reininger Forg (1895) 162 Mass. 544, 39 N. E. (1891) 41 Ill. App. 324, Affirmed in 190 (accident happened just after the (1892) 140 Ill. 334, 29 N. E. 1106.

Whether the duty of instructing an master to caution a boy of sixteen years ignorant foreigner sixteen years of age who is operating a punching machine, as to the proper way of pushing the clog-egainst the danger from the slippery conging pieces of clay into the cylinder dition of the floor, does not render him where they were pressed by a plunger liable for injuries to the boy's hand from was adequately performed is for the its coming into contact, on the first day jury, where the evidence is that he was that he worked, with the lever by which told that he should kick them in with the punch was released, as he attempted his foot, and was not warned as to the to save himself from falling when his danger of pressing his foot so hard as to

(u) Machinery in cordage factories. from slipping were perfectly apparent. Where plaintiff, an inexperienced girl Koehler v. Syracuse Specialty Mfg. Co. less than thirteen years of age, was in-(1896) 12 App. Div. 50, 42 N. Y. Supp. jured while operating a bobbin-winder in a cordage factory, and the evidence No duty to instruct can be predicated tends to show that she was not inwhere a boy of fifteen was injured by structed as to the general operation of catching his hand under the die of a ma- the machine, or as to the dangers incident thereto, the question of the mas-ter's negligence is for the jury. Dono-an inexperienced youth nineteen years van v. Overman & S. Cordage Co. of age, who had been injured after five (1900) 22 Ky. L. Rep. 777, 58 S. W. days of work, as to the dangers of allow-798.

first day that the plaintiff began to liable to be caught in uncovered cogoperate a machine which formed by com- wheels revolving underneath. Atlas Enpression the thread of screw caps for gine Works v. Randall (1884) 100 Ind. tin cans, it was held warrantable to 293, 50 Am. Rep. 798. A complaint render a general verdict in his favor, should be dismissed which is framed on where it is also specially found that he the theory that a master was negligent was only thirteen years of age, and was in failing to instruct a youth of eighteen was only thirteen years of age, and was in failing to instruct a youth of eighteen working under an agreement with his years who has worked for him three mother that he should not operate any years, as to the danger of cleaning a remachinery; that he was placed at work volving shaft. Smith v. Martin (1891) at a certain machine; that he had no 39 N. Y. S. R. 126, 14 N. Y. Supp. 935. previous knowledge of its character; and that no warning or instruction was given him. National Enameling & Stamping general verdict for the plaintiff would Co. v. Brady (1901) 93 Md. 646, 49 Atl. not stand where the jury had found specially in answer to interrogatories.

recognizes the duty to instruct a young gent boy sixteen years of age; that he girl (age not stated) as to the danger had knowledge of the dangerous condition of having her hair caught in moving mation of the machine (a planer) he was chinery. Parent v. Schloman (1897) operating, and knew that he must be Rap. Jud. Quebec, 12 C. S. 283 (she had careful in order to avoid injury; that he gone under a sewing-machine table to had received from the appellants some

replace the band).

machinery in motion.-In one case it as much as they should have imparted was laid down in general language that to him; that he had been using the maoiling dangerous machinery while in mo- chine from five to eight weeks before the tion was contributory negligence, even injury, and that he had no other experi-

for several days, to oil a band saw while appellee to do this in the performance of it is in motion, the operation being his duty in operating the machine; that effected by pouring oil into a cup in he knew how to stop the machine and front of and above the saw, is not bound could easily have done so; that he was to warn him of the obvious danger that not ordered or directed by the appellants his hand may come in contact with the to do the work in which he was so ensaw if he attempts to reach round from gaged when his fingers came in contact behind the saw. Buttle v. George G. with the revolving knives. Page Box Co. (1900) 175 Mass. 318, 56 A boy twelve years old N. E. 583. The rule under which a mas- take lumber away from a flooring mater is required to instruct a minor of chine and load it on a wagon, who is tender years who is set to work on a injured in attempting, under orders of dangerous machine has no application the foreman of the mill, to oil dangerous where a boy seventeen years old is in- machinery while in motion and without jured by unfenced cogwheels which he is proper instructions, may recover damages engaged in oiling, after he has been al- from his employer, even though he may ready doing this work for a year and have been doing this work for some time ten months. Sanborn v. Atchison, T. & before the accident happened. Hinckley S. F. R. Co. (1886) 35 Kan. 292, 10 v. Horazdowsky (1890) 133 Ill. 359, 8 Pac. 860 (sustaining a demurrer to the L. R. A. 490, 24 N. E. 421, Affirming evidence). A verdict has been set aside (1889) 33 Ill. App. 259. The controlling by which it was found that an employer feature here was the essential danger of Vol. I. M. & S.—69.

ing the ends of a piece of cotton waste (v) Thread-forming machines.-In a with which he is wiping the top of a case where injury was received on the machine to hang down so that they are

specially, in answer to interrogatories. (w) Sewing machines .- A Quebec case that the appellee was a bright, intelliinstruction and caution as to the use of (x) Risks incurred in cleaning, etc., the machine and its hazards, though not though the servant was a boy (age not ence in connection with such machinery; stated). Sutton v. Stead (1887) 3 that he was hurt by the machine while Times L. R. 499. wiping its platform, in front of the re-A superintendent who orders a servant volving knives, with pieces of cotton eighteen years old who has been working waste; that it was not necessary for the

A boy twelve years old employed to

of age, who testifies that she was not motion. to clean the machine). A court cannot say, as a matter of law, that a boy twelve years old does not need instrucdrawn between cogwheels, where his only experience had been with cogwheels arranged in a manner much less likely to lead to an accident of that kind. Chopin v. Badger Paper Co. (1892) 83 Wis. 193, 53 N. W. 452 (a case where the plaintiff, after working for a year in oiling years of age as to the dangers of such a single row of cogwheels, was set to work as cleaning a drill in rapid motion. work upon a double row). The danger (y) Air suction produced by moving is not so plain and open to a boy of fourteen years wholly unacquainted with the warning from the master.

cylinders of a mangle revolving toward his contract duty to perform. 30 Atl. 1013.

minor sixteen years of age, was without proper

the work, not that it was outside the chinery, that this fact was known to scope of the plaintiff's employment, as in the defendant, and that the plaintiff the cases cited in chapter xxv., post.

A verdict is not improper which deto work in wiping that machinery, clares an employer to be liable for inwithout any warning as to the danjuries received by a girl thirteen years ger of doing this while it was in White v. San Antonio Waterinstructed as to the manner in which a works Co. (1895) 9 Tex. Civ. App. 465, wheel at the end of a spinning frame 29 S. W. 252. Whether a boy fourteen might be cleaned safely by giving a years old fully appreciated the risks inpeculiar motion to another part of the volved in oiling a machine with uncovmachinery, and thereby securing a parmachinery, and thereby securing a parered cogwheels after working round it
tial revolution of the wheel. Glover v. for six months is a question for the jury.

Dwight Mfg. Co. (1888) 148 Mass. 22, B. F. Avery & Son v. Meek (1898; Ky.)
18 N. E. 597 (plaintiff had been working 45 S. W. 355, holding that the general
four weeks, but the injury was received knowledge of the danger of the work
when she was trying for the first time which, as the court had declared on the previous appeal (1894) 96 Ky. 192, 28 S. W. 337, must be imputed to the servant, did not necessarily imply that he tion as to the danger of having his hand realized the actual danger to which he was exposed in doing the act from which the injury resulted.

In Fisk v. Central P. R. Co. (1887) 72 Cal. 38, 13 Pac. 144, the court said, arguendo, that it was the duty of a master to warn a child about twelve

incident to wiping the cogs of a gearing machinery.—It is for the jury to say whether instruction should have been given, where a boy of fourteen years who working or use of machinery, that he can had previously been engaged for two be held, as a matter of law, to have as- years in a spinning room in such general the risks attendant thereon, work as was suited to his capacity, and where he has received no caution or had thus obtained some knowledge of the Neilon v. machinery in the factory, was required Marinette & M. Paper Co. (1890) 75 to undertake the essentially novel service Wis. 579, 44 N. W. 772. Whether a of standing on an ordinary stepladder, Whether a of standing on an ordinary stepladder, boy (age not stated) ought, in the exerand holding a belt away from a revolv-cise of reasonable prudence, to have aning shaft, to prevent it from crawling ticipated an accident due to the starting while it was being mended, the position of a sand elevator by another while he thus occupied being one in which he was was engaged in cleaning out the boot, exposed to a considerable draught of air was held to be for the jury upon eviproduced by the rapid motion of a large dence that no such accident had ever drum and the belt which connected it happened before. Hess v. Adamant Mfg. with the gearing of a water wheel. Co. (1896) 66 Minn. 79, 68 N. W. 774. Hayes v. Colchester Mills (1894) 69 Vt. In a case where the injury was relation 1, 37 Atl. 269. "It is evident," said the ceived not in the ordinary operation of court, "that this is not a case in which the machine, but while the cylinder was it can be said, as matter of law, that being waxed, it was held that the danger the service the plaintiff was called upon of having her arm caught between two to render was or was not such as it was This new each other is not, as matter of law, ob- service had come within the line of his vious to a girl of thirteen years. Kil- employment if his advancing years and keary v. Thackery (1895) 165 Pa. 584, experience had prepared him to undertake it. It had not come within the A complaint is not demurrable which line of his employment if it was still . to treat the question

alleges in effect that the plaintiff, a beyond his capacity. It was therefore skill and experience in handling ma- of the defendant's negligence in requiring the service as depending simply upon

plaintiff's capacity.'

ordered to manipulate a wood-working to operate an elevator, had not been inmachine, he should be warned as to the structed as to the precautions to be obdanger created by the fact that the re- served in the event of the cage stopping volving knives produce a strong suction between the floors. O'Brien v. Sanford of the air, which tends to draw towards (1892) 22 Ont. Rep. 136. A boy of sixthem the hands of the operator. Bohn teen employed to run an elevator is not Mfg. Co. v. Erickson (1893) 5 C. C. A. chargeable, after four days' work, with 341, 12 U. S. App. 260, 55 Fed. 943.

fourteen employed to take bottles from away, where he is not of sufficient age a shelf and assort them was injured by and experience to comprehend the danger the breaking of one of the bottles. The of accidentally taking hold of the cable court held that there is no duty to in- instead of the check line. Thompson v. struct the servant, where the work and Johnston Bros. Co. (1893) 86 Wis. 576, place are not dangerous and the ma- 57 N. W. 298. See also § 291, note 14, terials are those in common use. Mel- ante. chert v. Smith Brewing Co. (1891) 140 Pa. 448, 21 Atl. 755.

been engaged for six months in operating a bottling machine, and during that which the elevator is set in motion, until time bottles have frequently burst in the cross beam of the elevator catches his presence, he assumes the risk of being struck by the flying fragments of the floor through which the elevator is deglass, owing to the fact that the gates

several years' experience in the work of Co. (1892) 155 Mass. 590, 30 N. E. 174. filling cider bottles under a high pres-80 N. W. 821.

"expert" hand was injured by the burst-moving waste from a gearing, may shut ing of a soda water bottle, owing to her to and throw him against the gearing, omission to put on the mask provided the evidence showing that the gate is for her protection, and swore she did not plainly liable to be set in motion if know of the danger to which she was touched by his person. Brady v. Ludlow

221.

The case should not be withdrawn from the jury, where the evidence is that Where a minor of fifteen who has the injured person, a child less than previously sweeping floors is twelve years of age who has been hired knowledge of the risk of any danger (z) Handling of glass bottles.—Re- arising from the proximity of the drum covery has been denied where a boy of and cable to the check line but 6 inches

A boy nineteen years old, of ordinary intelligence, must be presumed to under-Where a youth nineteen years old has stand the danger of keeping hold of the shipper rod outside an elevator well, by his hand between it and the edge of the scending, and cannot recover for an inintended to protect him have been rejury due to this cause, although he was moved. Dunn v. McNamee (1896) 59 not informed how near the cross beam N. J. L. 498, 37 Atl. 61. A boy nineteen years old who has had ing through it. Rood v. Lawrence Mfg.

(bb) Gates, etc., working on hinges .sure is presumed to appreciate the risk A servant eighteen years old who has of occasional explosions. Omaha Bot- worked for seven or eight weeks on a tling Co. v. Theiler (1899) 59 Neb. 257, machine protected by an iron gate is bound to understand, without instruc-But in an English case, where a girl tion, the danger that the gate, which he seventeen years old and described as an has swung back for the purpose of reknow of the danger to which she was exposed, a verdict in her favor was sustained. Crocker v. Banks (1888) 4 901. A minor fifteen years old who, Times L. R. 324. (aa) Elevators.—The owner of a injured while cleaning a hinged apron freight elevator is not negligent, so belonging to a cotton picker, which as to be liable for an injury to an sprang up under the action of the weight elevator boy over fifteen years of age, by which it was held in a certain position except when it was pulled and kept the elevator, and the levator, and the fact that down capacity recovery. the elevator," caused by the fact that down, cannot recover damages. Coullard while he was leaning against a beam v. Tecumseh Mills (1890) 151 Mass. 85, of the elevator, tying his shoe, the 23 N.E. 731. Holmes, J., said: "The elevator was suddenly started by a new plaintiff . . . knew that the iron employee whom the plaintiff had in apron which caught his fingers would structed as to the manner of starting spring back if pulled down and released. and stopping the elevator. Sullivan v. He knew its position relatively to the Lally (1896) 166 Mass. 265, 44 N. E. front opening, between the edge of which and the apron his fingers were caught.

plaintiff that he did not know before, if he possessed the ordinary intelligence of

(cc) Chisels.—A complaint is not de-Whitelaw v. Memphis & C. R. Co. (1886) the risk. 16 Lea, 391, 1 S. W. 37 (a fragment plaintiff was using to cut steel).

cutting iron, detached when the side-set was struck with a heavy hammer by a coservant, where it had become so battered from use that fragments were ob-Supp. 684, Affirmed in (1897) 21 Misc. viously liable to be broken off by a blow. 295, 47 N. Y. Supp. 185. Hefferen v. Northern P. R. Co. (1891)

45 Minn. 471, 48 N. W. 1.

appears that the work would have been Sims v. East & West R. Co. (1889) 84 much less dangerous if two men had Ga. 152, 10 S. E. 543. been employed to do it, and that the

(ee) Hooks.—A years old is presumed to understand the in unloading, assumed the patent risk of danger of having his hand injured by injuries from the falling of the ties striking against a hook near to one upon upon him in stopping the car, under the which he is hanging tongues. Ryan v. direction of the foreman at points at Armour (1897) 166 Ill. 568, 47 N. E. 60, which ties were needed, as was cus-Affirming (1896) 67 Ill. App. 102. The tomary, by thrusting a piece of scantling court considered that, as he had worked in front of the wheels. Houston & T. more than a day, he had had ample C. R. Co. v. Martin (1899) 21 Tex. Civ. opportunity to ascertain the conditions. App. 207, 51 S. W. 641.

(ff) Lanterns.—A brakeman eighteen

Knowing these facts, he knew that, if he years of age who has done his duties put his hand through the opening and let satisfactorily for three months cannot the flap spring up while it was there, it be heard to allege that he had not the would get pinched. He also knew by ex-skill and experience which would qualify perience the degree of force necessary to him for trimming and caring for a lanhold the apron down. We do not see tern, and knowing whether it would go what the defendant could have told the out or not. Pennsylvania Co. v. Congdon (1892) 134 Ind. 226, 33 N. E. 795.

(gg) Saddles and appurtenances .- A boys of fifteen." Verdict for plaintiff set boy (age not stated) assumes the risk from a defective stirrup strap of a saddle provided for his use, where, upon murrable which alleges in effect that the calling the attention of a representative plaintiff, a minor nineteen years old, of the employer thereto, the strap was after being engaged in a machine shop subjected to a test which was apparently for two years, was set to work at the satisfactory both to such representative repairing of an engine, that he was in and to the boy, who had been riding jured through using a cold chisel in a horses for two years, and was presumcase in which a skilled mechanic would ably experienced in matters pertaining not have used it, that he had no experi- to saddles and riding tackle. Davis v. ence which would have given him a Forbes (1898) 171 Mass. 548, 47 L. R. A. knowledge of the correct method of doing 170, 51 N. E. 20. Knowlton, J., dissentthe work, and that the defendant had ing, considered that it was for the jury never instructed him touching the same. to say whether the plaintiff understood

(hh) Cleaning of waste pipes .- A was broken off of the chisel which the minor of fifteen years who was neither a plumber nor a professional mechanic is A master is not liable to a servant, not, as matter of law, debarred from reseventeen years old, whose eye was put covering for an injury to his arm, which out by a fragment of a side-set used for was burnt by a solution of potash in a waste pipe which he was cleaning out by the orders of his master. Dunn v. Connell (1897) 20 Misc. 727, 46 N. Y.

(ii) Handling of heavy objects.—A nonsuit has been affirmed in a case where (dd) Claw-bars.—A section hand nine- a youth seventeen years old was injured teen years old who was injured by the while loading a flat car with lumber of slipping of a claw-bar which he was uniform length, after he had worked using to hold up a bridge tie while it seven days in the railroad yard and was being spiked to a rail cannot re-helped to pile one car. Such work, it cover, where the evidence is that he had was said, required no special skill or done similar work for three months, antecedent training from which an oblithough not on bridges, although it also gation to instruct him could be implied.

A member of a section gang, over claw-bar was worn. Houston & T. C. R. twenty years of age and familiar with Co. v. Scott (1901; Tex. Civ. App.) 62 the work, engaged in unloading cross S. W. 1077. workman nineteen standards were removed for convenience

There is no duty to warn a boy of

fifteen working on a farm, as to the coating of grease, should have been indanger that while helping to put new structed as to the temperature at which trucks under a wheat binder the machine it was safe to insert the spoons in the may tip over. Wagner v. Plano Mfg. Co. liquid. Latorre v. Central Ŝtamping Co. (1901) 110 Wis. 48, 85 N. W. 643.

There is no presumption that a lad 99. eighteen years old who has usually been employed as a cook in a lumber camp, held that a demurrer was properly susbut who, at the time of the accident, tained to a complaint which alleged subhad been engaged for five days in "skid-stantially that the plaintiff, a youth ding logs," appreciates the danger of nineteen years old, had been taken away undertaking to stop a rolling log by a from the duties which he was hired to "back cant." Wolski v. Knapp-Stout & perform, and temporarily put to work in

timber.-A nonsuit should not be sulting from the heat caused it to be granted in a case where the plaintiff, a absorbed into the plaintiff's system to boy fifteen years of age, without any his injury; that such steaming of the previous experience, fell into a vat of paper was not usual in the defendant's heated liquor, owing to the fact that establishment; that the defendant knew, the end of a wooden pole had become or ought to have known, the effect which soggy with use and slipped on the surface of a movable pipe which he was employed in the work; and that the depushing. Under such circumstances the fendant failed to give the plaintiff notice jury might properly find that he ought of the poisonous nature of said work, or to have been instructed as to the proper of the effect of said employment. The treatment of the pole in case the end grounds of this ruling were that it was should become soft. Heavey v. Hudson not alleged that the paper bore the ap-River Water Power & Paper Co. (1890) 57 Hun, 339, 10 N. Y. Supp. 585.

fails to warn an apprentice fifteen years the defendant had neglected to submit it old, of the danger arising from heaping to proper examination. So far as apfresh coal on the furnace without the peared, the plaintiff's means of deterprecaution of taking measures to pre-mining whether the paper was poisoned vent the gases thereby generated from were as good as the defendant's. If it escaping into the bellows, is liable for were not so, the complaint should have injuries to him from the bursting of the stated the facts which made the differbellows by such gas. Reisert v. Williams ence. O'Keefe v. National Folding Box

(1892) 51 Mo. App. 13.

is not demurrable which alleges that the employer, knowing that the clothing of carded the old doctrines of technical a young and inexperienced boy had become saturated with dangerous and in- sion under similar circumstances; but flammable oils and gases in the course of the decision, even when considered with his employment, ordered him to warm reference to those doctrines, seems to himself at a hot stove, not only without the present writer to be of very doubtful instructions as to the hazard arising correctness. The essential effect of the therefrom, but with an assurance that complaint, it is submitted, is that the his clothes were no more liable while in defendant knew, or ought to have known, that condition to take fire than if wet that he was directing the plaintiff to do with water, the result being that the work which involved a latent danger of boy's clothing ignited, and he was burned which he had neither actual nor conto death. (1895) 66 Fed. 260.

It is for the jury to say whether a cause of action is indisputable. boy fourteen years of age who was burnt to death, after working three days, by that the rollers used for finishing paper the ignition of a vat of turpentine into in a paper mill generate a strong cur-which it was his duty to insert heated rent of electricity as they revolve, and spoons for the purpose of removing a that this current tends to draw frag-

(1896) 9 App. Div. 145, 41 N. Y. Supp.

(mm) Poisonous vapors.—It has been Co. Co. (1895) 90 Wis. 178, 63 N. W. placing colored paper saturated with 87 (verdict for defendant set aside). poison into a box heated with steam; (jj) Action of moisture in softening that the vaporization of the poison rethe process would have upon the person pearance of being poisoned, or that it was of a kind in the manufacture of (kk) Furnaces.—A blacksmith who which poison is commonly used, or that & Paper Co. (1895) 66 Conn. 38, 33 (11) Inflammable fluids.—A complaint Atl. 587. It seems scarcely possible to suppose that any court which has displeading would reach a similar conclu-Wallace v. Standard Oil Co. structive notice. That allegations which fairly convey this meaning state a good

(nn) Action of electricity.-The fact

self accordingly. This conception has been further elaborated in the following passage of a judgment in which the supreme court of Massachusetts was discussing the right of a boy twelve years of age to recover for injuries caused by contact with an unguarded gearing:

"In determining the master's duty in such a case the inquiry is, What instruction does the servant appear to need? Is there reason to believe him ignorant of anything which, for his protection, he ought to know, or incapable of appreciating the risks from what he sees around him? In the absence of anything to show the contrary, the master has a right to assume that he knows those facts of common experience with which ordinary persons of his age and appearance are familiar. In hiring a boy twelve years of age and apparently of average intelligence, an employer is not called upon to tell him that,

rollers, and thus endangers the arms of a person who may be holding such fragments in the vicinity of the rollers, cannot be declared, as a matter of law, to be within the comprehension of a boy fifteen years old. Wyman v. Orr (1900) 47 App. Div. 136, 62 N. Y. Supp. 195 (plaintiff was suddenly jerked round by the action of the current as he was backing out with an armful of paper).

(oo) Operation of mines.—A boy of nineteen who has usually been engaged in other work, and is assigned to the essentially hazardous duty of moving cars along a descending tramway from a coal mine to a place where the cars are emptied by machinery, should be warned of the cars becoming uncon-trollable from the steepness of the grades. Alabama C. Coal & Coke Co. v. Pitts (1892) 98 Ala. 285, 13 So. 135 (complaint alleging that servant had been struck by a tipple pole released prematurely by the shock of the car was

prematurely by the shock of the car was held to show good cause of action).

In Jones v. Florence Min. Co. (1886)
66 Wis. 268, 57 Am. Rep. 269, 28 N. W. 207, the evidence showed that the plaintiff was less than fifteen years old when he entered into the employment of the defendant, and that up to the date of his injury he had been engaged above ground at work which was apparently not hazardous. There was no evidence that he ever before worked under ground that he ever before worked under ground in a mine, or that he was at all familiar with the dangers of such employment. That the work under ground was not rightly been directed. considered proper work for a boy of his 'Kelly v. Barber Asphalt Co. (1892) age to perform was a fair inference from 93 Ky. 363, 20 S. W. 271.

ments of paper strongly towards the the fact that the defendant's captain and pit boss both testified that they had forbidden him to go down into the mine for any purpose. The other evidence showed that the mine was a dangerous place to work in, from the fact that blasting was constantly going on in it, and that the consequence of such blasting was to loosen the ore and rock in the roof and sides of the mine so that there was danger from the falling of such ore and rock. The court said that, upon the evidence, the question should have been submitted to the jury, whether the plaintiff was of sufficient age and experience, or had sufficient information from the captain or pit boss, or from any other source, to comprehend the dangers incident to work in the mine.

(pp) Work on ships .- In Williams v. Churchill (1884) 137 Mass. 243, 50 Am. Rep. 304, it was urged that the plaintiff was under age and inexperienced, and that the behavior of a loose end of a taut rope was a hidden danger. But as the plaintiff was over nineteen years old, had lived on the seashore all his life, had been to sea three summers, and had been on this boat four months, the time which it took his brother to become familiar with the duties on board and to get promoted, the court held that, taking these facts in connection with the nature of the employment which he had accepted, the master had a right to assume that the plaintiff knew how to handle a line, and to order him to do so without special warning or instructions, and that a verdict for the defendant had

if he holds his hand in fire, it will be burned, or strikes it with a sharp instrument, it will be cut, or thrusts it between the teeth of revolving cog-wheels in the gearing of a mill, it will be crushed. From infancy and through childhood, as well as in later life, we are all making observations and experiments with material substances, and every person of ordinary faculties acquires knowledge at an early age of those familiar facts which force themselves on our attention through our senses."2 Manifestly, however, the criterion thus suggested is too indefinite to be of much real service to settling the ultimate question which is involved, viz., the extent of the respective province of courts and juries in drawing inferences from the testimony. That there is room for a very wide difference of opinion as to the theoretical acquaintance which minors shall be assumed to possess with the properties of matter and the results of the operation of physical laws is abundantly demonstrated by the cases cited in the note to the preceding section. In regard to many groups of facts, conclusions have been arrived at which are either flatly contradictory, or are only susceptible of being reconciled by ascribing to certain minute differentiating factors a significance which seems to be entirely disproportionate to their actual importance.

## D. SERVANT'S MEANS OR OPPORTUNITIES OF KNOWLEDGE.

401. Generally.— The reports contain a large number of cases exemplifying the operation of a principle which may be formulated thus: A servant will be affirmed or denied to be chargeable with knowledge of a given risk, according as it is considered that a reasonably observant person possessing his natural and acquired capacity for observation would or would not have ascertained the existence of that risk, if he had made a proper use of the means or opportunities of knowledge which were available before the injury in suit was received by him. The scope and effect of this principle will be discussed in the ensuing sections.

If there is any evidence going to show that the servant had an op-

<sup>2</sup> Ciriack v. Merchants' Woolen Co. (1890) 151 Mass. 152, 6 L. R. A. 733, 23 ance could not fail to notice it. Porter N. E. 829. See § 399, note l, subd. (k), supra.

<sup>1</sup> Knowledge may be inferred from "opportunities of obtaining that knowledge in the exercise of ordinary care." Muldowney v. Illinois C. R. Co. (1874) arise from the conduct of the business, and those risks which the exercise of his mouldowney v. Illinois C. R. Co. (1874) arise from the conduct of the business, and those risks which the exercise of his opportunities of inspection while giving diligent attention to such service would have disclosed to him." Baltimore & O. W. 364. Opportunity of knowledge of S. W. R. Co. v. Welsh (1897) 17 Ind. a defect is legally equivalent to knowledge, wherever an ordinarily observant.

portunity of ascertaining the existence of the risk in question, the employer is entitled to have the jury instructed to the effect that a servant having an opportunity to know of a risk is presumed to know of it.2

The risks to which the doctrines discussed in the following sections are peculiarly, if not exclusively, applicable, are those belonging to the classes designated by the term "obvious," or one of the other epithets which are used to express the idea that their existence and character were ascertainable, without any special examination, by any ordinarily intelligent person who made a proper use of his sight and other senses.3

It is manifest that, in many instances, facts which tend to show that a servant had means or opportunities of ascertaining the existence of certain general conditions may, by changing the logical standpoint, be viewed as evidence which indicates that he had, in the course

probability that any servant will know self thereof, he cannot derive any advanhim, and who may fairly be expected to knowledge he might have acquired by do their duty. Batterson v. Chicago & the reasonable exercise of his faculties."

G. T. R. Co. (1884) 53 Mich. 125, 18 N. St. Louis, Ft. S. & W. R. Co. v. Irwin W. 584. "The courts decline to hold the (1887) 37 Kan. 701, 16 Pac. 146.

condition of the bridge and its danger notice only of such "obvious" defects as while passing thereunder, if there was he had an opportunity of observing in any, but ignored such knowledge or opportunity, and neglected to avail himder duties.

what is generally to be seen by his own tage from such ignorance or want of observation, or by information from knowledge, but his rights are to be dethose who are on the spot working with termined the same as if he possessed the

W. 584. "The courts decline to hold the master liable when the defects in the machinery are perfectly obvious to anyone, and the servant has had the time and opportunity to consider and appreciate the extent of the risk." Moore v. St. Louis Wire Mill Co. (1893) 55 Mo. App. 491. It is the duty of a servant to improve every opportunity furnished by his employer to learn about his duties and their accompanying dangers. Hathaway v. Michigan C. R. Co. (1883) 51 Mich. 253, 47 Am. Rep. 569, 16 N. W. 634.

"St. Louis & S. F. R. Co. v. Marker (1883) 41 Ark. 542 (railway laborer had his leg caught in a cattle guard, while sitting on the side of a car).

In a case where a railway servant was in the master liable when the defects in the master liable when the defects in the "The positive aspect of this proposition is exemplified by such passages as the following: "The duty to observe and make himself acquainted with deceased. The opportunity to observe and acquire a knowledge of these danyers had been enjoyed by him for many discharged the duty towards himself acquired of him." Boyd v. Harris (1896) 176 Pa. 484, 35 Atl. 222.

The negative significance of the proposition is indicated by the ruling that it

In a case where a railway servant was sition is indicated by the ruling that it injured by a low overhead bridge, it was is not error, in a case where a switchheld that the defendant had no cause to man was injured by the want of ballast complain of the following instructions: between the ends of ties, to refuse a requested instruction that a servant is or the bridge and of the position had an opportunity to inform himself of the condition of the bridge and of the position had an opportunity to observe. Little of the braces and their proximity to the Rock & M. R. Co. v. Moseley (1893) 6 top of the caboose, he could not recover; C. C. A. 225, 12 U. S. App. 514, 56 Fed. and (2) that "if he had a fair opportunity for acquiring a knowledge of the fact that the servant is affected with condition of the bridge and its degree." of his employment, acquired that combination of special knowledge and aptitudes, mental and physical, which the law assumes to be the result of experience in any given line of work. See subtitle B, supra. Sometimes it is not very easy to ascertain, from the wording of the opinions, which of these alternative conceptions it was intended to rely upon as the rationale of the decision. Indeed, it seems safe to say that the possibility of considering evidence of this sort under two aspects has not been fully apprehended, or at all events, not remembered in particular cases, by some of the courts. Owing to the uncertainty engendered by obscurity of language, and by the failure of judges to appreciate or to bear in mind the double significance of such evidence, it is often a matter of difficulty to determine the category to which a given decision belongs. This difficulty the writer has endeavored to surmount to the best of his ability, though, he fears, not with entire success.

402. No opportunities of obtaining knowledge before the time of the accident.—In any case which involves the question whether the servant had an opportunity of ascertaining the existence of dangerous conditions, it is necessary to determine, in the first place, whether he had ever, at any time prior to the conjuncture when the accident occurred, been in such a situation with respect to those conditions that, supposing the circumstances to have been favorable, he might possibly have discovered the peril to which he was subjected by their existence. If the evidence is fairly susceptible of the construction that he had never been in such a situation, the master's responsibility is established in so far as it depends upon this element, and the plaintiff is entitled to recover unless it shall be demonstrated that he ought to have taken notice of the danger at, or just before, the moment when he was injured.1

track cannot be declared, as a matter of law, to have known of the existence of this particular track before. Gulf, C. & from a defective engine pipe. Flynn v. S. F. R. Co. v. Warner (1899) 22 Tex. Wabash, St. L. & P. R. Co. (1885) 18 Civ. App. 167, 54 S. W. 1064. Ill. App. 235.

A brakeman upon entering the employ of a railway company is not chargeable tracks.—A brakeman is not, as a matwith notice of the risk of a hole 5 inches ter of law, chargeable with notice of the

¹ (a) Railway tracks.—A switchman knowledge of the plaintiff, a brakeman, who steps into a hole in an unsurfaced depended upon a variety of hypothetical depended upon a variety of hypothetical circumstances which it was necessary to establish by specific evidence, it was held the hole, or of its depth, if he had in one case that he was not, as a matter worked theretofore in another part of of law, bound to take notice of the danthe switch yard, which was surfaced, ger created by a sheet of ice formed by and testified he had never walked along water which had dripped on the track

Obstructions above railway deep between the ties. San Antonio & risk of coming in contact with an over-A. P. R. Co. v. Parr (1894); Tex. Civ. head bridge which is so low as not to App.) 26 S. W. 861.

admit of the passage of a person stand-On the ground that the constructive ing upright on the top of a car, and

402a. Sufficiency or insufficiency of opportunities actually obtained before the accident.— Supposing the evidence to be of such a nature that a jury would not be justified in finding that the servant had no opportunity whatever to discover the dangerous conditions, the next stage in the investigation is to determine whether the opportunities which it is apparent that he had were sufficient to render a person of his natural and acquired capacity for observation chargeable with a

other signals, where he is on his first trip. Fitzgerald v. New York C. & H. R. R. Co. (1899) 37 App. Div. 127, 55 N. Y. Supp. 1124.

The fact that other railway companies have maintained some of their overhead bridges so low as to be dangerous is not sufficient to charge a brakeman with notice that there is such a bridge on his own line. Louisville, N. A. & C. R. Co. v. Wright (1888) 115 Ind. 378, 16 N. E.

Obstructions beside railway

A brakeman who was not familiar with the surroundings, and had had no opportunity to make himself familiar opportunity to make himself familiar operation of.—In Wedgwood v. Chicago with them, was held not to be charged by W. W. R. Co. (1878) 44 Wis. 44, the able with notice of the risk of being absence of evidence that the plaintiff ant's yards. A distinction was taken as a ground for inferring want of op-between such a structure and similar portunity to learn its defects. structures near side tracks. For the lat-

that he had ever switched a car on the from which the injury resulted, it will not be held, as a matter of law, that a switchman was chargeable with notice of the fact that a building occupied by a customer was close to a siding constructed solely for the purpose of reaching it. Sweet v. Michigan C. R. Co. (1891) 87 Mich. 559, 49 N. W. 882.

which is not guarded by telltales or tice of the danger caused by a structure near the track, where there is nothing to show that his duties had, at any time prior to his being struck by it, brought him into a position to have observed the position of the structure with relation to the track. Illinois & St. L. R. Co. v. Whalen (1886) 19 Ill. App. 116.

Evidence as to the construction of chutes on defendant's road on which the injured servant was employed as a brakeman prior to the accident is competent as showing his knowledge of the dangerous proximity of the chutes to tracks.—A brakeman making his first the track. But evidence as to the contrip over the road is not bound, as mat- struction of stock chutes on other trip over the road is not bound, as matter of law, to know the danger caused railways on which he had worked by structures near the track, which is incompetent, where it is not shown are few and exceptional. Scanlon v. that he had worked on that part of the Boston & A. R. Co. (1888) 147 Mass. railways where such stock chutes were 484, 18 N. E. 209 (see further, as to erected. Keist v. Chicago G. W. R. Co. this case, § 404, infra).

A byckenen who was not familiar also \$ 404, note 5 infra.

struck by a fish chute adjoining a part had ever before been in charge of the of the main track outside the defend- car which injured him was emphasized

portunity to learn its defects.

It is for the jury to determine whether ter kind, trainmen are bound to look a railroad switchman knew, or was out, as they are usually necessary in guilty of negligence in not knowing, that the conduct of the business of a rail- telephone poles upon coal cars projected way company. Phelps v. Chicago & W. beyond the deck of the car, and to what M. R. Co. (1899) 122 Mich. 171, 81 N. extent, where the cars arrived in the W. 101, 84 N. W. 66. yard after dark and shortly before he In the absence of evidence showing was injured, and he was in proximity to them when the foreman uncoupled track in question, or had some other them, and during that time he was en-reason for apprehending the special risk gaged in blocking the wheels of the adjoining car. George v. Clark (1898) 29 C. C. A. 374, 56 U. S. App. 505, 85 Fed. 608. See also Condon v. Missouri P. R. Co. (1883) 78 Mo. 574 (§ 405, note

1, infra).

The danger of coupling to a box car a passenger locomotive with a "goose neck" attachment is not one which a A jury is justified in finding that a brakeman who has, according to his own brakeman was not chargeable with no- testimony, seen no locomotives during knowledge of those conditions. The most important of the evidential elements which determine the answer to this question are these:

(a) The natural capacity of the servant for taking advantage of the chances for observation which presented themselves. This element is often emphasized in cases where the injured servant was a minor.

(e) Unguarded openings.—Where the N. Y. Supp. 256. testimony of the plaintiff in an action to recover for an injury resulting from loose wheel from a bucket used in unhis stepping into an unguarded opening loading a ship is not chargeable with in the floor of defendant's sawmill showed that he had worked in the mill had no opportunity to examine the aponly an hour before the injury, and then pliance. Morton v. Zwiereykowski not in the vicinity of the opening; that (1900) 91 Ill. App. 462, Affirmed in 192 he had never worked in such a mill before, and was given no instruction,-it is error to instruct the jury, in effect, that, if the hole was in plain sight, plaintiff was bound to see it. Nyback v. Champagne Lumber Co. (1901) 48 C. C. A. 632, 109 Fed. 732.

(f) Machinery.—A court cannot say, as a matter of law, that a servant was negligent in not observing the peculiar perils incident to handling in the dark a new machine which he had never before seen. Walsh v. Peet Valve Co.

(1872) 110 Mass. 23.

The case is for the jury where an employee in a manufactory, having had occasion to go through a passageway between two machines, struck his leg against an iron rod projecting from one of the machines, the evidence being that to tip it, the evidence being that this he had never used the passage before, but had seen it used by operatives and overseers; that the light in the passageway was insufficient, and the similarity or the lever. Flaherty v. Norwood Enin color between the machines and floor and rod tended to render the obstruction invisible; and that the plaintiff had looked for obstructions, but saw none. Edwards v. Tilton Mills (1901) 70 N. H. 574, 50 Atl. 102.

A foundry hand who is suddenly called upon to assist in raising a heavy weight by means of a crane which is defective in having no "dog" for holding the weight when raised to the desired height, its place being supplied by in- 150 III. 449, 37 N. E. 912, Affirming serting an iron spike in the cogwheels, (1893) 47 Ill. App. 444. is not necessarily negligent because he catches his finger in the wheel while thus engaged in the morning of the day when using the spike, if it appears that, al- he was injured by the collapse of a bank though he had been working several of earth which he was excavating may

his five or six months of service on years in the foundry, he was employed freight trains, except those with the or- in another shop where the cranes were dinary drawhead attachment, must be operated differently, and that he had presumed, as a matter of law, to appreciate. Galveston, H. & S. A. R. Co. v. ated before. Dzinbienski v. J. L. Mott Garrett (1889) 73 Tex. 262, 13 S. W. 62. Iron Works (1900) 56 App. Div. 58, 67

> A servant injured by the fall of a knowledge of the defect, where he had

Ill. 328, 61 N. E. 413.

(g) Vehicles.—A servant who, at the master's direction, loaded a wagon with lumber, and was injured by the breaking down of a wheel, is not, as a matter of law, chargeable with a knowledge of the risk, when he had never used the wagon. Boelter v. Ross Lumber Co. (1899) 103 Wis. 324, 79 N. W. 243 (the defendant ineffectually urged that the case was one for the application of the principle that the defects of all simple appliances are presumed to be known to the servant).

(h) Ladles.—The servant's knowledge of the risk is for the jury where he was injured by the overturning of a ladle of molten metal, due to the use of a common round stick for a lever with which particular ladle had never before been seen by the plaintiff, and that he did not know there was anything wrong with it gineering Co. (1898) 172 Mass. 134, 51 N. E. 463.

(i) Mines.-It cannot be said, as a matter of law, that an employee in a mine, visiting a low, narrow passage for the first time, and carrying no other light than a miner's lamp, ought to have observed that the grade of the drift was sufficient to cause a loaded car to run by its own momentum on an iron track. Consolidated Coal Co. v. Bruce (1894)

(j) Banks of earth, etc.—An employee

See § 399, note 1, supra. But in respect to adults also it is recognized that, in view of the fact that some men have greater powers of observation than others, and a stronger desire to investigate and understand, knowledge cannot be imputed to a servant, as a matter of law, on the ground that some persons having the same opportunities of observation as he had would have ascertained the existence of the dangerous conditions.1

- (b) The acquired capacity of the servant for taking advantage of the chances for observation which presented themselves. It is obvious that, in many instances, a court will be justified in declaring, as a matter of law, that an experienced servant having the chances of observation disclosed by the evidence ought to have discovered the danger, although that conclusion would not be a necessary one if he had been inexperienced in the employment. Cases illustrating situations analogous to each of those discussed in §§ 394-396, supra, will be found in various subdivisions of note 1 to the following section.
- (c) The length of the period during which the chances for observation presented themselves. See next paragraph.
- (d) The number of occasions on which those chances presented themselves. This and the element last mentioned must always, it is obvious, be considered together, since the material question to be ultimately decided is really whether the servant had been so often in a position where he might have observed the danger that his failure to observe it must be pronounced culpable in point of law. Usually, of course, the number of actual chances for observation will be found to have been greater when the period available for observation was a long one than when it was a short one. But manifestly there is no necessary or invariable relation between these two circumstances.2

properly be found to have been excus- ligence in a case where the injury was iron wedges had been driven the night and it was shown that there had been no before into the top, and that afterwards there had been a heavy fall of rain. Thomas v. Ross (1896) 21 C. C. A. 444, ing since then in that part of the yard. 41 U. S. App. 574, 75 Fed. 552. A laborer who had been engaged in excavating a bank for about five hours before it fell on him was not chargeable with knowledge of a dangerous crack in it which was not visible from the place where he was at work. Elledge v. National City & O. R. Co. (1893) 100 Cal. 282, 34 Pac. (2) R. Co. (1893) 100 Cal. 282, 34 Pac. (3) Formation of ice.—A brakeman's general knowledge of the physical conditions in the vicinity of a tank is not the employment of the defendant, he was conclusive upon the question of his negressially chargeable with knowledge

ably ignorant of the dangerous condition due to his slipping on a sheet of ice in which it was, owing to the fact that formed by water leaking from the tank, iron wedges had been driven the night and it was shown that there had been no

that can be safely affirmed in this connection is that, if the chances occur every day in the regular course of the servant's employment, and this is the most common predicament to be reviewed—his ignorance of the danger becomes less and less excusable as the period available for observation is prolonged. The decisions in which the effect of this element is discussed are far more numerous than any other class of cases which turn upon the servant's opportunities of knowledge, and, as will be amply apparent from an examination of the following section, are, if not absolutely irreconcilable, only reconcilable by the aid of wire-drawn distinctions.

(e) The character of the servant's duties, whether favorable or unfavorable for the purposes of observation. With respect to this element, it would appear that a large number of the cases which have been decided in the servant's favor proceed upon a principle which may be enunciated thus: If it was not a recognized fact of the functions of the servant to look out for dangerous conditions of the same kind as those which caused the injury (see §§ 414 et seq., infra), and his chances of observation were merely such as were casually afforded by occasional proximity to the defective instrumentality, it is for the jury to determine whether he ought to have discovered the conditions. But a comparison of the rulings upon virtually identical groups of concrete facts shows very clearly that some of the courts, even if they accept this principle as theoretically correct,—which cannot be affirmed with certainty,—construe it in such a sense that it is of very little advantage to the servant.3

Considered under another aspect, this element is also suggestive of the principle that knowledge ought not to be imputed, as a matter of law, when it is a reasonable inference from the testimony that the servant could not, without unduly neglecting or delaying the performance of his work, utilize the opportunities of observation which were afforded by his local relations to the dangerous conditions.4 But it

of the existence of the obstructions on decisions cited in § 403, note 1, subd. the track by which he was injured while (a)-(e), infra. coupling cars at a certain station. But being of opinion that there was no averthat, when injured, the plaintiff was would have disclosed to him." coupling cars at that station for the first ville & R. R. Co. v. Henderson (1893) time, and then first became aware that 134 Ind. 636, 33 N. E. 1021. the obstructions complained of were on or near the track. Whether he ought to making it appear that the defect was "of have known of the obstructions was a such a nature as not to be discoverable question to be determined by the evi- in the reasonable and ordinary exercise

\*The risks assumed by the servant are this contention did not prevail, the court "those risks which the exercise of his opportunities for inspection, while givment inconsistent with the hypothesis ing diligent attention to such service,

The servant cannot recover without of diligence in the course of his duty." \* Contrast especially the antagonistic Central R. & Bkg. Co. v. Kenney (1877)

is apparent from an examination of the cases that this principle also has been very differently construed by various judges. deed it seems to be, for practical purposes, wholly ignored.<sup>5</sup>

In any case where the defect was a concealed one, it is obvious that a servant who has had nothing to do with the operations which created that defect cannot be charged with knowledge of its existence simply because he was required to work near that part of the plant which was

tention to other matters. A man whose attention is constantly directed to mov-Ill. 169, 23 N. E. 1021.

"Unless the defects are such as to be obvious to anyone giving attention to the duties of the occasion, the employee has a right to assume that the employer has performed his duty in respect to the implements and machinery furnished."
Louisville, N. A. & C. R. Co. v. Buck (1889) 116 Ind. 566, 2 L. R. A. 520, 19 N. E. 453. See also Carpenter v. Mexican Nat. R. Co. (1889) 39 Fed. 315, where similar language is used.

Among the factors rendering the servmentioned the "exigencies of the situa-tion" (Wedgwood v. Chicago & N. W. R. Co. [1878] 44 Wis. 44); and the engrossing nature of his duties (Cincin-[1887] 112 Ind. 166, 13 N. E. 659; Mason & O. R. Co. v. Yockey [1900] 43 C. C. A. 228, 103 Fed. 265).

In Dorsey v. Phillips & C. Constr. Co. (1877) 42 Wis. 583, where one promises was struck by a cattle chute near the around thus: "The safety of railroad trains depends largely upon the exclusive attention of those optrains themselves. It is not for the interest of railroad companies or of the public-with like, if not equal, concern in the safety of trains—that persons so employed should be charged with any Ill. 206, 4 N. E. 381. duty or necessity to divert their attention. And it appears to us very doubt- infra.

58 Ga. 490; Baker v. Western & A. R.

Co. (1882) 68 Ga. 706.

"The servant is especially entitled to assume that his master had furnished him with suitable and safe materials, machinery, and surroundings, and relieved him of investigation and inquiry in that regard, where the performance of his duties requires constancy of attention to other matters. A man whose well be doubted whether it would be reacted to the discount of the dangerous of his duties requires constancy of attention to other matters. A man whose well be doubted whether it would be reacted to the same of the dangerous of the doubted whether it would be reacted to the track. well be doubted whether it would be reasonable to expect them, while engaged in solution is constantly directed to most solution to expect their, while engaged in sibly give much attention to the ties, their minds an accurate profile of the switch-bars, etc., over which he may, route of their employment, and of colfrom time to time, have to pass." Chilateral places and things, so as to be always chargeable, as well by night as by day, with notice of the precise relation of the train to adjacent objects. In the case of objects so near the track as to be possibly dangerous, such a course might well divert their attention, from their duty on the train, to their own safety in performing it. Notwithstand-ing some things said in some cases cited for the appellant, we should be rather inclined to think that, in the absence of express notice of immediate danger, employees operating trains may perform their duties under an implied warrant ant's ignorance excusable have been that they may do so without exposing mentioned the "exigencies of the situathemselves to extraordinary danger; tion" (Wedgwood v. Chicago & N. W. that is, danger not necessarily incident to the course of their employment."

Compare also Valley R. Co. v. Keegan (1898) 31 C. C. A. 255, 58 U. S. App. 377, 87 Fed. 849 (§ 403, note 1, subd. (a), infra; Bryce v. Chicago, M. & St. P. R. Co. (1897) 103 Iowa, 665, 72 N. W. 780 (same note, subd. (d)).

In a case where a brakeman was injured by striking against the upper timbers of a covered bridge, it was held proper to instruct the jury that such an employee is not required to know absoerating them, to the track and to the lutely all the defects of construction and all obstructions along the railroad, and to neglect his duties to be on a constant lookout for defects along the road. Chicago & A. R. Co. v. Johnson (1886) 116

<sup>5</sup> See § 403, note 1, subd. (a)-(e),

defective. The cases involving the opposite situation are reviewed in § 405, infra.

(f) The physical environment of the servant at the time or times when the chances for observation presented themselves. One important circumstance to be considered under this head is the quality of the light which was available at the times when the servant was in a position where, so far as the conditions of space and distance were concerned, he might have observed the danger.7

Another element of a more special character than those so far mentioned is presented by those cases in which recovery has been allowed 8 or refused 9 on the ground that certain fellow servants of the injured person, who had had the same opportunities for observation as he had, had failed to notice, or had noticed, the dangerous conditions.

403. Same subject continued. Illustrative decisions.—In the note below are collected a large number of decisions illustrating the evidential significance of the elements which have been discussed under their general aspects in the preceding section. For the purpose of facilitating comparison, they are arranged under subdivisions designated by headings similar to those employed in all the longer notes in the present chapter. Other pertinent cases will be found cited in §§ 405, 406, infra.1

Mass. 320, 54 N. E. 854 (§ 403, note 1, sented themselves in the daytime is men-

subd. (aa), infra).

In several cases cited in § 403, note to be adverse to the servant. 1, infra, the courts seem to have pro-I, infra, the courts seem to have proceeded on the theory that a servant Mach. Co. (1897) 68 Minn. 305, 71 N. could not be charged with knowledge, as W. 276 (§ 403, note 1, subd. (r), infra). a matter of law, when the opportunities for observation occurred in the night-time. Oolf v. Chicago, St. P. M. & O. R.

Co. (1894) 87 Wis. 273, 58 N. W. 108 (subd. d); Illinois C. R. Co. v. Welch (subd. d); Illinois C. R. Co. v. Welch fact that the fastening of the rails on (1869) 52 Ill. 183 (subd. d); Fredenburg v. Northern C. R. Co. (1889) 114 pletely finished was held to have been as N. Y. 582, 21 N. E. 1049 (subd. a); sumed by a servant who, for some time Teass & P. R. Co. v. Crow (1893) 3 Tex. before the accident, had been traveling Civ. App. 266, 22 S. W. 928 (subd. c). Compare also Hunt v. Kane (1900) 40 (1859) 22 Ill. 633. A railroad company C. C. A. 372, 100 Fed. 256 (subd. a). is not liable for injuries to a brakeman But a strong decision to the contrary is by being thrown from the top of a car Ryun v. New York, N. H. & H. R. Co. on which he was standing, near his a matter of law, when the opportunities Ryan v. New York, N. H. & H. R. Co. on which he was standing, near his (1897) 169 Mass. 267, 47 N. E. 877 brake, trimming his lamp, by the jerkant was allowed to recover on the by the unevenness of a new and unfinground that the light in a mine was ished side track over which he had dim, see Severance v. New England Tale passed several times, and the condition Co. (1900) 72 Vt. 181, 47 Atl. 833 of which was open and obvious. O'Neal (subd. ee).

note referred to, the circumstance that

See McMahon v. McHale (1899) 174 the opportunities for observation pretioned among those which were deemed

\*Anderson v. Winston (1887) 31 Fed. 528 (§ 403, note 1, subd. (dd), infra).

(subd. d). For a case in which the serv- ing and lurching motion given the car subd. ee).

v. Chicago & I. Coal R. Co. (1892) 132
In several of the cases cited in the Ind. 110, 31 N. E. 669.

A brakeman who has been for a con-

403a. Sufficiency or insufficiency of the opportunities of knowledge at the time of the accident.—Where the question to be decided is

employ, and during that time passing a certain yard, is chargeable with knowledge of any holes that can be seen by a casual observer. Ragon v. Toledo, A. A. & N. M. R. Co. (1893) 97 Mich. 265, 56 N. W. 612.

for two months at a station where there is a side track laid across a large depression, on ties which are blocked up and not ballasted, is chargeable with a knowledge of the patent danger that his foot may be caught between the ties Chicago & G. T. R. Co. (1884) 53 Mich. 125, 18 N. W. 584. A switchman and car coupler who has been employed in a yard for several months, and has ily seeing is presumed to take notice. passed an open ditch under the track Bean v. Western North Carolina R. Co. every day, is presumed to appreciate the danger created by it. DeForest v. Jew-ett (1881) 23 Hun, 490, Affirmed in (1882) 88 N. Y. 264. There can be no recovery for an injury from a passing forc, and has no knowledge or notice of train, to a switchman whose foot was caught in a hole in the planking between the railroad tracks, which he could have seen every day for six weeks. Gleason v. New York & N. E. R. Co. (1893) 159 Mass. 68, 34 N. E. 79. Notice that the space between the ties of a side track is not filled, and that it is laid with old iron rails, is imputed to a brakeman who has been a baggageman and brakeman for six years, and a brakeman on a particular road for three months, and has worked recently as brakeman on a gravel train ballasting the track in the vicinity of a place where he is injured, and during such employment has often been on and about the side track. Atchison, T. & S. F. R. Co. v. Alsdurf (1892) 47 III. App. 200.

without steam or power to move itself, planking at each of the forty crossings into the roundhouse for repairs, as on his run where he is required to switch sumes the risk of being caught between cars, and that he assumes the risk of insuch engine and another engine stand-jury from defects in such planking, ing upon one of the divergent tracks, Fluhrer v. Lake Shore & M. S. R. Co. where the position of each is seen by (1899) 121 Mich. 212, 80 N. W. 23. him, and he takes his position of his

siderable time in a railway company's own choice, with full knowledge of the fact that the engine as it moves forward will come closer to the standing one. Anglin v. Texas & P. R. Co. (1894) 9 C. C. A. 130, 23 U. S. App. 62, 60 Fed. 553.

A section foreman has been held en-A railway servant who has worked titled to recover for injuries caused by the derailment of a work train on a part of the track which was not under his charge. Taylor, B. & H. R. Co. v. Taylor (1890) 79 Tex. 104, 14 S. W. 918.

The falling of a mass of rock upon a railroad track is not an ordinary hazard while he is coupling cars. Batterson v. of which a brakeman employed on a freight train which passed rapidly by the dangerous point while he was in a position which prevented him from read-(1890) 107 N. C. 731, 12 S. E. 600.

its dangerous condition, does not assume the risk of the lack of necessary appliances to prevent the escape of heavily loaded cars from a coal track with a steep grade onto the main track, but has the right to act upon the assumption that the coal track is reasonably safe and suitable for the use to which it is put, and that the cars stored thereon are properly secured. Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. (1898) 32 C. C. A. 44, 59 U. S. App. 283, 87 Fed. 133.

A watchman employed by a railway company to guard its property, who, when attempting to board a slowly moving train, stumbled over a pile of sand which had been lying beside the track four or five days, and fell under the Knowledge of the want of fencing on wheels, cannot be said, as a matter of a certain division of a railway is im- law, to be chargeable with notice that puted, as matter of law, to an engineer the sand had been left there. Chicago, who has been running over it two and a R. I. & P. R. Co. v. Kinnare (1901) 190 half years before an accident. Sweeney Ill. 9, 60 N. E. 57, Affirming (1900) 91 v. Central P. R. Co. (1880) 57 Cal. 15. Ill. App. 508. It cannot be said, as a A watchman at a railroad roundhouse matter of law, that a brakeman is rerequired to assist in moving an engine quired to know the condition of the

Ignorance by a yardhand upon a rail-

whether the opportunities for observing the danger at or immediately before the moment when the accident occurred were such as to charge

road, of the dangerous character of the road where it crosses a public highway, will not be held inexcusable as matter ballasted ties and an uncovered cattle of law, where the yard was a mile long, he rode as often as he walked, and when on the ground his duty required active work and great attention. Valley R. Co. v. Keegan (1898) 31 C. C. A. 255, 58 U. S. App. 377, 87 Fed. 849. A brakeman is not, as matter of law, chargeable with a knowledge of the existence of a steep grade at a particular point on the track, and of the risk incident to making a coupling upon it. Leonard v. Minne-apolis, St. P. & Ste. M. R. Co. (1896) 63 Minn. 489, 65 N. W. 1084.

A yard switchman is not, as matter of law, negligent in failing to notice a small incline a few feet in width, forming the connection between an outside track of the railroad and the sidewalk, although he has been passing and repassing it for several days. Rouse v. Ledbetter (1896) 56 Kan. 348, 43 Pac. 249. The risk incident to walking on an incline on which a car track is laid, at one particular point in which there is no opportunity

44 S. W. 35. Vol. I. M. & S.—70.

A brakeman will not be held, as matter of law, to know that there are unguard in one of the yards in which he is required to do switching, because he has acted in such capacity for three weeks, passing through such yard twice a day on a round trip of 100 miles. Illinois C. R. Co. v. Sanders (1897) 166 Ill. 270, 46 N. E. 799, Affirming (1896) 66 Ill. App. 439.

A brakeman is not chargeable, as matter of law, with a knowledge of the dangers created by uncovered signal wires in a yard in which he had done switching work only twice before the day on which he was injured. Indiana, I. & I. R. Co. v. Bundy (1899) 152 Ind.

590, 53 N. E. 175.

(b) Frogs, switches, and guard rails. The risk resulting from the want of blocking between switch rails is assumed by a switchman who has worked for two months in a yard where this arrangement is in common use. Chicago, B. & Q. R. Co. v. Smith (1885) 18 Ill. App. 119. A servant who has been working for stepping off the track, is not an ob- for several years as brakeman and as vious risk to a servant who has often conductor of freight trains, and is frepassed along it before, where there was quently brought by his duties into a cernothing to direct his attention to the tain yard to make up his train, is prerisk on any of the previous occasions sumed to know the kind of frog which when he had been on the track. Ben- is in use there, and cannot recover if ham v. Taylor (1896) 66 Mo. App. 308. he receives an injury owing to the fact A railroad engineer is not conclusively that they are not blocked. Southern P. bound to take notice of all omissions of Co. v. Seley (1894) 152 U. S. 145, 38 the company by which he is employed, to L. ed. 39, 14 Sup. Ct. Rep. 520. A maintain the statutory fences and cattle brakeman who has been engaged for sevguards, so as to constitute his failure to eral years in the performance of duties complain of such an omission an assump- which were of such a nature that he tion of the risk thereby caused. Terre must unquestionably have known that a Haute & I. R. Co. v. Williams (1897) 69 large portion of the frogs on defendant's road were not blocked, and who had been A brakeman who, after three days employed in broad daylight around and service, falls into a cattle guard while near the frog where the accident ocservice, falls into a cattle guard while near the 1rog where the accident occoupling cars in the nighttime, is not, as matter of law, guilty of negligence in being ignorant of its position. Fredenburg v. Northern C. R. Co. (1889) 114

N. Y. 582, 21 N. E. 1049. One who enters the employ of a railroad company as a brakeman does not thereby assume recover against the railroad company for an injury caused by catching his foot in risk of injury from an uncovered cattle an injury caused by catching his foot in guard within the yard limits, although a frog of standard make in the yard in passing over the road he was in a po- where he was employed for a considerin passing over the road he was in a po-sition where he might have known of the able time (period not specified) as yard danger. Galveston, H. & S. A. R. Co. v. brakeman, and where he could observe Slinkard (1897) 17 Tex. Civ. App. 585, the possibility of danger from the frog. Richmond & D. R. Co. v. Risdon (1891)

the servant with notice, the element constituted by the number of the occasions on which observation was possible is necessarily excluded, since, in the nature of the case, there is only a single occasion to be

seven months in one of the yards of a company which, as a general rule, does not use blocking, assumes the resulting risk. Narramore v. Cleveland, C. C. & St. L. R. Co. (1899) 48 L. R. A. 68, 37 C. C. A. 499, 96 Fed. 298. A switchman is chargeable with knowledge of the defects in a switch in not having a proper space between the main rail and the point of the switch rail, and in not having blocking in that space, where he has worked over and about the switch in question for many years, and hundreds of times within the year preceding the accident, and the condition of the switch and its surroundings has been unchanged during that time. Quinn v. Chicago, R. I. & P. R. Co. (1898) 107 Iowa, 710, 77 sumed to have known of the obvious danbrakeman for two years on a road where 100 Fed. 256. the frogs and guard rails were not filled appreciate the danger of getting his foot caught in such frogs and guard rails while stepping about and over them.

87 Va. 335, 12 S. E. 786. A brakeman blocking); Rush v. Missouri P. R. Co. is chargeable with notice that frogs and (1887) 36 Kan. 129, 12 Pac. 582 (switchswitches at a certain station were un- man who has been working for two blocked, where they were in the same months in a yard is affected with notice condition as when he began work of the want of blocking between a guard eighteen months before he caught his and the main rail at a certain place); foot in one of them. Lake Shore & M. S. Peoria, D. & E. R. Co. v. Ross (1894) R. Co. v. McCormick (1881) 74 Ind. 55 Ill. App. 638 (switchman who had To an employee who had become worked for sixteen months in a yard held more or less familiar with a yard while chargeable with knowledge of the risk working as a signalman for several caused by the want of filling between a months, and who for a month previous to guard rail and a main rail); Missouri, the accident had been engaged in K. & T. R. Co. v. Thompson (1895) 11 switching, the fact that a plank used for Tex. Civ. App. 658, 33 S. W. 718 (risk blocking of a frog was not as thick by arising from the want of blocking in a one inch as that ordinarily used in the guard rail presumed to be known and yard in question was held to be a palpa- assumed by a switchman who has worked ble defect. Rajotte v. Canadian P. R. in a yard for about seven weeks). The Co. (1889) 5 Manitoba L. Rep. 365. A question whether a switchman ought to switchman who has been employed for have noticed that a particular guard rail was not blocked was held to be for the jury in Curtis v. Chicago & N. W. R. Co. (1897) 95 Wis. 460, 70 N. W. 665. On the ground that the condition of guard rails, whether blocked or unblocked, would not be likely to be observed by brakeman passing on trains, it has been held that evidence to the effect that there were numerous other unblocked guard rails besides the one which caused the injury in suit was inadmissible in an action by such an employee. Trott v. Chicago, R. I. & P. R. Co. (1901) 115 Iowa, 80, 86 N. W. 33. An extra hand who worked in different yards in which there were many switches, and in which men were continually employed in making repairs, cannot be charged, as matter N. W. 464. A skilful railroad brakeman of law, with knowledge of the defective of mature years, who frequently passed condition of the blocking of a particular an unblocked guard rail, must be pre-switch in one of those yards, which he was required to use in the nighttime, alger incident thereto. Wabash R. Co. v. though the defect had existed for some Ray (1898) 152 Ind. 392, 51 N. E. 920. time, and was obvious in the daytime. One who had worked as section man and Hunt v. Kane (1900) 40 C. C. A. 372,

Whether or not a railroad employee or blocked was held, as matter of law, to was guilty of contributory negligence in pursuing his duties in a switch yard in which a frog projected several inches above the track at a point where he had Gillin v. Patter & S. R. Co. (1899) 93 frequently to pass, without discovering Me. 80, 44 Atl. 361. See also Appel v. and reporting the condition, or otherwise Buffalo, N. Y. & P. R. Co. (1888) 111 taking precautions against danger there-N. Y. 550, 19 N. E. 93 (switchman after from, is for the jury, after considering working daily for several years in a yard the nature of the defect, its location, his is presumed, as matter of law, to undermovements with reference thereto, and stand the risks created by the want of his familiarity with the surroundings, taken into account. But with this exception the considerations with reference to which the servant's constructive knowledge is determined

and all the other facts and circumstan-length of time to charge him with a (1898) 103 Ga. 820, 30 S. E. 503.

head coming in contact with a bridge Stricker (1878) 51 Md. 47, 34 Am. Rep. while standing on top of a car cannot re- 291 (brakeman had passed under the cover, where he had on numerous occa- bridge about 1,500 times since cars like sions passed under the same bridge. Wil- that on which he was had been put into liams v. Delaware, L. & W. R. Co. (1889) use); Pittsburgh & C. R. Co. v. Sent-116 N. Y. 628, 22 N. E. 1117; Owen v. meyer (1879) 92 Pa. 276, 37 Am. Rep. New York C. R. Co. (1869) 1 Lans. 108 (684 (several months employed). (brakeman had been every day for a year A brakeman injured by coming into in a position where he might have no-collision with the overhead braces of a ticed the relative height of the bridge covered truss bridge is not, as matter of lington, C. R. & N. R. Co. (1881) 56 Iowa, distance between them and the tops of 520, 9 N. W. 364 (servant had been em- cars, where it is a fair inference from ployed as brakeman for four years on a the testimony given by several experiroad where he had often passed under enced trainmen that it was an extremely bridges of the same height as the one by difficult matter to discern by merely 53 Am. Rep. 691 (bridge had been passed there is evidence going to show that, aldaily for three months); Clark v. Rich- though he had crossed the bridge daily mond & D. R. Co. (1884) 78 Va. 709, 49 for several months before the accident, times by daylight).

brakeman on a railroad will be presumed curred, and that there was no other to have become acquainted with the low bridge with braces so low as the one in bridges over the track. Brossman v. Le-question. St. Louis, Ft. S. & W. R. Co. high Valley R. Co. (1886) 113 Pa. 491, v. Irwin (1887) 37 Kan. 701, 16 Pac. 57 Am. Rep. 479, 6 Atl. 226 (brakeman 146. If it is not shown that the serv-

was killed at night).

months four low bridges in close proxim- sional use of cars higher than the averof the east side of the east bridge and of them, and the jury would therefore also in front of the west side of the west be warranted in finding that he was not bridge, and understood that these signals familiar with them, the court cannot dewere a warning for all the bridges, as-clare, as matter of law, that he was sumes the risk of an omission of the sigguilty of negligence in not ascertaining,
nals from the intermediate bridges. by measurement or accurate observation,
Ryan v. Long Island R. Co. (1889) 51 whether he could pass safely under the
Hun, 607, 4 N. Y. Supp. 381. A brake- overhead timbers of a bridge while standman who on several occasions has been ing erect. Atchison, T. & S. F. R. Co. near a bridge is chargeable with notice v. Rowan (1895) 55 Kan. 270, 39 Pac. that it is not protected by warning sig- 1010.

nals. Fitzgerald v. New York C. & H.

R. Co. (1891) 36 N. Y. S. R. 755, 12 head bridge was held not to be, as mat-N. Y. Supp. 932 (accident occurred at ter of law, imputable to a brakeman who night).

standing when he came into collision at night, but never while he was on the with an overhead bridge was higher than top of the cars. Louisville, N. A. & C. others used by the company, and he was R. Co. v. Wright (1888) 115 Ind. 378. 16 aware of that fact, he cannot recover if N. E. 145. he had been on the road a sufficient A switchman who has been working in

Walker v. Atlanta & W. P. R. Co. knowledge of the height of the bridge. 1898) 103 Ga. 820, 30 S. E. 503.

Lynch v. New York, L. E. & W. R. Co.

(c) Obstructions above railway tracks. (1892) 44 N. Y. S. R. 663, 18 N. Y.

A brakeman who is injured by his Supp. 417; Baltimore & O. R. Co. v.

and the cars on the line); Wells v. Bur- law, chargeable with a knowledge of the which he was injured); Hooper v. Co-looking at such a bridge how far its over-lumbia & G. R. Co. (1884) 21 S. C. 541, head timbers were above a train, and Am. Rep. 394 (bridge passed several he had not been on the top of the cars while they were passing over the bridge, After two months' service, a freight more than once before the accident ocant's attention had even been called to An employee who has passed for three the additional risk created by the occaity, which had a warning signal in front age, or that he had ever ridden upon one

had passed underneath it eight or nine If the car on which a brakeman was times during the daytime, and as often

are essentially similar to those which are controlling in the cases collected in the two preceding sections.

a yard for three years, but always at a car in order to look under it. Monight, is not necessarily chargeable with Kee v. Chicago, R. I. & P. R. Co. (1891) notice of the defective condition of a 83 Iowa, 616, 13 L. R. A. 817, 50 N. W.

Civ. App. 266, 22 S. W. 928.

(d) Obstructions beside railway tracks. character of his duties, with knowledge of the location of a pole which has been 169 Mass. 267, 47 N. E. 877. set too near the track, and cannot recovv. Central R. Co. (1901) 112 Ga. 762, 38 S. E. 79. An engineer who has crossed a truss bridge 200 times before the accident is chargeable with a knowledge of the distance of the timbers from the cab of the locomotive. Illick v. Flint & P. M. R. Co. (1888) 67 Mich. 632, 35 N. W. gerous proximity to the side of his engine is not warranted where the evidence is that, before the accident, he had been, for more than sixteen months.

A brakeman is not chicago, St. P. M. & O. R. Co. (1894)

BY Wis. 273, 58 N. W. 408.

A brakeman is not chicago, St. P. M. & O. R. Co. (1894) tion, could be seen for a distance of a half mile and more along the track and each side thereof; that during this period of time the fireman, in the discharge of this station; and that a rule of the comtheir duty. New York, C. & St. L. R. Co. v. Ostman (1896) 146 Ind. 452, 45 a siding, where he has passed the same 245 (but not on this point). almost daily for nearly two months, and has on more than one occasion taken cars in a yard but two weeks is not, as matbrakeman who has been over a division inches from the wall of the car and 4 of a road about 400 times must be pre-feet from the track. sumed to know the distance, from the gon Short Line & U. N. R. Co. (1892) rails, of wing fences at cattle guards, 23 Or. 94, 31 Pac. 283. so as to charge him with the risk of

spout several feet above the cars, which 209 (dissenting Beck, J.) A servant who has been out of repair three months. had worked for five years as brakeman Texas & P. R. Co. v. Crow (1893) 3 Tex. on a night train was held to have assumed the risk of being struck, while descending from a freight car, by a fence -A yardmaster is chargeable, from the nearly 4 feet from the nearest rail. Ryan v. New York, N. H. & H. R. Co. (1897)

A section man who has been working er for injuries caused by striking against for two hours on a track close to which it while on a moving train. Blackstone is a pile of lumber is presumed to appreciate the risk that, in getting out of the way of a train, he may stumble on it. Bengtson v. Chicago, St. P. M. & O. R. Co. (1891) 47 Minn. 486, 50 N. W. 531.

A switchman is not, as matter of law, chargeable with notice of the position of a switch stand which he had never no-708. A finding of a jury that a fireman ticed, where he had always worked at did not have an opportunity to know night, and the switch, not being used,

tinually employed upon the same engine dangerously close to the track, where the upon which he was at work when struck evidence is that the difference between by the chute; that the chute in question the distance which it stood from the was so conspicuous that it, and its locatrack and the distance which would have been safe was only 7 or 8 inches; that the plaintiff had never, before the accident, passed or attempted to pass the pole on the side ladder of a car; and his duties, passed the station where the that the only opportunities which he chute was located twice each week, and had had to judge of its proximity to the frequently did work and switching at track were from passing it on foot and on the tops of moving cars in the course pany required trainmen to take note of of his employment. Whipple v. New dangerous points, and to take time to do York, N. H. & H. R. Co. (1896) 19 R. their duty. New York, C. & St. L. R. I. 587, 35 Atl. 305. A similar conclusion with regard to facts almost identi-N. E. 651, Reversing on Rehearing cal was reached in *Potter v. Detroit, G.* (1895) 41 N. E. 1037. A brakeman is H. & M. R. Co. (1899) 122 Mich. 179, (1895) 41 N. E. 1037. A brakeman is H. & M. R. Co. (1899) 122 Mich. 179, presumed to know of the obvious danger 81 N. W. 80, Judgment Reversed on Refrom the location of a cattle chute near hearing (1900) 122 Mich. 205, 82 N. W.

A railroad switchman who has worked out on the siding. Boyd v. Harris ter of law, chargeable with knowledge (1896) 176 Pa. 484, 35 Atl. 222. A that a certain switch pole is but 20 Johnston v. Ore-

Whether or not a conductor on a trolhanging low on a ladder at the side of ley road assumed the danger from the

The servant has been held entitled to go to the jury on the ground that, at the moment when the danger first came within the range of

location of a trolley pole not more than withstanding he had frequently passed 6½ inches from the outside edge of the the point in question, where his attenplatform steps along the side of the tion at such times was directed to recars is for the jury upon evidence that leasing the brakes, and, by reason of the poles were set at irregular distances the curve on either side and his ordifrom the track, and that he had run a nary position on the train, it was diffi-car past the poles only on one occasion, cult to estimate the distance between where it does not appear on which side such cars and the truss. Bryce v. Chiof the car he was on that occasion, or cago, M. & St. P. R. Co. (1897) 103 whether the car was an open or closed lowa, 665, 72 N. W. 780. one. Pierce v. Camden, G. & W. R. Co. (1896) 58 N. J. L. 400, 35 Atl. 286.

engineer who was running an engine days, and had made several trips past back to its starting point on a railway a coal shed, a footboard of which was which was about to be converted into a 16½ inches from the ladders on the cars, trolley line was chargeable with knowl- and his train had stopped there at least edge of the fact that the trolley poles twice to receive coal, the court refused had been erected, and also of their po- to say, as a matter of law, that he knew sition with relation to the track, al- that the structure was so near the track though it was the first time he had as to render it unsafe for a brakeman been over the line since they had been to use the ladder on that side of the cars erected, and on the outward trip he had while passing. Chicago & A. R. Co. v. been sitting on the side of the engine Stevens (1901) 189 III. 226, 59 N. E. opposite to that on which they stood. 577, Affirming (1900) 91 III. App. 171. North Birmingham Street R. Co. v. Whether a brakeman who was in-North Birmingham Street R. Co. v. Whether a brakeman who was in-Wright (1901) 130 Ala. 419, 30 So. jured, while descending a side ladder, 360 (no duty to warn). This is cer- by a trestle work near the track, was tainly a strong decision.

while leaning out of the gangway to in- 305. spect the condition of a hot box, under direction of the engineer. Central 52 Ill. 183, 4 Am. Rep. 593, where a Trust Co. v. East Tennessee, V. & G. R. brakeman was injured by a structure Co. (1896) 73 Fed. 661, Distinguishing projecting dangerously far towards the East Tennessee, V. & G. R. Co. v. Head track, defendant's counsel urged that (1893) 92 Ga. 723, 18 S. E. 976, on the the rule of law governing the case was ground (1) that the injured employee that a person engaged for a particular there was an engineer, whose duty it service, and knowing, or having full opwas to watch the track, and who there- portunity to know, of the conditions fore had greater opportunities of knowl- and circumstances of the service, asedge than a fireman; and (2) that the sumes all risk arising therefrom, in the object which struck the engineer was absence of fraud or concealment on the the post of a "telltale," which would be part of the master. But the court conmuch more likely to attract the atten-sidered that this proposition was not tion of employees than a station-limit applicable to the facts of this case, sayboard.

a brakeman of the risk of catching his acquired such knowledge before the acclothing on a bolt projecting from the cident, as he had been but two months

In a case whe**re a brakeman on a** freight train had been in the service of In a recent case it was held that an the railroad company for twenty-eight

chargeable with knowledge of the risk As a fireman's duties have no relation created by the structure, after having to the roadbed and track, he is not been four days in the employment and chargeable by law with knowledge of passing it a few times, is a question for the location of a station-limit board so the jury. Robel v. Chicago, M. & St. near the track that he is struck by it P. R. Co. (1886) 35 Minn. 84, 27 N. W.

In Illinois C. R. Co. v. Welch (1869) ing: "It would have been morally im-See also Dorsey v. Phillips & C. possible for him to have ascertained the Constr. Co. (1877) 42 Wis. 583 (§ existence of all such special perils as 402a, note 4, supra). The question as to the assumption by is no reason for supposing that he had top of a truss while standing on the upon the road, and had always passed side of a box car is for the jury, not- the station where he was injured, in the

time upon the road."

8 Kan. App. 316, 55 Pac. 673.

(e) Railway rolling stock; construcman is presumed to understand the dan-man is presumed to understand the dan-ger incident to coupling such cars. are brought together to be coupled. Hathaway v. Michigan C. R. Co. (1883) Beaudin v. Central Vermont R. Co. 51 Mich. 253, 47 Am. Rep. 569, 16 N. (1893) 38 N. Y. S. R. 473, 14 N. Y. W. 634. As a servant employed to couple cars is likely to know as much about using such drawbars daily for a considerable period. Second v. Chicago & M. Ga. 674.

L. S. R. Co. (1895) 107 Mich. 540, 65 N. W. 550. A freight brakeman who has been in the company's employment to the manner in which broad-gauge dent to stock cars having no bumpers. cars are carried, where he has been 14 S. W. 242. Tex.)

night, except upon two trips. More of that fruit issuing from the car, and over, it is to be remarked that the dan- from his previous experience that simiger was of such a character that it lar cars might come into the yard at might well escape the observation of a any hour of the day or night, to know person who had been even for a long that, when such a car arrives, he will be called on to handle couplings of an Contributory negligence or assump unusual kind ("Miller"), and that he tion of the risk cannot, as a matter of must, at his peril, use appropriate law, be imputed to a servant who was means for securing his safety. Thomas crushed between a car which he was as- v. Missouri P. R. Co. (1891) 109 Mo. sisting to move and a platform at the 187, 18 S. W. 980. The contributory side of a switch track upon which the negligence of a switchman injured while car had, without his knowledge, been uniting two couplings of peculiar conthrown by the direction of the foreman, struction not intended to be used tomerely because he had on one previous gether is for the jury, where there is occasion, and possibly two, assisted in evidence that, although he had been a pushing a car on the track furthest switchman for two years, he had only from the platform, and was passing had to unite such couplings two or three along the track past the switch with times; that the pin used was a square the other employees about the time it or flat pin; that if it had been a round was thrown. Consolidated Kansas City pin, fitting the hole in which it was Smelting & Ref. Co. v. Peterson (1899) used, he could have drawn it out with his hands; that, as it was, when he A fireman is not chargeable with found it jammed he was compelled to knowledge that the fastenings of the get a rock and attempt to drive it out; spout of a water tank, which gave way and that, in doing this, he was injured and allowed the spout to fall on him, by the backing train. Southern P. Co. were defective. Missouri, K. & T. R. v. Burke (1893) 9 C. C. A. 229, 23 U. Co. v. Gordon (1895) 11 Tex. Civ. App. S. App. 1, 60 Fed. 704 (Pardee, J. dis-672, 33 S. W. 684.

A brakeman after being eight or nine tion and operation of.—After a week's months in the employ of a railway comwork on a road where foreign cars with pany is chargeable with knowledge that double deadwoods are being constantly the projecting sills of a certain kind of received, even an inexperienced brake- cars in common use on the road are

In a case where a stove in a railway the peculiar construction of a bump on car was not properly secured, and cona foreign car as any other agent of the sequently fell over on a brakeman when company, negligence is not predicable of the train was derailed, the defendant the omission to warn him of the danger was held entitled to an instruction that, created by such bumper. Simms v. if it was the duty of the injured servant South Carolina R. Co. (1886) 26 S. C. to light the stove, and its defective con-490, 2 S. E. 486. The risk of being indition was open and patent, and was jured by a defective kind of drawbar is nevertheless carelessly overlooked by assumed by a brakeman who has been him, he could not recover. Atlanta &

A brakeman on a narrow-gauge rail-Houston & T. C. R. Co. v. Barrager working on the train for six months, A and has had his attention specially switchman who, on several previous oc- called to the alleged source of the accicasions, has coupled foreign cars laden dent by having worked, before he bewith oranges, is presumed, both from came a brakeman, on the hoist by which the special circumstance of the fragance the car bodies were transferred to the trucks. Titus v. Bradford, B. & K. R. barred from recovery. Bonner v. Moore Co. (1890) 136 Pa. 618, 20 Atl. 517.

A fireman who has been at work in 272. that capacity for two years is presumed to be aware of the risk resulting from in the ratchet of a brake wheel is for the want of air brakes on his employer's the jury, where he has made only one trains. France v. Rome, W. & O. R. trip on the car, and there is evidence Co. (1895) 88 Hun, 318, 34 N. Y. Supp. that the wheel was partially concealed, 408.

a week on an engine between which and R. Co. v. Haslett (1884) 74 Ga. 59. the tender there is no apron cannot recover for injury caused by that defect, whether, by the exercise of ordinary Chicago, M. & St. P. R. Co. v. Standart care and diligence, a locomotive engi-(1884) 16 Ill. App. 145. A fireman neer might have discovered a defective was held not to be, as a matter of law, condition of the pilot before starting on chargeable with knowledge of the dan- the trip, where the engine was standing ger caused by the fact that water had in a depression on the track at the time escaped from the engine tank, and had he took charge of it. Fordyce v. Edfrozen on the apron connecting the en-wards (1898) 65 Ark. 98, 44 S. W. 1034. gine and the tender. Mason & O. R. Co. Whatever danger there is in the fact v. Yockey (1900) 43 C. C. A. 228, 103 that a screw projects beyond the crank Fed. 265. The presumption is that a of a hand car, and that there is for this brakeman who has been working six reason an increased probability that the days on a logging train knows that a clothes of a man turning the crank may bumper on an engine tender, which is be caught, is as well known and as ob-16 inches higher than one on the car vious to one who has used the car for next to it, will overlap the latter when several days as it is to his employer. the engine and car come together. Mc-Curey v. Boston & M. R. Co. (1893) 158 Laren v. Williston (1892) 48 Minn. Mass. 228, 33 N. E. 512. 299, 51 N. W. 373.

chargeable with notice that the flanges W. 191. of the wheels were unusually shallow, Co. (1883) 30 Kan. 689, 1 Pac. 139.

A section hand, after twenty months' use of an iron rod which communicates motion from a lever to the wheels of a hand car, is presumed to know its condition. Burlington & C. R. Co. v. Liehe (1892) 17 Colo. 280, 29 Pac. 175. It is for the jury to say whether a railway servant who, while coupling two engine tenders, was crushed between them, was negligent in obeying an order to couple them, where the evidence is that he was employed in the capacity of a hostler helper, assisted in knocking fires out of engines, in coupling engines and cars, and in moving them, and when injured had been so engaged for about eighteen months. Thompson v. Chica- their feet. Mansfield Coal & Coke Co. go, R. I. & P. R. Co. (1900) 86 Mo. App. v. McEnery (1879) 91 Pa. 185, 36 Am. 141. A switchman new to work, who is Rep. 662. injured, after only seven hours' work, An employee upon a wrecking car on by a "stuck link," is not necessarily de- a railroad cannot recover for injuries

(1893) 3 Tex. Civ. App. 416, 22 S. W.

The plaintiff's knowledge of a defect and that its condition might not have A fireman who has been working for been disclosed by frequent use. Central

It is a question of fact for the jury

A jury is justified in finding that a A painter who, while traveling on a track walker whose connection with a steam car, has got on and off at every hand car was only incidental and casual station, has helped to push it a consid- was excusably ignorant that rubber on erable distance, has, according to his the brake shoe constituted a dangerous own testimony, examined it, and has defect. Galveston, H. & S. A. R. Co. v. own testimony, examined it, and has defect. Galveston, H. & S. A. R. Co. v. several times wiped the wheels, is Parrish (1897; Tex. Civ. App.) 40 S.

Whether a servant in a stone mill, and that the wheels were worn flat, who has gone once over a tramway with McQueen v. Central Branch Union P. R. a car having projections upon it which almost fill the space between it and a certain structure close to the track, has constructive knowledge of this fact, and of the further fact that there are similar projections upon other cars also, is a question for the jury. Salem Stone & Lime Co. v. Griffin (1894) 139 Ind. 141, 38 N. E. 411.

(f) Bridges and trestles.—The risks arising from the unsafe condition of a bridge are presumed to have been known, where the servant had passed over it daily for several months, and, according to his own testimony, it swayed so much under the passage of a team that the horses could scarcely keep

sustained through the toppling over of a carpenter, who had been engaged only the car and derrick while standing upon about three hours in carrying lumber a bridge which was defective and inse- along a narrow runway on a scaffold at cure because of injuries at the time of the side of which was placed at one the wreck, and their temporary repairs, point an additional plank to furnish and the improper fastening of the ropes space for the laborers to pass each other, used to secure the derrick upon the car, was not chargeable, as a matter of law, where the defects of the bridge were with knowledge that this plank was not patent and readily discoverable, and he nailed to its supports, and that, even if participated with the wrecking master he had known of the defects, he would in handling the ropes. McGrath v. Tex- not necessarily have been guilty of negas & P. R. Co. (1894) 9 C. C. A. 133, ligence in using the scaffold. Doyle v. 23 U. S. App. 86, 60 Fed. 555.

No action can be maintained for in- Mo. 1, 41 S. W. 255. juries caused by a fall from the track unguarded; and that he had previously Whalen v. Whitoomb (1901) 178 Mass. traversed similar walks, and also the 33, 59 N. E. 666.
one from which he fell. Nugent v. The omission of an employer to notify Brooklyn Union Elev. R. Co. (1901) 64 a servant of the removal of some tack-App. Div. 351, 72 N. Y. Supp. 67.

folds is not, as matter of law, charge- of his judgment. able with negligence in failing to observe, after a few hours of work, that (i) Slippery surfaces. — (See also one of the boards is not secured. Doyle next subd.) The owner of a steam these conditions were or ought to have 55 U.S. App. 460, 84 Fed. 428. been known to him, as he had already Wash. 83, 63 Pac. 1108.

Missouri, K. & T. Trust Co. (1897) 140

(h) Parts of buildings.—A depresof an elevated railway company, where sion in the concrete floor of a passagethe evidence is that the plaintiff had way, less than a foot in diameter and been in the defendant's employ for ten from 12 to 3 inches deep, and filled with years as lampman, brakeman, and con-leather dust of a darker color than the ductor; that, according to his own tes- concrete, created a risk which was obtimony, he had observed narrow, un-vious as regarded an employee who had guarded walks along the sides of the been working about six months in the tracks similar to that from which he room, and whose duties for at least two fell, and had passed along such a walk weeks before he was injured by stepping in switching a train, but at the time of into the depression were such as to the accident had not observed the width make it necessary or convenient for him of the walk in question, nor that it was to pass over this passageway every day.

A servant injured by the giving way on which he was working, the result be-of a roughly built bridge over certain ing that the building fell, is not in itpiping across which he was wheeling self negligence, as he must be held to cinders in a barrow is not necessarily have been aware of a circumstance chargeable with a knowledge of its un- which he had an ample opportunity of safe condition, where it had been con- observing, and which was clearly visible structed by his foreman, and he had to his sight. The true question for the been working there only a short time. jury, under such circumstances, is St. Louis S. W. R. Co. v. Mayfield whether the employer acted with reaconable prudence in compliance with (g) Platforms and scaffolds.—A the rule which requires him to provide workman inexperienced as regards scaf- for the safety of his servants to the best Sykes v. Packer (1882) 99 Pa. 465.

v. Missouri, K. & T. Trust Co. (1897) dredge is not liable for injuries to an 140 Mo. 1, 41 S. W. 255. There can be employee slipping upon an inclined table no recovery for the death of an experi- upon which he went to oil machinery, enced engineer who lost his balance and because of the absence of cleats, where fell off a platform into machinery which he had frequently been on the table durhe was oiling, where the evidence shows ing the six weeks preceding the accithat the accident was due to the dim dent, and had also had his attention light, the unevenness of the platform, called to the risk. American Dredging and the want of a railing, and that Co. v. Walls (1898) 28 C. C. A. 441,

(j) Unguarded openings.—An traversed the platform several times, ployee familiar with the conditions from French v. First Ave. R. Co. (1901) 24 having worked several years in that part of the premises assumes the risk from It has been held that a workman not the want of railing to guard a vat con-

taining vitriol, in the floor of the fac- v. Roberts (1891) 143 Pa. 1, 21 Atl. tory, and from the obscurity preventing 998. him from seeing it, whether such obscurity arises from a want of light, or standing between the rolls which convey from steam, or both; and he cannot reall the planks coming from a circular cover for injuries sustained by falling saw is liable to be hit by one of them into the vat while attempting to pass is deemed to be obvious to an employee from one part of the factory to another. who has been working for 2½ months in

A servant who had worked several the morning of the accident. Demers days in a tannery where the planks laid v. Deering (1899) 93 Me. 272, 44 Atl. along the edge of open vats for the employee the edge of open vats for the edge of open vats ployees to walk upon were occasionally rendered slippery by the vapors which saw for three days is not necessarily rose from the vats and settled upon chargeable with knowledge of the danthem, is presumed to comprehend the ger incident to his place of work, as a and by the obscurity created by the va- by. pors thus rising from the vats, and cannot recover for an injury received in 85 N. W. 826.

App. Div. 641, 65 N. Y. Supp. 955.

(k) Obstructions above roadways.—

A person employed to drive a team for hauling materials from a platform, to reach which it is necessary to pass under a hearm over a reterway assumes the damper of supplies them of the danger of the damper of th der a beam over a gateway, assumes the dangers of contact with cogwheels canrisk of the beam being too low so that not be relied on as a ground of action he is likely to be struck by it in passing by a servant who got into the narrow back and forth, where the defect is inclosed space where the cogwheels were, plainly visible, and he has been driving after he had been engaged for several teams under the beam for several years. weeks upon work which enabled him to Baker v. Barber Asphalt Pav. Co. see them in operation. Casey v. Penn-(1899) 92 Fed. 117. A man who has sylvania Asphalt Paving Co. (1901) 198 driven a good truck for a wear is charge. Pa. 348, 47, 4th 1128. Contributory driven a coal truck for a year is charge- Pa. 348, 47 Atl. 1128. Contributory able with knowledge of the relative negligence is not predicable, as a matheight of a beam on the coal bin and ter of law, where the evidence is that the seat on the truck. *Miller* v. a mill-hand was injured by uncovered *Grieme* (1900) 53 App. Div. 276, 65 cogs three days after returning to his N. Y. Supp. 813.

pins about 18 inches long, which it was tion at the time of the accident was discustomary to insert in the top of a tracted by his duties. Craver v. Chrisbuggy to keep the load securely in its tian (1885) 34 Minn. 397, 26 N. W. 8 place, is such a conspicuous and mani- (1887) 36 Minn. 413, 31 N. W. 457. A fest fact to one who has been engaged sawmill hand is chargeable with knowlfor eight days in handling such buggies edge of the position of an uncovered that his failure to notice the defect is cogwheel near the place where he has

(m) Saws.—The danger that a man Carrigan v. Washburn & M. Mfg. Co. the room where the saw is, though not (1898) 170 Mass. 79, 48 N. E. 1079. in connection with the saw itself until

A servant who has been operating a danger caused by this slippery condition result of another unguarded saw close Christianson v. Northwestern Compo-Board Co. (1901) 83 Minn. 25,

attempting to cross the planks before (n) Planers.—Where a servant who daylight and in vapors so dense that had been working for the most part in a he was compelled to feel his way. Ship- mill yard was injured while engaged in he was compelled to feel his way. Shippey v. Grand Rapids Leather Co. (1900) the work of carrying away the smooth late Mich. 533, 83 N. W. 284.

A servant who, when going to clear planer, by striking his foot against recice from a flume rack, fell into an open space between two platforms, was held unable to recover, where it appeared that the planks by which the space had been covered had been removed a week knives, it cannot be declared, as a mator ten days before the accident. Robten v. Brounville Paper Co. (1900) 53 had previously had of observing them charged him with notice of the danger (k) Obstructions above roadways.—

Mill yard was injured while engaged in the work of carrying away the smooth planer, by striking his foot against revolving knives which could not be seen by a person standing in the position occupied by him, and he himself testifies that he knew nothing about these bins v. Brounville Paper Co. (1900) 53 had previously had of observing them charged him with notice of the danger created by them. Vecinan v. Morea

duties, that the cogs had been covered (1) Vehicles.—The absence of large prior to his absence, and that his attennegligence, as a matter of law. Bemisch been working for three days, if the only

Olson v. McMurray Cedar Lumber Co. Marshall (1901) 178 Mass. 9, 59 N. E. (1894) 9 Wash. 500, 37 Pac. 679. 454.

An employee who has been working only one or two days is not, as matter ligence of a servant injured by catching of law, chargeable with knowledge of his coat sleeve upon a set screw upon a the fact that the rods protecting a gear-revolving shaft while he was attempting ing have become so bent as to produce to adjust a belt upon a pulley on the an opening dangerously large. Lore v. shaft is for the jury, where it appears American Mfg. Co. (1901) 160 Mo. 608, that he had often adjusted the pulley, 61 S. W. 678. It is for the jury to say and had never noticed the screw, and whether a servant in a sawmill should that other employees who had adjusted have known of the danger arising from the belt in the same manner had not cogwheels which had been uncovered noticed it. Pruke v. South Park Foun-since his employment began, one week dry & Mach. Co. (1897) 68 Minn. 305, before the accident. Barbo v. Bassett 71 N. W. 276. (1886) 35 Minn. 485, 29 N. W. 198. In a case wh

months, and has received full instruc-Laurence Mfg. Co. (1893) 159 Mass.

378, 34 N. E. 458.

inexperienced servant injured within fifteen minutes after he began work upon a machine with swiftly revolving toothed rollers, between which he was told to push brick bats with a short stick, is not necessarily debarred recovery. Chicago Anderson Pressed Brick Co. v. Rembarz (1893) 51 Ill. App. 545.

(q) Revolving tumblers.—No recovery can be had for the death of an employee who stumbled against a revolving tumbler from which flanges and rivet heads projected in such a way as to catch his clothing and throw him be-38 App. Div. 38, 55 N. Y. Supp. 992.

shaft after he has worked on the emwho had been working about three weeks that the screw could be seen from the tion could be maintained, the evidence

obstruction to the view is a skid consid- floor, as the servant must be regarded erably narrower than the cogwheel. as having assumed the risk. Demers v.

The question of the contributory neg-

In a case where the injury was caused (p) Revolving cylinders, etc. — An by a projecting set screw, the plaintiff's employee engaged to remove waste from own testimony showed that he had a slowly revolving cylinder, who has worked inside of a mill, taking lumber been engaged at the work for fifteen from the big saw, for nearly two years, and had been employed as assistant on tions as to the manner of performing it, the scantling machine-that is, in putassumes the risk of having his arm ting the lumber in place to be cut by the caught in the machinery. Daigle v. saw-for about nine months, and that during that time he had, upon different occasions when the foreman was absent, run the machine in all eighteen days prior to the accident. The court said: "It does not appear that plaintiff's duty as assistant was such as would necessarily give him knowledge of the structure of the machine or of the existence of the projecting set screw, which was a concealed danger. It is not shown that he had ever been called upon, or that it was any part of his duty, to be-come acquainted with this machinery, or to adjust it when out of order. It is doubtless true that some men with the same opportunity would have become familiar with its mechanism and fully tween the tumbler and the shafting, qualified to take charge of it, but it is where he had worked for many years a matter of common experience that all and was familiar with the machinery. men would not. There is a difference Carlson v. Monitor Iron Works (1899) in the capacity of men to acquire a particular knowledge of machinery, or of (r) Set screws.—A carpenter who is the arrangement of its parts, or manner injured by a set screw in a revolving of construction, some having greater power of observation, and more desire to ployer's premises for a considerable investigate and understand, than others. time cannot recover on the ground that The extent of plaintiff's knowledge of he ought to have been instructed as to this machinery was therefore a question the danger. Keats v. National Heeling of fact for the jury to determine from Mach. Co. (1895) 13 C. C. A. 221, 21 the evidence before them." Ingerman v. U. S. App. 656, 65 Fed. 940. A servant Moore (1891) 90 Cal. 410, 27 Pac. 306.

(s) Carding machines. — In a case in a factory cannot recover for injuries where a door in the fence round a card caused by his sleeve being caught in a machine fell out while a servant was set screw on the shaft while oiling it, wiping the machine, and he thrust his where there is uncontradicted evidence hand against it, it was held that no acshowing that he was experienced in the gence in failing to discover that it was use of machines, and that he had himself taken off and put on the door several times. Riverside Cotton Mills v. Green (1900) 98 Va. 58, 34 S. E. 963.

(t) Pulleys.—Knowledge of the danger of the work is not conclusively inferred from evidence that the plaintiff had habitually put belts on the pulley in question during a period of rather over a year before the accident. McDade v. Washington & G. R. Co. (1886) 5 Mackey, 144, Affirmed in (1890) 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044.

(u) Belting.—A woman of mature age and average intelligence assumed the risk of working in a narrow space in the vicinity of unguarded cross belts and pulleys, where she had worked nearly two months in such place before the injury, and four years previously at a machine similar in almost every respect, though the belt was straight instead of a cross belt, where the narrowness of the space was obvious and was observed by her before she commenced the work. Kenney v. Hingham Cordage Co. (1897) 168 Mass. 278, 47 N. E. 117. A servant who has been oiling a machine for one year, and is injured owing to the absence of a bolt, which causes a belt to shift from a loose on to a tight Mass. 449, 59 N. E. 75. pulley while he is working, is chargeable with notice of the defect, where the which he is almost the only user, occabolt has been missing for nine months. Coyle v. Griffing Iron Co. (1899) 63 N. J. L. 609, 47 L. R. A. 147, 44 Atl. 665, Affirming (1898) 62 N. J. L. 540, 41 Atl. 680, where the decision was put upon the ground that the inspection of the machine had been adequate.

(v) Steam shovels.—It is a question for the jury whether a man employed vator. Juchatz v. Michigan Alkali Co. for the first time to operate a steam shovel, who was not instructed by the master as to the risks of the occupation, had time to learn of them before his injury, which occurred within five days after he began work. Alton Paving, Bldg. & Fire Brick Co. v. Hudson (1897) 74 Ill. App. 612, Affirmed in (1898) 176

Ill. 270, 52 N. E. 256.

(w) Machinery for cutting or breaking metal .- The direction in which the fragments of bolts will fly after they are cut off by nippers operated by a servant caused by falling down an elevator shaft, is presumed to be known to him. Chicago & A. R. Co. v. Pettigrew (1898) 82 Ill. App. 33.

(x) Steam engines.-Whether a serv-

impossible to exactly center the valves controlling the operation of a piston rod so as to stop its motion entirely, is for the jury, where the servant had only operated it for about two hours, and the motion was so slight as to be almost imperceptible. Borgeson v. United States Projectile Co. (1896) 2 App. Div. 57, 37 N. Y. Supp. 458.

(y) Machinery for breaking up metal. —A servant in a foundry, who has for two months seen the effect of the operation of an appliance used for the breaking of castings, and for two weeks has been a daily witness of that process, is presumed to understand the risk that pieces of iron may sometimes fly somewhat farther than usual. Wood v. Heiges (1896) 83 Md. 257, 34 Atl. 872.

(z) Elevators.—An employee who had run an elevator many times a day for 60 days before the accident, will be held to have appreciated the danger that the jerking and shifting of the elevator, of which he knew, would cause loose boxes placed by him on the elevator floor in piles 6 feet or more high to be so moved and shaken in the ascent of the elevator as to be caught under a projecting beam, the place of which he also knew. Barry v. New York Biscuit Co. (1901) 177

An employee injured by an elevator of sioned by a premature loosening of the elevator from its fastenings at the bottom of the shaft, being occasioned by the weakness of a wooden spring in plain sight of the plaintiff, may not recover from his employer, as it was his duty and he had an opportunity to see the defect before getting upon the ele-(1899) 120 Mich. 654, 79 N. W. 907.

An employee, a part of whose duty for more than two years had been to sweep and clean out the bottom of an elevator shaft several times a week, who was injured, while performing such duty, by the descent of the car upon him, cannot recover, as the risk was an obvious one. Volk v. B. F. Sturtevant Co. (1900) 43 C. C. A. 527, 104 Fed. 276, Affirming (1900) 39 C. C. A. 646, 99 Fed. 532.

A servant cannot recover for injuries where he had been in the same employment for three months, and had opportunity of knowing where the elevator was, and that it was used by others ant was guilty of contributory negli- and liable not to be standing at the door

firming (1900) 90 Ill. App. 49.

should have been observed by a servant 63 N. W. 517. is a question for the jury, where inpears that he could not see the girder washout, is a question for the jury. readily on account of the darkness. Ol- Breen v. Field (1892) 157 Mass. 277, son v. Hanford Produce Co. (1900) 111 31 N. E. 1075. Iowa, 347, 82 N. W. 903.

engaged in loading bales of cotton on a Laporte v. Cook (1899) 21 R. I. 158, 42 ship was confined by his duties to the Atl. 519. lower hold, where he did not and could not have seen the hooks by which the bales were lowered, he is not chargeable with knowledge of their defective condition. Ocean S. S. Co. v. Matthews (1890) 86 Ga. 418, 12 S. E. 632.

Where employees injured by the falling of a derrick had nothing to do with its erection or operation, and were required to work so near it that they might be injured by its fall, it cannot be said, as a matter of law, that they were negligent in working there or that they assumed the risk of such injury. McMahon v. McHale (1899) 174 Mass.

320, 54 N. E. 854.

dinary mental capacity, who has been facturing & Invest. Co. (1899) 92 Me. Co. (1883) 1 Ariz. 464, 2 Pac. 748. 565, 43 Atl. 512.

of the shaft. Browne v. Siegel, C. & Co. falling off the ladder while he was feel-(1901) 191 III. 226, 60 N. E. 815, Afing in the dark for the post, after he had mounted to the highest slat. Whether the dangerous condition motte v. Boyce (1895) 105 Mich. 545,

(cc) Trenches and banks of earth .jury was caused by his coming into con- Whether a servant injured by the subtact with a girder projecting into an sidence of a trench, caused by a washout elevator shaft so far as to come close to which had occurred not long before the the platform of the elevator, and it ap-accident, should have known of the

A laborer was not, as a matter of law, (aa) Other hoisting apparatus.—A guilty of contributory negligence in common laborer who has been working working, under the direction of a foreround a crane for three weeks, and is man, in that part of a trench which was injured owing to the fact that the hook not sheathed or curbed, so as to preclude attached to the crane, which is used for recovery for injuries caused by the cavhoisting pieces of timber, is too dull to ing of the trench, where he had only hold them properly, cannot recover worked in the trench for an hour when where the jury has found specially that the accident happened, he was not fahe could have seen the defect if he had miliar with the character of the soil, looked. Rietman v. Stolte (1889) 120 and the danger was not necessarily ob-Ind. 314, 22 N. E. 304. Where a servant vious to a person of his experience.

A laborer who reached the place of work only a few minutes before a bank of earth fell upon him while he was undermining it is not chargeable with knowledge of its specially dangerous condition owing to the fact that iron wedges had been driven into the top on the previous day, and that there had been a fall of rain during the night preceding the accident. Thomas v. Ross (1896) 21 C. C. A. 444, 41 U. S. App. 574, 75 Fed. 552.

(dd) Tunnels .- A laborer engaged in excavating a tunnel is chargeable with knowledge of a crack in the walls, which all his fellow workmen have observed. An employee of mature years and or- Anderson v. Winston (1887) 31 Fed. 528.

(ee) Mines.-No action can be mainworking for two weeks or more about a tained for the death of a laborer in a machine by which round logs 4 feet long, mine who was killed by one of the rocks covered with ice, are raised 38 feet upon which it was his business to remove hooks nearly 4 feet apart, on which they from the bottom of the excavation where are placed, should be held to have as- he was working, after they had been sumed the risk of injury from a log thrown down from the sides by other falling from the hooks. Jones v. Manu- miners. Lopez v. Central Arizona Min.

Whether an employee in a mine had (bb) Ladders.—The risks incident to knowledge of alleged defects in a tramusing a ladder made by nailing horizon- way is a question for the jury, where it tall slats to upright posts which exwas not part of his duty or business to tend only 18 inches above the brick work be on the lookout for such defects, but of a boiler is presumed to be appreciated by an employee who has been engaged the course of his employment, the opportor a month in stoking the boiler; and tunities and defects being of such as the restor as to afford ground for an inhe cannot recover for injuries due to his character as to afford ground for an inference that he had observed and did sonous gases generated in a sulphuric Co. (1899) 122 Ala. 118, 26 So, 124.

haul ore from the interior of the mine State use of Eckhardt v. Lazaretto to the ore house by means of a vehicle, Guano Co. (1899) 90 Md. 177, 44 Atl. and not having anything to do with timbering a tunnel, had knowledge concerning the condition of the roof, is for the caused by throwing water on potassium jury. Sampson Min. & Mill. Co. v. is not entitled to an instruction which Schaad (1890) 15 Colo. 197, 200, 25 Pac. declares him to be free from negligence gerous state of the roof of a drift is for caused by putting potassium into water, the jury, where he had passed under the where there is evidence that he was place several times a day in the course warned of his peril by the shouts of by of his work. Cherokee & P. Coal & Min. standers, and that frequent explosions Co. v. Britton (1896) 3 Kan. App. 292, from the same cause had occurred near 45 Pac. 100.

A miner injured by the falling of a (1897) 140 Mo. 433, 41 S. W. 909. rock which had negligently been allowed it was excavated cannot be said, as mat-ties will be conclusively presumed, after ter of law, to have been chargeable with working with him in the same railway knowledge of the risk, where it appears yard for twenty years. Latremouille v. that, although he had been employed Bennington & A. R. Co. (1891) 63 Vt. several months in the mine, he had not 336, 22 Atl. 656. helped to excavate the shaft, that the only light in the shaft was by lanterns, servant was a track repairer and was and that the place from which the rock carried on the construction train for six fell could scarcely be seen in ascending weeks preceding the injury, and that the and descending the shaft. Severance v. engineer in charge of the engine draw-

part, the slate composing the roof in a skill to run the engine in an ordinarily had no knowledge of the unsafe or dan- that the injured servant was chargeable gerous condition of the roof, inasmuch with notice of the incompetency of the as he had been in the mine only ten engineer. Lake Shore & M. S. R. Co. v. days before the injury occurred, suffi- Stupak (1886) 108 Ind. 1, 8 N. E. 630. ciently alleges that the injury occurred A section hand who has daily opporwithout any fault or negligence on his tunity to observe the incompetency of part. Hochstettler v. Mosier Coal & his foreman cannot recover for an in-Min. Co. (1893) 8 Ind. App. 442, 35 N.

Dangerous chemical properties of various substances.-An employee of a corporation engaged in the business of manufacturing white lead assumes the knowledge of the incompetency of a corisk of his health, necessarily incident to such business, of which he has knowledge or means of knowledge afforded by to the circumstances which necessarily his frequent opportunities to observe the precautions adopted by other employees such servant. Daly v. Sang (1895) 91 for their protection. Berry v. Atlantic Wis. 336, 64 N. W. 997. White Lead & Linssed Oil Co. (1898) 30 App. Div. 205, 51 N. Y. Supp. 602.

in a guano factory for several years, and cient number of servants to manage the has had constant opportunities of ascer- master's machinery properly is pre-

know of them. Whatley v. Zenida Coal acid tank, assumes the risk of injury 2. (1899) 122 Ala. 118, 26 So. 124. from inhaling those gases while en-Whether a mere laborer employed to gaged in repairing a leak in the tank.

A servant injured by an explosion A miner's knowledge of the dan- unless he actually knew of the danger him. Hill v. Meyer Bros. Drug Co.

(gg) Incompetency of coservants. to remain on the side of a shaft when Knowledge of a fellow servant's quali-

A complaint alleging that the injured New England Tale Co. (1900) 72 Vt. ing the train "was habitually careless 181, 47 Atl. 833. and negligent in the discharge of his A complaint which states that, with- duties as such engineer, during all the out any fault or negligence on plaintiff's time, and was not possessed of sufficient coal mine fell upon him, and that he careful and prudent manner," shows

jury caused by that incompetency. Mc-Dermott v. Hannibal & St. J. R. Co. (1885) 87 Mo. 285.

See also § 405, post.

To render a servant chargeable with servant, his means of knowledge as to such incompetency must have reference attend the performance of his duties as

(hh) Number of employees assigned to certain work. — The danger arising An employee who has been employed from the fact that there are not a suffitaining the dangers caused by the poi-sumed to be known to a man who has

possible observation, the weather was dull and stormy; or darkness prevailed; or temporary conditions prevented him from using his eyesight effectively;3 or the work in which he was engaged was so engrossing as to divert his attention from his surroundings4 (see also §

N. S. 851.

has been repairing tracks in a yard is presumed to have become acquainted with the rate at which trains are usunotice of the practice of running such trains. Larson v. St. Paul, M. & M. R. Co. (1890) 43 Minn. 423, 45 N. W. 722. several weeks a brakeman is presumed which is created by the running regulations under which the train has been dised due care in ascertaining the conditions under which the train has been tion of the coupling appliances. Louis-operated during the whole of that period. Wright v. New York C. R. Co. 220, 21 S. W. 866.

(1862) 25 N. Y. 562.

A divil appliance of the coupling appliances. Louis-operated during the whole of that period. Wright v. New York C. R. Co. 220, 21 S. W. 866. to understand the danger of a collision ing upon the question whether he exer-

look after the building and maintenance of railroad bridges and trestles assumes

has seen men on cars which were being marked that the nature of the servant's switched, is not, as matter of law, duties was not such as to bring the chargeable with knowledge of a custom danger to his notice. in the yard not to have men on cars while they are being switched. cago & N. W. R. Co. v. Kean (1897) 70

Ill. App. 676.

been in his employ for three years. foreman, whose duties did not require Saxton v. Hawksworth (1872) 26 L. T. him to observe and make safe the condition of the tracks, had never seen them (ii) Systems and methods of work.— before the accident. Kennedy v. Lake A section man who for fifteen months Superior Terminal & Transfer R. Co. (1896) 93 Wis. 32, 66 N. W. 1137.

<sup>2</sup> In Fish v. Illinois C. R. Co. (1896) 96 Iowa, 702, 65 N. W. 995, it was held ally run there. Bengtson v. Chicago, St. that a brakeman who knew of stones P. M. & O. R. Co. (1891) 47 Minn. 486, falling from gravel cars along the track 50 N. W. 531. A section man who has did not assume the risk caused by their been working for three months on a presence, where the company was in the railway where one third of the trains habit of cleaning off such stones from are irregular or extra is chargeable with time to time, and he began work at midnight, when he could not see whether any stones were on the track.

The fact that a brakeman is called After serving on a particular train for upon unexpectedly to make a coupling soon after midnight has a material bear-

A civil engineer whose duties are to company, who is directed to make reok after the building and maintenance pairs on the roof of a passenger car railroad bridges and trestles assumes standing on a side track, and is told the risk of injury from the failure of that it will remain there several hours, the company to provide a watchman at is not, as a matter of law, guilty of nega bridge which gives way under the ligence in remaining on the upper deck train upon which he is traveling in dis-charge of his duties, as he must be pre-stretched across the track, by which he sumed to know that no watch is kept is struck and injured, when the car is upon such bridge. Texas & P. R. Co. v. started soon after he gets on, and the Smith (1895) 31 L. R. A. 321, 14 C. C. smoke and cinders from the engine come A. 509, 30 U. S. App. 176, 67 Fed. 524. directly in his face. Stotlenberg v. An employee who has worked in a Pittsburg & L. E. R. Co. (1895) 165 switch yard a short time only, and who Pa. 377, 30 Atl. 980. The court re-

<sup>4</sup> A "machine runner" operating a ma-Chi- chine to undermine coal cannot, as a matter of law, be held to have had his attention drawn to the fact that the Whether knowledge of the dangerous duty of inspecting the roof of the mine. conditions shall be imputed to the fore- which the foreman had agreed to asman of a switching crew, who, while at- sume. was being neglected, because he tempting to couple freight cars on a had been in the room about two hours spur track, stumbled over piles of ashes and there had been no inspection, albetween the rails, and was caught be-though frequent inspections were retween the cars, is for the jury where the quired, where it is a fair inference from evidence is that the day was dark, with the evidence that he was giving the marain and sleet falling; that the ash piles chine his constant attention in an atwere from 4 to 8 inches high, and cov-tempt to break the record for runs. ered with snow and ice; and that the Westville Coal Co. v. Schwartz (1898)

350, note 1, ante); or was such as to give him no time to make observations.5 On the other hand, notice of all obvious dangers is imputed, as a matter of law, to a servant whose opportunities for observation are not restricted or diminished by any specially unfavorable conditions.6

As to the effect of the servant's temporary forgetfulness of a previously ascertained danger, see §§ 281, 350, 351, ante.

404. Knowledge of particular risks; how far inferable from knowl-

177 Ill. 272, 52 N. E. 276, Affirming not palpably defective, is not necessarily

(1897) 75 Ill. App. 468. Whether a brakeman was negligent of contributory negligence. Leak v. in attempting to unite two cars with de-fective couplings is a question for the 455, 32 S. E. 884. A locomotive engineer jury, where the evidence is that he had does not assume the risk from a defect at no time been called by his duties to in an engine, where he does not have at no time been called by his duties to in an engine, where he does not have examine or observe the coupler; that, as time to inspect or examine the engine testified by experienced brakemen, he before using it. Missouri, K. & T. R. would not be likely, in the ordinary Co. v. Durlin (1899; Tex. Civ. App.) time of uncoupling a car and keeping 50 S. W. 1034. That an employee might his face to the engine, to have seen the have seen that the key to a pin holding defect in the deadwood, and certainly in place apparatus for hoisting material would not have seen or known of from a trench was out was not negligraph of the engine of t would not have seen of known of from a trench was out was not negliany defect in the springs; and that gence preventing a recovery for an inhe had not been warned by any serv-jury caused by the fall of material, ant of the company of any defects therewhere he was hurriedly put to work in in. Bender v. St. Louis & S. F. R. the trench without an opportunity to ex-Co. (1897) 137 Mo. 240, 37 S. W. amine the machine. Higgins v. Wil-132. The danger of coupling a foreign liams (1896) 114 Cal. 176, 45 Pac. 1041. car, the drawbar of which differs so Whatever may be the obligations of a much in height from those on the empression to acquaint himself with the much in height from those on the em- servant to acquaint himself with the together, is not a danger of which a for injuries due to its defects, where it required to take notice. Ohio & M. R. no time to inspect it. Chicago & A. R. R. Co. v. Wangelin (1892) 43 Ill. App. Co. v. Scanlan (1897) 170 Ill. 106, 48 324. A brakeman was not guilty of con- N. E. 826. tributory negligence in attempting to See also Mann v. Oriental Print couple a car having timbers projecting Works (1875) 11 R. I. 152, where the over the end, where he went toward it fact that the servant had been suddenly see that the projection would prevent the want of opportunity to examine and compelled to act in great haste. Illinois elements favorable to him. C. R. Co. v. Reardon (1894) 56 Ill. App.

6 In Hathavay v. Michigan C. R. Co.
542. A court will not declare, as a matter of law, that a brakeman is guilty of 16 N. W. 634, one of the grounds on
negligence in not discovering a defect in which the plaintiff was held unable to a brake and ceasing to use it, when he recover for an injury received in couphas only two or three minutes to un- ling two cars with double deadwoods was couple the car and regulate its move—that the brief period that elapsed while ments so as to bring it to a standstill the moving car was slowly approaching at a given point. *Philadelphia & R. R.* the stationary one afforded an ample opat a given point. Printacephia & R. R. the stationary one afforded an ample opCo. v. Huber (1889) 128 Pa. 63, 5 L. R.
A. 439, 18 Atl. 334. A brakeman who,
while hastily attempting to get on a
slowly moving car, is injured by the giving way of a stirrup which he had no
opportunity to inspect, and which was

Central R. Co. (1900; N. J. L.) 45 Atl.

debarred from recovery on the ground

ployer's own cars that it will slide past condition of a temporary appliance, such them and permit the cars to come close as a scaffold, he is entitled to recover servant engaged in coupling cars can be is furnished to him complete and he has

rapidly and without good opportunity to called upon to undertake new duties, and his making the coupling safely, and was estimate the danger, were adverted to as

edge of general conditions.—The range of circumstances under which knowledge may be imputed to a servant who has the means or opportunities of knowledge has been considerably extended by the admission of a principle which may be stated as follows:

A servant who is, or ought to be, aware of the fact that certain dangerous conditions arising from the construction, arrangement, or operation of the master's instrumentalities are found in so many places or are of such frequent occurrence as to be normal incidents of the employment is deemed to be chargeable, as a matter of law, with knowledge of each single instance of those conditions, although it may be apparent that this would not have been a necessary conclusion if his constructive knowledge had been considered with reference solely to the nature of his opportunities for observing that particular instance, and without respect to the deductions which might be drawn from the wide distribution or frequent occurrence of conditions of a similar description.1

stating clearly the precise rationale of (1893) 158 Pa. 365, 27 Atl. 1002.

the decision).

first time, in broad daylight, is bound to steep, that it has no railing, and that its

a train made up for that purpose, with the road after dark." full knowledge of the nature of the work

1032 (short per curiam opinion, not moved. Derr v. Lehigh Valley R. Co.

A railroad fireman assumes the risk Anyone using a stairway, even for the of using a particular switch at night without a lamp, where he knows that no notice such obvious defects as that it is lamps are supplied for switches generally, although he does not know that steps are placed at irregular intervals. the particular switch has no lamp, and Steps are placed at Irregular intervals. the particular switch has no lamp, and Sweet v. Ohio Coal Co. (1890) 78 Wis. has had no opportunity of acquiring 127, 9 L. R. A. 861, 47 N. W. 182. such knowledge. Illinois C. R. Co. v. L. (a) Railway tracks and appurters Swisher (1895) 61 Ill. App. 611. The nances.—If low joints in a railway court said: "The distinction between a track, causing jolts and jars, are to be condition existing in a class of appliexpected by a brakeman because of their ances and a condition peculiar to a partenuation of the country because of their ances and a condition peculiar to a partenuation of the country because of their successions. expected by a brakeman because of their ances and a condition peculiar to a partrequency, he cannot recover for an injury caused by one, unless there is evidinapplis, B. & W. R. Co. v. Flanigan dence that it was caused by a joint so (1875) 77 Ill. 365. In this case the unusually low as to import negligence condition was common to switches on of the company. Texas & N. O. R. that part of defendant's road and for a Co. v. Dillard (1888) 70 Tex. 62, 8 S. long distance. Plaintiff had ample op-W. 113. A section hand who knows the general condition of the railroad track known, that there were no lamps on to be defective in certain particulars asswitches on that part of the road. . . . . sumes the risk of injury from all defects. He did not deny that he know the general sumes the risk of injury from all defects He did not deny that he knew the genof that nature, whether particularly eral condition of the switches in that known to him or not. Green v. Cross respect, but confined his denial to the (1890) 79 Tex. 130, 15 S. W. 220 (hand one that was left open, which was not car derailed owing to worn condition of different from the others. If there was increased hazard in his employment on A railroad engineer assumes the risk account of the use of switches without incident to the opening of a road blocked lamps, he knew that he was exposed to by snowdrifts, when he sets out upon that hazard every time he went over

An employee familiar with the work, and the dangers incident, although he who undertakes to block the driv-does not know the exact location and ing wheel of a locomotive engine on size of every drift which must be re- a down grade, assumes the risk, if the blocking does not hold, of having his court said: "If there was any danger hand caught on a spike in one of the to the plaintiff while in the performance sleepers, where he knows that the sleep- of his duty, from the structures thus ers are secondhand, and that spikes are placed, it was a risk he had assumed in some of them, although he does not He knew the manner in which the road

Where all the frogs and guard rails trains. in the yard where a servant is working The fact that an engineer knew nothare, so far as he has observed, unblocked, ing about the position of a temporary he cannot, in the exercise of ordinary post will not enable him to recover for care, assume that the particular one injuries caused by striking against it, which causes his injury is blocked, even when he is familiar with the road, and if he has not had an opportunity to in- there are many other structures closer form himself as to its condition. Burn- to the track than the post. Thain v. ham v. Concord & M. R. Co. (1896) 68 Old Colony R. Co. (1894) 161 Mass. 353, N. H. 567, 44 Atl. 750. Similarly, it has 37 N. E. 309. The court said: "It is been held that an experienced switch-necessary for railroad companies to put man who had been working nearly two up structures near enough to their months in a certain yard where all the tracks for it to be possible for persons guard rails were unblocked assumed the on the trains to come in contact with

jury caused by an unblocked guard rail, not bound to give warning of every such where he was familiar with the yard in structure to every person employed upon which the accident occurred, and knew its trains. There must be some point that the guard rails in that and other within the limit which it is possible for yards on the line were not blocked. Rice a man on a train to reach at which the v. New York C. & H. R. R. Co. (1900) railroad company has a right to build 55 App. Div. 339, 67 N. Y. Supp. 136. without notice, and to assume that those To same effect see Haas v. Buffalo, N. on the trains will keep out of the way. Y. & P. R. Co. (1886) 40 Hun, 145, where it was held that no action could soon as he gets outside of the line of be maintained by a workman who knew the train when it is in motion." that there were no blocks in similar places on the road, although he did not existence of "clearing posts" between the have actual knowledge of the precise lo-switch and main tracks along the line cation of this particular guard rail. of the road assumes the risk incident to Recovery was also denied in Banks v. the existence of such a post at a par-Georgia R. & Bkg. Co. (1901) 112 Ga. ticular switch, although he had no ac-655, 37 S. E. 992, on the ground that tual knowledge of its existence. Scidall the frogs on the line were unblocked. more v. Milwaukee, L. S. & W. R. Co.

defendant, where a brakeman is suing for injuries caused by a cattle guard ber of cattle guards are dangerous bewhile he was coupling a car, and it is cause of their proximity to the track. shown that such guards existed at intervals over the whole road. Fuller v. Lake Shore & M. S. R. Co. (1896) 108 Mich. 690, 66 N. W. 593.

(b) Obstructions near railway tracks. -An engineer who was struck by a signal post while leaning out of his locomotive cannot recover where he knew that there were other structures on the ticular cattle guard in question was so road at the same distance from the near the track. Missouri P. R. Co. v. track (3 ft. 8 in.), although he knew Somers (1888) 71 Tex. 700, 9 S. W. 741; nothing about this particular post. (1890) 78 Tex. 439, 14 S. W. 779. Lovejoy v. Boston & L. R. Corp. (1878) Notice that a coal bin close to a 125 Mass. 79, 28 Am. Rep. 206. The ing may be encountered at any point is

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know of the particular spike which was constructed, the proximity to the causes the injury. O'Neil v. Keyes track of these structures, and the meth- (1897) 168 Mass. 517, 47 N. E. 416. ods employed in the management of the

resulting risk. Missouri, K. & T. R. Co. them. Parallel tracks usually must be v. Thompson (1895) 11 Tex. Civ. App. laid near enough to each other to create 658, 33 S. W. 718. A brakeman cannot recover for an in- in opposite directions. A company is Everyone knows that there is danger as

A railroad employee knowing of the A verdict is rightly directed for the (1895) 89 Wis. 188, 61 N. W. 765.

A brakeman aware that a large numand that in this regard they are all substantially alike, must be held to take the risks incident to their general condition, and cannot recover for an injury received by being struck by one of them while stooping, on the lower step of a car, to throw off a defective brake, although he did not know that the par-

Notice that a coal bin close to a sid-

Such a principle obviously has no application to cases in which it is shown that conditions like those which caused the injury were, as a matter of fact, exceptional rather than normal.<sup>2</sup>

while pushing a car along a siding in the dark. Pahlan v. Detroit, G. H. & M. R. Co. (1899) 122 Mich. 232, 81 N. W. 103.

The fact that a brakeman was unacquainted with a yard where he was struck by a fish chute will not enable him to recover, where he knows that there are many similar structures at various points on the road. Phelps v. Chicago & W. M. R. Co. (1899) 122 Mich. 171, 81 N. W. 101, 84 N. W. 66.

A brakeman on a short section of railbeen piled so near the road that a person on the side of a car passing them is liable to be struck, assumes the risk from that cause, although the precise location of the danger is not stated to him. Smith v. Winona & St. P. R. Co. (1889) 42 Minn. 87, 43 N. W. 968.

See also Fisk v. Fitchburg R. Co. (1893) 158 Mass. 238, 33 N. E. 510

(subd. (c) infra).

(c) Railway cars; construction and operation of .- A servant assumes the risk incident to the handling of broken and disabled cars placed upon the repair which cars are placed thereon. His finding a car on a repair track is in effect a warning as to their condition. Brown v. Chicago, R. I. & P. R. Co. (1898) 59 Kan. 70, 52 Pac. 65.

An instruction that, if cars constructed in the manner of the car occasioning the injury were in common use by well-managed roads, and were received in exchange by the defendant company, to the knowledge of the plaintiff, the plaintiff assumed the risk of finding one in the train on which he was brakeman, is erroneous in limiting the use to the plaintiff's knowledge, which was unimportant where he had had ten years' experience. Benson v. New York, N. H. & H. R. Co. (1901; R. I.) 49 working on a certain division of a railprojecting awning upon a permanent upon the road. It was the plaintiff's

imputed to a servant who admits that structure, while he is climbing a side he knew of the company's practice to ladder on a foreign car which is of unlocate this class of structures in such usual height, but similar to other cars a position; and he cannot recover if, of a like construction, which have been owing to his failure to keep a lookout, occasionally received on the road, is he comes into collision with one of them deemed to have assumed the risk to which he was exposed by the use of such cars and the existence of such a structure. Fisk v. Fitchburg R. Co. (1893) 158 Mass. 238, 33 N. E. 510.

(d) Unguarded openings.—A servant who knows that a vat may be left uncovered at any time for the purposes of his employer's business is deemed to accept the risk of such a temporary condition whenever it may supervene. Carrigan v. Washburn & M. Mfg. Co. (1898) 170 Mass. 79, 48 N. E. 1079.

A longshoreman who from his preroad, who is notified that stones have vious experience is familiar with the usual conditions prevailing while the cargo is being stowed on ships belonging to the same owners as the one in which he is injured cannot recover damages if, while obeying an order of the stevedore to go forward between decks and fetch some dunnage, he falls through an open hatchway. The Hadje (1881) 19 Blatchf. 354. An experienced stevedore is bound to take notice of the effect of the operation of discharging cargo upon the opening of the scuttles. Kraeft v. Mayer (1896) 92 Wis. 252, 65 N. W. 1032.

(e) Management of teams.-A teamstrack, where he knows the location of ter knowing that steam escapes from the repair tracks and the purpose for boilers from time to time, and hauling loads to a place near boilers, cannot recover for an injury caused by a kick from the horse he was driving, which was frightened by steam escaping automatically from such a boiler. Denver Tramway Co. v. O'Brien (1896) 8 Colo.

App. 74, 44 Pac. 766.

In Scanlon v. Boston & A. R. Co. (1888) 147 Mass. 484, 18 N. E. 209, where a brakeman was injured by a structure close to the track, the court refused to apply the doctrine of the cases cited in note 1, supra, saying:
"He did not know that there were erections so near the track as to endanger him. Such erections were, in fact, few and exceptional. Within 15 miles of Boston there were but seven,-three sig-Atl. 689. A brakeman who has been nal posts, one telegraph pole, and three bridges and abutments. It does not apway for two years, and is injured by a pear whether there were any others

Other qualifications of the principle are these: That the servant's knowledge of the existence of a condition which may and usually does produce certain defects in a large number of cases does not charge him with an acceptance of the risk created by any particular one of that class of defects as soon as it actually supervenes;3 that his knowledge of the fact that the general condition of that portion of the master's plant which caused the injury is unsatisfactory will not charge him with knowledge of a particular defect; 4 and that he is not

upon the place on the car which was pro-

vided by the defendant."

structural safeguards, and, to the servant's knowledge, has failed to replace them in a large number of instances after they have been worn out, this does not amount to the establishment of a dangerous system, the risk of which the servant assumes by reason of his knowledge. To defeat his recovery it must be shown that he knew of the want of the safeguard at the particular place where he was injured. Sherman v. Chicago, M. & St. P. R. Co. (1885) 34 Minn. 259, 25 N. W. 593 (said of a case where the were a number of cars on the road with blocking of frogs had been worn out).

The fact that a brakeman injured by having his foot caught between ties in a railway switchyard knew of the generally dangerous condition of the tracks in the yard in not having spaces between ties filled in will not warrant a court in declaring that, as matter of law, he knew of the extra hazard to which he where the exposure of the ties was greater than in other places. St. Louis, I. M. & S. R. Co. v. Robbins (1893) 57
Ark. 377, 21 S. W. 886.

The fact that ballast of the same general character was used at points other than that at which the accident occurred will not serve as a notification to the servant of the fact that at the point where he was injured there were used stones so large that it was culpable to have put them there. Galveston, H. & S. A. R. Co. v. Pitts (1897; Tex. Civ. App.) 42 S. W. 255.

A railroad employee did not, as mater of law, assume the risk of falling

first trip as brakeman; he was unfamil- into a ditch 8 inches deep between the iar with the road and with the running ties at a switch in one of three railroad of trains, and was not informed that yards in which he worked, where all the there was any such danger, or in any other ditches in the same yard were way cautioned in regard to it; and he much shallower and less dangerous, and had no reason to know that there were there were no ditches in the other two permanent erections so near the tracks yards. Hennesey v. Chicago & N. W. as to make it dangerous for him to be R. Co. (1898) 99 Wis. 109, 74 N. W.

An employee of a railroad company Where the master has adopted certain will not be presumed to know that a particular coal car is furnished with a hand hold and stirrup, where most of the company's coal cars are not so equipped, so as to charge him with contributory negligence in not using them. Light v. Chicago, M. & St. P. R. Co. (1894) 93

Iowa, 83, 61 N. W. 380.

Actual knowledge of the particular defect alone will bar the action of a brakeman injured by the pulling out of a hand hold from the rotten top of a car, where, though he knew that there rotten tops, the cars were not so uniformly rotten as to establish a condition of which he was bound to take notice. Fordyce v. Culver (1893) 2 Tex. Civ. App. 569, 22 S. W. 237, Distinguishing Missouri P. R. Co. v. Somers (1888) 71 Tex. 700, 9 S. W. 741, note 1, supra.

<sup>3</sup> Thus, the fact that the ground on which a side track was laid was known by the brakeman to be wet and soft, and that low joints were liable to be caused thereby, will not charge him with actual knowledge of the existence of such a defect whereby he was injured while making a coupling. Texas & P. R. Co. v. McCoy (1897) 17 Tex. Civ. App. 494, 44 S. W. 25.

<sup>4</sup> Graham v. Chapman (1890) 33 N. Y. S. R. 349, 11 N. Y. Supp. 318 (notice that the ties were rotten at a certain point not necessarily imputed to an employee because he knows the track to be in a generally rough condition).

The fact that a brakeman has been in the defendant's employ for two weeks,

deemed to be affected with notice that a certain instrumentality is dangerously placed merely because he had had, in the course of his employment, sufficient opportunity to ascertain its general position.5

Even as thus restricted in its operation, the conception that knowledge of the particular may be deduced, as a matter of law, from knowledge of the general, would seem, in many instances, to involve extremely harsh consequences. The present writer ventures to express the opinion that in most, if not all, of the cases in which it has furnished the foundation for a conclusion adverse to the servant the doctrine of imputed notice has been beyond the justifiable limits.

404a. Knowledge of coservant not imputed to injured servant.-One servant is not the agent of another in such a sense that the knowledge of a defect which is possessed by the former can be imputed to the latter. This principle enures to the benefit of an injured servant. whether he was or was not under the control of the employee who knew of the defect.1

## D. COMPARISON BETWEEN THE POSITION OF MASTER AND SERVANT IN REGARD TO IMPUTED KNOWLEDGE.

405. Servant's means or opportunities of knowledge equal to those of the master.— Constructive knowledge of a danger is frequently imputed to a servant on the ground that his means or opportunities of

caused by tripping over such a piece cision by the same court, cited in note while coupling a car, where there is no 1, subd. (b), supra.

The fact that a brakeman had a gen-

proper to refuse an instruction to the of any obstruction so close to the track effect that, if the jury found that the as this was, and he had, therefore, good plaintiff had been employed as brakeman reason for expecting to find the track or conductor on trains passing the chute clear. Pidcock v. Union P. R. Co. several times a week, during some (1888) 5 Utah, 612, 1 L. R. A. 131, 19 months before he was hurt, and had also Pac. 191. assisted several times in running cars into and out of the siding to which the man in charge of a piece of work is not chute was adjacent, they must find that imputed to his subordinates, there being he had means of knowledge as to its situation. The court considered it to be Hooper (1890) 52 N. J. L. 253, 19 "contrary to the experience of human Atl. 215 (foreman). Compare Covey v. life that one knowing generally of a Hannibal & St. J. R. Co. (1887) 27 Mo.

and has thus acquired a general knowl-thing, without opportunity of ascertainedge of the neglect of the company to ing its precise relations and conditions, keep the tracks near the wood yards is to be charged with notice of them." free from pieces of wood, will not pre- Dorsey v. Phillips & C. Constr. Co. clude him from recovering for injuries (1877) 42 Wis. 583. Contrast the de-

of the condition of the track at the place eral knowledge that there was a switch where he was injured. Hulehan v. stand at a certain point does not charge Green Bay, W. & St. P. R. Co. (1887) him, as a matter of law, with knowledge 68 Wis. 520, 32 N. W. 529. 68 Wis. 520, 32 N. W. 529.

that it was dangerously close to the track, where the evidence shows that a struck by a cattle chute, it was held rule of the company forbade the placing

<sup>1</sup>The knowledge possessed by a fore-

knowledge were equal to, or the same as, those of the master.1 most of the instances in which recovery has been denied for this reason, it can scarcely be said that this conception of the servant's position carries with it any particular logical significance, the conditions which caused the injury being essentially of the same nature as those presented in the cases in §403, ante; that is to say, obvious to any

A brakeman is not chargeable with notice of the defective condition of the wheels of the tender because the engineer, who is his fellow servant, has no-

<sup>1</sup> A comparison between the positions 68 Fed. 630. of the master and servant laid the For exam

thought that the employer had no Tomahawk Pulp & Paper Co. (1901) knowledge and no reasonable means of 110 Wis. 307, 85 N. W. 960. knowledge of the danger at the time master are very numerous. It will be no evidence that he had ever seen it besufficient to cite the following: Hay fore).

 App. 170 (foreman);
 Indiana Car Co. (1894)
 5 S. D. 402, 59 N. W. 217;

 v. Parker (1885)
 100 Ind. 181 (fore-Missouri, K. & T. R. Co. v. Young man).

 (1896)
 4 Kan. App. 219, 45 Pac. 963;

 (1883) 59 Tex. 19; Sonnefield v. Mayton (1897; Tex. Civ. App.) 39 S. W. 166; Holt v. Chicago, M. & St. P. R. tice of such condition. Illinois C. R. Co. (1896) 94 Wis. 596, 69 N. W. 352; Co. v. Pirtle (1893) 47 Ill. App. 498. Dixon v. Western U. Teleg. Co. (1895)

of the master and servant laid the foundation of the modern law of employers' liability. Priestly v. Fowler opportunities" of knowledge, see the following cases: Kaare v. Troy Steel & (1837) 3 Mees & W. 1, Murph. & H. I. Co. (1893) 139 N. Y. 369, 34 N. E. 305, 7 L. J. Exch. N. S. 42, 1 Jur. 987. 901; Griffiths v. New Jersey & N. Y. R. In one part of his opinion Lord Abin-Co. (1894) 8 Misc. 3, 28 N. Y. Supp. ger remarked that "in most of the cases 75; Gulf, C. & S. F. R. Co. v. Williams in which danger may be incurred, if (1888) 72 Tex. 159, 12 S. W. 172; not in all, he [the servant] is just as Kansas City, M. & B. R. Co. v. Burton likely to be acquainted with the probability and extent of it as the master." Truro (1887) 31 Fed. 158; Haley v. The first example of the phrase "equal Case (1886) 142 Mass. 316, 7 N. E. 877; means of knowledge" seems to be that Dale v. St. Louis, K. C. & N. R. Co. For examples of the phrase "equal means of knowledge" seems to be that Dale v. St. Louis, K. C. & N. R. Co. which occurs in the opinion of Bram- (1876) 63 Mo. 459; Flynn v. Beebe well, B., in Dynen v. Leach (1857) 26 (1868) 98 Mass. 575; Baltimore & O. L. J. Exch. N. S. 221. In a later case S. W. R. Co. v. Spaulding (1898) 21 the judge charged the jury that, if they Ind. App. 323, 52 N. E. 410; Relyea v.

An instruction to the effect that, if the arch fell, or that the deceased had the evidence showed that the plaintiff's the same knowledge or means of knowl- opportunities of observing the condiedge, then they should find for the detions of the appliance were equal or fendant; but in the opposite view of the superior to those of the defendant, he case, for the plaintiffs. Ogden v. Rum- could not recover, although it is correct mens (1863) 3 Fost. & F. 751. See as an abstract proposition of law, should also Williams v. Clough (1858) 3 not be given when the evidence shows Hurlst. & N. 258, 27 L. J. Exch. N. S. that there were no opportunities of ob-325. The later cases in which a serv-servation. Condon v. Missouri P. R. ant has been held unable to recover be-Co. (1883) 78 Mo. 574 (proof was that cause his means of knowledge were plaintiff, for the first time, went upon a equal to or the same as those of the defective car after dark, and there was

sufficient to cite the following: Hayden v. Smithville Mfg. Co. (1861) 29

Conn. 548; Fairbank v. Haentzche the plaintiff had as good an opportunity (1874) 73 Ill. 236; O'Keefe v. National of discovering it as the defendants, and Folding Box & Paper Co. (1895) 66 was at least as guilty of neglect in not Conn. 38, 33 Atl. 587; Cowhill v. observing it." Honner v. Illinois C. R. Roberts (1893) 71 Hun, 127, 24 N. Y. Co. (1854) 15 Ill. 550.

Supp. 533; Griffin v. Ohio & M. R. Co.
(1890) 124 Ind. 326, 24 N. E. 888; in cases where the risk is said to be as Carlson v. Sioux Falls Water Co. "obvious" to the servant as to the mas-

person of ordinary intelligence who had a reasonable chance of observing them.<sup>2</sup> Not infrequently, however, this form of expression is naturally suggested by the fact that the servant was in an exceptionally favorable position for ascertaining the existence of the danger. Under these circumstances, it possesses a certain special appropriateness. One class of cases exemplifying this situation is that in which it appears from the evidence that it was the function of the injured servant himself to remedy, prevent, or report the conditions

ter (Everhard v. Diamond Match Co. which had no shield, exploded and in- [1899] 98 Fed. 555; Connors v. Morton jured fireman); Wright v. New York C. [1894] 160 Mass. 333, 35 N. E. 860; R. Co. (1862) 25 N. Y. 562 (brakeman Steffen v. Mayer [1888] 96 Mo. 420, 9 injured by collision due to certain run- S. W. 630; Clark County Cement Co. v. ning regulations, under which the train Wright [1897] 16 Ind. App. 630, 45 N. on which he served had been operated E. 817); or "open and obvious" alike for several weeks); Naylor v. New York to the servant and the employer (Louis- C. & H. R. R. Co. (1888) 33 Fed. 801 ville & N. R. Co. v. Kemper [1897] 147 (engineer killed through misplacing of Ind. 561, 47 N. E. 214; Denver Tram- switch, and consequent derailment way Co. v. Nesbit [1896] 22 Colo. 408, owing to change in color of switch tar- 45 Pac. 405); or "equally open to the get); Hamilton v. Richmond & D. R. observation" of the servant and the Co. (1889) 83 Ga. 346, 9 S. E. 670 master (Evansville & R. R. Co. v. Henderson [1893] 134 Ind. 636, 33 N. E. platform in the dark; nothing to show 1021; Eransville & R. R. Co. v. Barnes that it was intended for such a pur- [1894] 137 Ind. 306, 36 N. E. 1092; pose); Southern P. Co. v. Leash (1893) 1021; Eransville & R. R. Co. v. Barnes that it was intended for such a pur-[1894] 137 Ind. 306, 36 N. E. 1092; pose); Southern P. Co. v. Leash (1893) Baltimore & O. S. W. R. Co. v. Welsh 2 Tex. Civ. App. 68, 21 S. W. 563 (fire-[1897] 17 Ind. App. 505, 47 N. E. 182); man of engine on a pile-driver car in-or "open" to both master and servant jured through the failure of the mas-(Swanson v. Lafayette [1893] 134 Ind. ter's representative to replace the end 625, 33 N. E. 1033); or "open alike to of the car); Atlas Engine Works v. the knowledge and observation" of the Randall (1885) 100 Ind. 293, 50 Am. master and servant (Chicago, St. L. & Rep. 798 (hands caucht in correlect). master and servant (Chicago, St. L. & Rep. 798 (hands caught in cogwheels); P. R. Co. v. Champion [1894] 9 Ind. Rudd v. Bell (1887) 13 Ont. Rep. 47
App. 526, 36 N. E. 221, 37 N. E. 21).

Another way of stating the same conception is that a master is not liable for 165 Mass. 368, 43 N. E. 205 (risk arisinjury to an employee where it does not ing from use of a certain pattern of appear that his knowledge of the danger was, or in the exercise of due care could have been, greater than the employee's. Dube v. Gay (1899) 69 N. H.
670, 46 Atl. 1049.

Such are the following: Ames v.
Lake Shore & M. S. R. Co. (1893) 135
Ind. 363, 35 N. E. 117 (injury caused by unblocked frog); Rajotte v. Canadian P. R. Co. (1889) 5 Manitoba L.
Rep. 365 (injury from unblocked frog); Rajotte v. Canadian P. R. Co. (1889) 5 Manitoba L.
Rep. 365 (injury from unblocked frog); a worn spot); Diamond Plate Glass Peoria, D. & E. R. Co. v. Hardwick (1892) 48 Ill. App. 562 (brakeman injured by the striking of a loose plank at a crossing against the footboard of a switch engine, after he had been riding on the board over the same crossing N. E. 538 (large stone set on edge on many times a day for a considerable smaller stones fell over); Steffen v. period); Texas & N. O. R. Co. v. McKee Mayer (1888) 96 Mo. 420, 9 S. W. 630 (1894) 9 Tex. Civ. App. 100, 29 S. W. (danger that a horse attached to a guard of a machine operated by the gearant for nearly three years); Hart could be servant for nearly three years); Hart could be servant for nearly three years); Hart could by the gearant for nearly three years); Hart could by N. E. 355, Reversing (1890) 123 N. Y. 641, 25
N. E. 385, Reversing (1890) 123 N. Y. 641, 25
N. E. 385, Reversing (1890) 123 N. Y. 641, 25
N. E. 385, Reversing (1890) 123 N. Y. 641, 25
N. E. 385, Reversing (1890) 163 N. E. 681, 250 (defective elevator injured employee who was accustomed to ride on it); Rogers v. Galves-vator injured employee who was accustomed to ride on it); Rogers v. Galves-vator injured employee who was accustomed to ride on it); Rogers v. Galves-vator injured employee who was accu appear that his knowledge of the dan- guard of a machine operated by the

in question.3 In another class the action has been held not maintainable because the servant had himself produced, or assisted in pro-

frightened by a train); Larich v. Moies work, over the same platform, in the (1894) 18 R. I. 513, 28 Atl. 661 (over same condition, and under similar cir-1033 (bank of gravel fell on shoveller); Texas & P. R. Co. v. French (1893) 86 quired for the special work of running Tex. 98, 23 S. W. 642 (error in a case cars down an incline to a transfer boat of this type, to refuse a charge that, if is a fact presumably as well known to the danger to be expected from the cav- an experienced brakeman engaged in the ing of a bank was as open to the ob- work for a considerable time as it is servation of the servant as it was to the to his employers. Illinois C. R. Co. v. foreman, the servant could not recover). Jones (1882) 11 Ill. App. 324.

The danger involved in using a simple appliance like a 12-foot ladder with a ping of an elevator while a servant is defect so obvious as the absence of about engaged in placing heavy granite sills 20 inches at the top of one of the side therein is as obvious to him as to the rails is presumed to be known to a servant of mature years and average mental capacity. Jenney Electric Light & P. Co. v. Murphy (1888) 115 Ind. which is being unloaded from a wagon 566, 18 N. E. 30. A hand car being a simple appliance, it will be assumed that a section hand who has used it for about twenty months is as familiar with its condition as his foreman. Burlington & C. R. Co. v. Liehe (1892) 17 Colo. 280, 29 Pac. 175.

The danger of losing his balance and having his hand caught in unguarded cogs near a ladder which a servant who has been at work in a brick factory for three months is using is as obvious to him as to his master. Buhle v. Harland (1890) 37 Ill. App. 350.

The danger that the clothes of a man on a hand car may be caught in a screw projecting from the crank is as obvious to him, after helping for several days to run the hand car, as it is to his employer. Carey v. Boston & M. R. Co. (1893) 158 Mass. 228, 33 N. E.

A superintendent of bridges and assistant superintendent of the constructmen who undertake the work of shortion of a railway, who has made a personal inspection of the condition of the track, and is aware that the cross-ties are not sufficiently secure, being only half tied, and that the road, which has not been opened for passenger traffic, is not safe for a rapidly moving train, assumes the risk of the derailment of a train upon which he is riding. Evansville & R. R. Co. v. Barnes (1894) 137 I. M. & S. R. Co. v. Morgart (1885) 45 Ind. 306, 36 N. E. 1092.

Knowledge of the risk of injury from the narrowness of a platform is imputed to a servant, where he has wheeled his denied recovery for injuries caused by barrow many times, both night and day, the breaking of a rope on the ground during the three weeks he has been at that, having often seen and constantly

hanging bank of sand fell); Swanson v. cumstances. Kaare v. Troy Steel & I. Lafayette (1893) 134 Ind. 625, 33 N. E. Co. (1893) 139 N. Y. 369, 34 N. E. 901. The fact that stronger couplings are re-

> The danger caused by the sudden dropmaster. Connors v. Morton (1894) 160

Mass. 333, 35 N. E. 860.

The fact that the poles of a derrick are wet, and therefore liable to slip during the operation, is as obvious to a workman as to his foreman. Pintorelli v. Horton (1900) 22 R. I. 375, 48 Atl. 142.

The servant's allegation of ignorance is overcome by another allegation showing that he was injured by slipping on loose ashes while pushing a heavy car. Louisville & N. R. R. Co. v. Kemper (1896) 147 Ind. 561, 47 N. E. 214.

3A servant who was thrown against gearing by the shutting to of an automatically closing gate which he touched while rising from a floor which it was his duty to keep clean cannot recover. Brady v. Ludlow Mfg. Co. (1891) 154 Mass. 468, 28 N. E. 901.

Where the evidence shows that the danger of collapse of an arch became known only when it actually began to subside, such danger is regarded as one which can be observed as well by the ing it up, as by their employer. Ogden v. Rummens (1863) 3 Fost. & F. 751 (verdict for defendant was not disturb-

A conductor under whom an incompetent engineer has been serving for six weeks is presumed to have had as good an opportunity as the company of ascertaining that incompetency. St. Louis,

Ark. 318.

In French v. Aulls (1893) 72 Hun, 442, 25 N. Y. Supp. 188, a servant was ducing, the conditions by something done in connection with the performance of his duties.4

as the master. But this decision seems On the other hand, it has been held that to be of very questionable soundness, as a charge by which the jury are told there were no external signs of weak-that, if the servant himself dug the

d, infra.
A carpenter cannot recover for inship in its construction, and not by any for the jury. La Salle v. Kostka defects in the materials furnished. Pef- (1901) 190 Ill. 130, 60 N. E. 72, Afinjured servant helped in the construct been approved in some states. tion of the scaffold which fell through and suitable for the purpose for which a barrel among the props, causing the it was made. Weeklund v. Southern beam to fall and injure him, cannot hold Oregon Co. (1891) 20 Or. 591, 27 Pac. his employer liable for the injury. 260. An engineer injured by falling off Lucey v. Hannibal Oil Co. (1895) 129 a coal chute upon which, at his own sug- Mo. 32, 31 S. W. 340. gestion, cleats had been nailed for the purpose of furnishing him with a stair-by the fall of a gang plank while he way, another and safe way having been was conveying a load over the same provided, cannot recover for injuries due from a car to the platform cannot reto the adoption of his suggestion. Hart cover on the ground that the gang plank 125, 18 Atl. 1011.

years a defective machine which he similar loads in safety, and had entire helped to construct will be presumed to control in the use of the gang plank. have known of the defect. Litchfield La Pierre v. Chicago & G. T. R. Co. Car & Mach. Co. v. Romine (1891) 39 (1894) 99 Mich. 212, 58 N. W. 60.

Ill. App. 642.

to see that it is safe before using it, him, owing to the want of a key to segence. Donovan v. Harlan & H. Co. position, will be held to have had con-

handled it, he knew as much about it (1899) 2 Penn. (Del.) 190, 44 Atl. 619. See §§ 408-411, and 414, subd. ditch at the spot where he was injured, he had such notice of its condition as would bar him from recovering for injuries from the falling of a scaffold jury received therefrom, is erroneous, through his own defective workman- since the question of such knowledge is fer v. Cutler (1892) 83 Wis. 281, 53 N. firming (1900) 92 Ill. App. 91. It was W. 508. If there was evidence that the admitted that such a charge would have

An action cannot be maintained by an defective bracing, it is error to refuse employee who had his leg caught and a request for an instruction to the effect broken by a bent of a bridge in process that if the scaffold fell from this cause, of construction, caused by its toppling and decedent helped in the erection of over as he slipped and placed his hand that part which fell, and was fully ac- against it for support, where the fact quainted with its construction, plain- that it was not strongly braced and suptiff cannot recover. Stewart v. Fergu- ported was obvious, and he had himself son (1899) 44 App. Div. 58, 60 N. Y. placed the bracing against it and knew Supp. 429. A timber company is not its position and condition. Lebanon v. liable on account of the alleged unsuit- McCoy (1894; Ind. App.) 36 N. E. 547. ableness of a timber chute, where an in-jured employee assisted in its construc-porary props under a dangerous beam tion, had as complete knowledge as to in the building where he is employed, its sufficiency as the company had, and and then continues his service, knowing after its completion pronounced it safe of the danger, and who needlessly rolls

v. H. C. Frick Coke Co. (1890) 131 Pa. should have been supplied with hooks, spikes, or cleats to keep it from slipping, An employee using for a period of two where he had previously unloaded twelve

A servant who had himself helped to In a Delaware case the jury were put in place a jackscrew which fell and charged to the effect that workmen are injured him was held to have relied, bound to see to the safety of appli- at his own risk, on the opinion of anances which they construct for their other as to its safety. Peirce v. Oliver own convenience, and the duty cannot (1897) 18 Ind. App. 87, 47 N. E. 485. be shifted to their employer, and even if A servant employed as an engineer, who one uses such an appliance constructed formerly owned and who assisted in putby his fellow workmen, he is still bound ting up a derrick which fell and crushed and if he does not, it is his own negli- cure the bolt which held the braces in

406. Servant's means or opportunities of knowledge superior to those of the master.— Another way of applying the test of a comparison between the relative positions of masters and servants is exemplified in those cases in which servants have been held chargeable with knowledge for the reason that their means or opportunities of knowledge were superior to or better than those of the masters.1 A controlling effect has been ascribed to this conception in cases where the fact emphasized is that the servant had been habitually handling the defective instrumentality, or had been constantly brought into close local relations thereto.2 Other classes of cases in which the more favor-

structive knowledge of its condition. servant "must have known as well as Wolf v. Big Creek Stone Co. (1897) 148 the master, or probably better," the dan-Ind. 317, 47 N. E. 664, Affirming (1894) ger to be apprehended. 138 Ind. 496, 38 N. E. 52.

ship in the course of construction, who, stepping off a platform, fell into a hole and was injured, cannot recover there-

with knowledge of its position, and can-wear). Compare Philadelphia & R. R. not recover for an injury caused by pro-Co. v. Hughes (1888) 119 Pa. 301, 13 jecting his person so far beyond the car Atl. 286, where the same phrase is reon which he is riding, on an adjoining peated. track, that he is struck by the standing

Recovery has been denied to a charwoman who cut her hand on a piece of report the fact to his superior. Having glass in a washtub, she herself having them under his control, he is better able poured in the water which covered it. to observe their condition than is the Flynn v. Beebe (1868) 98 Mass. 575. master. If defects exist, and are not The danger that certain iron plates observed by those who have them in which had been insecurely placed by the daily use, how can the master be better servant himself might fall is presumed able to know of any defects existing? to be better understood by him than by and if the servant uses them without obhis employer. Reese v. Clark (1892) jection the master has a right to as-146 Pa. 465, 23 Atl. 246. The risk resume that no cause of complaint exists.

ger to be apprehended.

2 "The duty which the master owes to An employee in a shipyard, at work his servants is to provide them with safe in a dark place between the decks on a tools and machinery where that is necessary. When he does this, he does not, however, engage that they will always continue in the same condition. Any defor if, a few days before, under the fect which may become apparent in their master's orders, he had assisted in use it is the duty of the servant to obboarding up the hole, which had there-serve and report to his employer. The after been reopened without the masservant has the means of discovering any ter's knowledge. Rick v. Cramp (1888; such defect, which the master does not Pa.) 11 Cent. Rep. 400, 12 Atl. 495. possess." Baker v. Allegheny Valley R. a.) 11 Cent. Rep. 400, 12 Atl. 495. possess." Baker v. Allegheny Valley R. A railway servant who helps to place Co. (1880) 95 Pa. 211, 40 Am. Rep. 634 a car on a certain track is chargeable (rope on derrick became defective from

When the master has provided his car. Kansas City, M. & B. R. Co. v. servant with safe tools it is "the duty of Burton (1892) 97 Ala. 240, 12 So. 88. the latter who has them in use to observe their condition, and, if defective, to sulting from a floor being slushy is presumed to be obvious to a servant, if with which the employee is brought in it is caused by oil from machinery, of actual contact when in use, and where the oiling of which he himself has by handling them he must necessarily charge. Murphy v. American Rubber see and know of their condition. When Co. (1893) 159 Mass. 266, 34 N. E. 268. a master provides his servant with an 17he use of this form of the test also axe or a pick to be used in the latter's is traceable to the leading case of Priestley v. Fowler (1837) 3 Mees. & W. 1, would arise no duty on the part of the Murph. & H. 305, 1 Jur. 987, 7 L. J. employer to inspect them, unless after Exch. N. S. 42, where Lord Abinger observed that, under the circumstances, the handle and use a chain for days, weeks,

able position of the servant has been asserted are those in which he had acquired, by experience or technical training, special skill in the work and a capacity for appreciating the dangers which it involved

time wear out or break is evident, but who is better able to judge of their condition than those who have them in tinues to operate a saw held back by a daily use? To hold otherwise would be wire rope, knowing it to be old and to offer a premium for carelessness; for worn and to sustain a weight of 150 the servant, by mere inattention to his duty, might allow his tools to become should break the saw will swing forunfit for use, and then visit the consequences upon his employers. A different rule would prevail with reference to machinery or perishable articles which experience teaches us require regular inspection, and which are ordinarily presumed to demand repairs or attention." Kinney v. Corbin (1890) 132 Pa. 343, 19

In a Wisconsin case the court, in laying down the doctrine that the duty of a railway company to know of the difference between the heights of the couplings on its own cars and those of anof law. to know of this difference, said: "The difference in the elevation of the knowing this difference when consenting mount Cemetery Asso. v. Davis (1894) to take this foreign car into its train. 4 Colo. App. 570, 36 Pac. 911. When the car and caboose were brought car to be attached to its train; and the would lay down the rule so strongly intestate is alleged to have been in the against the servant. See § 403, supra. use of proper care when he endangered anced, ought the plaintiff to recover? generally, \$ 390, supra.

or months, and then hold a master re- The duty of the company to know of sponsible for accidents resulting from this difference is not absolute, and it is wear and tear or breaking would be not presumed to know of it as a matter harsh law. That such articles will in of law." Kelly v. Abbot (1885) 63 Wis. 307, 53 Am. Rep. 292, 23 N. W. 890.

An employee in a sawmill who conpounds, and knowing that if the rope ward and strike him, assumes the risk. Week v. Fremont Mill Co. (1892) 3 Wash. 629, 29 Pac. 215.

An employer is not liable for the death of an employee killed at his post by the fall of a projecting rock, caused by blasting in an adjoining street, where he had no reason to expect that the blasting would weaken the rock, and the employee had better opportunity of observing changes in it than the employer. Dolan v. McLaughlin (1898) 33 App. Div. 628, 53 N. Y. Supp. 273.

Negligence cannot be imputed to an other company was not absolute, and employer for failure to shore up a ditch that it was not presumed, as a matter in which an employee injured by the caving in of the sides thereof was working, where the latter and those at work with coupling irons of this foreign car and him were better informed than the emthe caboose or other cars of the defend- ployer as to the danger to be apprehendant's road would not have been very ed from the liability of the earth to easily or readily observed when they cave, and the shallowness and other physwere distant from each other; and yet ical characteristics of the ditch were the company is sought to be held liable not such as to suggest danger, either to for its want of ordinary care in not the employer or the employees. Fair-

In an early New York case it was connearly together, this difference could sidered that an engineer was more likely have been at least much more readily to know of occasional defects in fences or seen and observed by comparison. The cattle guards or bridges than the comcompany is charged with negligently en- pany or its officers elsewhere located. dangering the lives of its brakemen by McMillan v. Saratoga & W. R. Co. not knowing of this difference, and, if (1855) 20 Barb. 449. But it is apprepresumed to know of it, in allowing this hended that no court at the present day

Where the evidence is conflicting, the his own life by not seeing, observing, or question whether carpenters who made a knowing of such difference in the eleva- ladder had a better opportunity to detion of the coupling irons. Did not the tect a knot in the side piece of the lad-intestate have the same, if not superior, der, into which a nail holding a cross means of knowing of this difference, as piece was driven, than a servant who afor to that of the company? If the negliterwards used the ladder, is for the jury. gence of the intestate and that of the Flanigan v. Guggenheim Smelting Co. company in this respect are equally bal- (1899) 63 N. J. L. 647, 44 Atl. 762. See,

(compare § 396, supra),3 and those in which it was his duty to repair the defective instrumentality,4 and those in which the injury was caused by conditions supervening during the progress of the work, as a result of some temporary arrangement of the appliances made by the servant himself or by his coemployees.5

407. Servant's means or opportunities of knowledge usually inferior to those of the master.—Although, as has been shown in the two preceding sections, it is a well-settled doctrine that knowledge is imputable to a servant in all cases where his opportunities or means of knowledge are equal or superior to those of the master, it is also clear, both upon principle and authority, that, if such equality or superiority is relied upon by the master in a case where the injury was due to a defect in some part of the plant, he has the burden of establishing their existence by specific testimony, and that, in the absence of such testimony, the obligatory knowledge of the servant is determinable with reference to the hypothesis that both his means and opportunities of knowledge are normally inferior to those of the master.1

\*Where the servant professes to have special skill in the work for which he is ines carefully a rope furnished him by hired, and the master disclaims the poshis employer, and who testifies that he session of such skill, the obligation of had a better opportunity to know how ascertaining the peculiar construction of the appliances to be handled and the proper mode of handling them rests on proper mode of handling them rests on ing of the rope. Reid v. Central R. & the servant, and not on the master. Bkg. Co. (1888) 81 Ga. 694, 8 S. E. 629. Hence, an instruction is erroneous which

A coachman has been declared more leaves the jury to infer in such a case competent than his master to form a that the master was bound to know the judgment as to the safety of driving a character of an appliance and the manner in which it should be used so as to prevent injury. Ray v. Jeffries (1887)

86 Ky. 367, 5 S. W. 867. The question of the liability of a master for injuries to a servant by reason of defects in machinery is for the court, and not for the and keep in proper repair a tram road on which engines and truck cars are run to boul loos. cannot recover, if, owing the service, and were constantly brought under his notice in the discharge of his regular duties, while he was skilled, and had opportunities to observe and understand the danger, superior to those of the master. Detroit Crude-Oil Co. v. Grable (1899) 36 C. C. A. 94, 94 Fed.

An experienced railway employee is was not properly secured). presumed to be better acquainted than the company's representatives with the danger created by the insufficiency of the light furnished while a new track is being laid in the nighttime. Gulf, C. & S. F. R. Co. v. Jackson (1894) 12 C. C. A. 507, 27 U. S. App. 519, 65 Fed. 48.

An experienced well digger who examgood the rope was than anyone else, cannot recover for injuries due to the break-

to haul logs, cannot recover, if, owing to the bad condition of the road, he is injured while riding on the top of a load

of cross-ties. White v. Kennon (1889) 83 Ga. 343, 9 S. E. 1082.

Martin v. Louisville & N. R. Co. (1901) 23 Ky. L. Rep. 798, 64 S. W. 417 (blade of iron along which lumber was being conveyed from one car to another

<sup>1</sup> See, generally, the cases cited in the following notes and under the next sub-

Where the master has created the danger, he is bound to guard against it; and if he admits that he did not know or believe that the danger existed, he cannot

The decisions also show that the courts do not consider it justifiable to impute knowledge to a servant, as a matter of law, on the ground that his means or opportunities of knowledge were equal or superior to those of the master, unless the risk to which the injury was traceable belonged to the class to which the description "obvious," "visible," "manifest," etc., is applicable.<sup>2</sup> Since it is to this class of

being unscientific and dangerous).

guard against injury from the pole, it was not sufficiently obvious to the officers of the defendant for them to observe it in the exercise of reasonable court was that the officers of the defendmake it safe.

the fall of a defective scaffold, the emhe did not know, or had not equal opportunity with the employer of knowing, that the scaffold was unsafe. Chicago & A. R. Co. v. Maroney (1897) 170 Ill. 520, 48 N. E. 953, Affirming (1896) 67 Ill. App. 618.

It is the duty of the servant to use reasonable care to inform himself in respect to the hazards to which he is exposed, but he is not under the same obligation as a master to know the nature and extent of the risks, unless they are patent. McDonald v. Chicago, St. P. M. & O. R. Co. (1889) 41 Minn. 439, 43 N.

"The doctrine that the servant cannot recover if he had equal means with the master of ascertaining the defect is not applicable to a case of latent defects in machinery, but only to cases where the defect is obvious to the senses, or would before the accident, or in the case of the then the servant's assumption of the

require superior knowledge and judg-negligence of a fellow servant; and ment from the servant. Faren v. Sellers probably others; but certainly not to the (1887) 39 La. Ann. 1011, 3 So. 363 (in-jury received through stepping on a here to the doctrine announced in this loose purline while a building was in case when here on a former occasion. course of demolition, the method adopted If the servant, as was then held, is not, and the master is, required to exercise In Whipple v. New York, N. H. & H. diligence to discover defects in machin-R. Co. (1896) 19 R. I. 587, 35 Atl. 305, ery with which the servant is employed it was urged that, if the proximity of a to work, the latter may recover, al-pole to the track was not sufficiently ob-vious to the plaintiff to put him on his or ascertaining its defects, if in fact he was ignorant of their existence and they were not patent or such as would have been disclosed by operating it as above stated. If the master did not know of care, and that the defendant could not the defect, and reasonable care on his be deemed negligent in maintaining the part would not have disclosed it, he pole in its position. The answer of the would not be liable. If, however, by would not be liable. If, however, by the exercise of reasonable care the emant located the pole; and that it was ployer could have discovered, although their duty to have so located it as to a like exercise of care on the part of the servant would also have disclosed to In an action for injuries sustained by him, a latent defect, yet, if in fact he did not know it, the master would be ployee need not prove affirmatively that liable, although the servant's opportunities to ascertain it were equal to those of the master. The servant has a right to assume that the machinery or implements furnished him by the employer are safe and suitable for the business, and he is not, while the master is, required to examine them for that pur-pose. The master is chargeable with knowledge which he might have acquired by the exercise of due care, the same as if he actually possessed it, whereas the servant has the right to assume that all necessary examinations have been made by the master, and is not required, either in person, or by another employed by him for the purpose, to examine the machinery as to its fitness and sufficiency." Porter v. Hannibal & St. J. R. Co. (1879) 71 Mo. 66, 36 Am. Rep.

"Where the danger is open and obvihave been disclosed to an ordinarily ob- ous to either master or servant, it might servant man in the ordinary use of the doubtless be properly said that master machinery in the business the servant and servant stand upon an equality. was engaged in, within the time the in-Brazil Block Coal Co. v. Hoodlet (1891) jured servant operated such machinery 129 Ind. 327, 27 N. E. 741. But even

risks alone that the doctrine as to equal means of knowledge is applicable, it is error to give an unqualified instruction which may lead

risk depends, not upon the equality of tunity as the company to know of dehis opportunities with those of his master, but upon the fact that by the exercise of reasonable care he ought to have known of the danger, and is therefore held to have known it. It is conceded by counsel for both parties that the defect in this case was a latent one. We think it clear that as to such a defect the master and servant are not upon an equality. The duty resting upon them is different, and the acts required of them to constitute care with reference to the discovery of the defect are differ-It could not, therefore, have been correctly said that the servant assumed the risk because his opportunities to observe the defect were equal to those of his master." Pittsburgh, C. C. & St. L. R. Co. v. Woodward (1894) 9 Ind. App. 169, 36 N. E. 442.

Where a brakeman was injured while running alongside a moving engine in the nighttime, by tripping over wires stretched across the path, the conclusion that the danger was equally open to the observation of the servant and the master is not necessarily deducible from special findings that the wires from a semaphore ran across the track on which the engine was, to a pulley box about 4 feet south of it, being strung about 7 inches from the ground between the track and the box, and from the box to the tower station the wires were strung higher than the box, and the wires running each way from it were in full view; that the brakeman was in full use of his sight, and had worked as a Chicago & E. I. R. Co. v. Richards brakeman for many years, and in that (1901) 28 Ind. App. 46, 61 N. E. 18. capacity for the defendant for several In Magee v. North Pacific Coast R. months, but did not know that the Co. (1889) 78 Cal. 430, 21 Pac. 114, wires he tripped over were not boxed. Considering the difference between the duty of the master to provide a safe place to work in, and that of the servant to use his opportunities to discover the dangers of his position, there is nothing in such findings to forbid a conclusion that the servant had a right to assume that his path was not rendered dangerous by means of wires stretched across it at such a distance from the ground that a person properly intent upon his duty was liable at night to be tripped up. Flutter v. New York, C. & St. L. R. Co. (1901) 27 Ind. App. 511, 59 N. E. 337.

a train crew have not the same oppor-

fects in the track, it has been held unwarrantable to declare, as matter of law, that an engineer who suffered injury by reason of such defects was guilty of contributory negligence simply because he knew the track was somewhat out of repair. Mehan v. Syracuse, B. & N. Y. R. Co. (1878) 73 N. Y. 585. That the servant had not equal opportunities with the master to discover the dangerous condition was also the basis of the decision allowing recovery in a some-what similar case where the injured servant was a fireman, and in passing over the section of road on which the accident ultimately occurred, had observed that it was a rough part of the track, that the rails were short, and inferred that it was a bad track from the bumping of the cars in passing over it. Dale v. St. Louis, K. C. & N. R. Co. (1876) 63 Mo. 455.

That the rule as to equal means of knowledge does not apply where the defect could not be discovered by the use of ordinary care was laid down in East Chicago Iron & Steel Co. v. Williams (1896) 17 Ind. App. 573, 47 N. E. 26.

In a case where a brakeman was injured by striking against a car left by the conductor of another train in an improper position on the adjoining track, it cannot be said that his opportunity to know the dangerous position of the car was as good as that of the conductor, since it was the latter's duty to see that the car was properly placed.

the following statement of principles from Shearm. & Redf. Neg. 4th ed. § 217, was expressly approved: "It has been often said that the master is not liable for defects in such things to a servant whose means of knowledge thereof were equal to those of the master. But this is an erroneous statement. The master has no right to assume that the servant will use such means of knowledge because it is not part of the duty of the servant to inquire into the sufficiency of these things. The servant has a right to rely upon the master's inquiry, because it is the master's duty so to inquire; and the servant may just-On the ground that the members of ly assume that all these things are fit and suitable for the use which he is

the jury to suppose that the law infers constructive notice in all cases where his means of knowledge were equal to those of the master.3

make it the duty of the servant to inis that, when the means of knowledge and the duty to use those means are equal, between master and servant, and neither uses those means, both are equally at fault." They also cite some recent cases which, in their opinion, show that the doctrine formerly enunciated in other cases to the effect that no action can be maintained where the servant's means of knowledge were equal to those of the master has now been repudiated. The present writer is unable to concur in the theory that this doctrine is no longer accepted by some courts. It never was applied to any risks except those of certain classes, (see note 2 to this section, and §§ 405, 406, supra), and it is quite clear from the later volumes of the reports that judges have evinced no disposition to treat it as an inappropriate criterion of the servant's constructive knowledge of such risks.

In Austin v. Appling (1891) 88 Ga. 54, 13 S. E. 955, it was remarked that the rule to the result of an equality of the means of knowledge must always be considered with reference both to the duties of the servant and to the question whether the defect was or was not

an obvious one.

An instruction that, if servant had the same means of knowledge as the master, he could not recover, was held to have been rightly refused for the reason that it did not appear from the evidence that it was a part of his duty N. E. 442. [drawbar]). to inspect the defective appliance. An instruction (wor Austin v. Appling (1891) 88 Ga. 54, 13 to the effect that knowledge is imputable to the servant if the dangerous con-Texas, S. V. & N. W. R. Co. v. Guy guide as to when either party should be (1893; Tex. Civ. App.) 23 S. W. 633. chargeable with knowledge of the fact, So is an instruction that the servant is properly refused. Western Stone Co. could not recover if he could have v. Whalen (1894) 151 Ill. 472, 38 N. discovered the alleged defect as well as E. 241.

directed to make of them. The true the master, and did not do so (Evans v. definition is that, when circumstances Chamberlain [1893] 40 S. C. 104, 18 S. E. 213); or if he had the "same means" make it the duty of the servant to inquire, it is contributory negligence on his part not to inquire." This passage, however, has been considerably 260, 24 U. S. App. 103, 63 Fed. 407; modified by the learned authors in the International & G. N. R. Co. v. Cook last edition of their treatise. Their [1897] 16 Tex. Civ. App. 386, 41 S. W. present view is thus summarized: 605; Muldowney v. Illinois C. R. Co. "The true rule as to equal knowledge [1873] 36 Iowa, 470; but see contra is that when the means of knowledge Odden v. Rummens [1863] 3 Foot & F. Ogden v. Rummens [1863] 3 Fost. & F. 751, § 405, note 1, supra); or "equal opportunities" of knowledge (Pittsburgh, C. C. & St. L. R. Co. v. Woodward [1894] 9 Ind. App. 169, 36 N. E. 442; Champion Ice Mfg. & Cold Storage Co. v. Carter [1899] 21 Ky. L. Rep. 210, 51 S. W. 16); or "as good means or opportunity" of knowledge (Wedgwood v. Chicago & N. W. R. Co. [1878] 44 Wis. 44 [court declined to say that the instruc-tion should have been given because the defect was one of long standing]); or "equal means" of knowledge (Teaas & P. R. Co. v. Kenna [1899; Tex. Civ. App.] 52 S. W. 555 [building near railway track]; Williams v. Missouri P. R. Co. [1891] 109 Mo. 475, 18 S. W. 1098 [incompetent coservant]); or "equal facilities" for ascertaining the danger (Lawrence v. Texas C. R. Co. [1901; Tex. Civ. App.] 61 S. W. 342 [incompetency of servant]; International & G. N. R. Co. v. Elkins [1899; Tex. Civ. App.] 54 S. W. 931 [defective rope]).

It has also been held proper to refuse an instruction that the servant could not recover unless he had not equal means of knowledge, as compared with the mas-(Silveira v. Îversen [1900] 128 Cal. 187, 60 Pac. 687 [defective reefing pennant]); or unless he showed that he did not have opportunities equal to those of his master for discovering the defect (Pittsburgh, C. C. & St. L. R. Co. v. Woodward [1893] 9 Ind. App. 169, 36

An instruction (words not given) in which the necessity for the exercise of S. E. 955. An unqualified instruction reasonable care and diligence on the part of the plaintiff is ignored, and by which the jury are required to balance ditions were equally open to his inspec- the opportunities as between the plaintion and that of the master is erroneous. tiff and defendant merely, without any

In some instances it is possible to deduce the impropriety of testing the obligations of the master and servant by the same standards from the consideration that the former possessed a larger measure of technical knowledge and skill, and was therefore able to obtain a more correct appreciation than the latter of the dangers incident to the employment.4 In others the excusable character of the servant's ignorance will be suggested by the fact that, at the conjuncture or conjunctures at which the servant was, so far as regards locality, favorably situated for ascertaining the existence of the dangerous conditions which caused his injury, his attention was absorbed in the performance of duties which were of such a character that it was impossible for him to utilize fully his faculties of observation.<sup>5</sup> See §§ 402, supra, and 413, infra.

\*"It is, in most cases, impossible that a workman can judge of the condition of a complex and dangerous machine wielding irresistible mechanical power, and, if he could, he is quite incapable of estimating the degree of risk involved in different conditions of the machine; but the master may be able, and generally is able, to estimate both." Clarke v. A miner is not bound to know whether an elaborate system of timbering in the Holmes (1862) 7 Hurlst. & N. 937, 948, 31 L. J. Exch. N. S. 356, 8 Jur. N. S. Eddy v. Aurora Iron Min. Co. (1890) 81 992, 10 Week. Rep. 405, per Byles, J.

"The degrees of care required of the master and servant also differ because

defects in a piece of machinery or in the roof of a mine that to the eye of a competent inspector, such as the master employs, portend unnecessary and unrea-sonable risks and great danger, may On the ground that the danger inci-have no such significance to a laborer dent to the use of a switch rope as a or miner who has had no experience in coupling between two cars in a construcwatching or caring for machinery or roofs of slopes in a mine; and the latter is not chargeable with contributory negligence simply because he sees or knows the defects, unless a reasonably intelli- St. J. R. Co. (1885) 19 Mo. App. 634. gent and prudent man would, under like circumstances, have known or appre-hended the risks which those defects indicate." Union P. R. Co. v. Jarvi (1892) 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. Rep. 65. The servant, although a man of ordi-

recovery for injuries caused by a de- under the gateway before; that the dan-

master and servant also differ because pected to search the rock and ground at the bottom of a shaft to see if there are any missed shots, before starting a drill.

Anderson v. Daly Min. Co. (1897) 15

Utah, 22, 49 Pac. 126.

On the ground that the danger inci-

tion train was not an abnormally dangerous contrivance, contributory negligence was denied to be an inference in point of law in Muirhead v. Hannibal &

In Haley v. Case (1886) 142 Mass. 316, 7 N. E. 877, the servant was a teamster, and he was injured by striking against the top of a gateway through which he was backing his team (1892) 3 C. C. A. 433, 10 U. S. App. 439, 53 Fed. Rep. 65.

The servant, although a man of ordinary prudence, as well as experience, may be quite incapable of appreciating jury to find that the defendant Dodge the degree of risk involved in the use assumed the personal direction and conformater may be and generally is capable. The court said: "From the testimony it was competent for the garden that the defendant Dodge the degree of risk involved in the use assumed the personal direction and conformater may be and generally is capable. Where the team should be driven, and Russell v. Minneapolis & St. L. R. Co. that he was familiar with the practice (1884) 32 Minn. 230, 20 N. W. 147. A of driving loaded vans under the gate-fireman is not necessarily barred from way; that the plaintiff had never driven under the gateway before: that the dan-

But it is clear that there are numerous cases in which none of these considerations is pertinent. The technical knowledge of the servant in regard to such conditions as those which caused the injury is often fully as great as that of the master. See § 406, supra. Nor will it be denied that, in many instances, time and place and means are perfectly favorable for a searching and exhaustive examination of the environment by the servant. As a matter of ultimate analysis, it will be found that the logical basis of the doctrine which thus places the master and the servant upon different footings in regard to imputed knowledge of risks is to be found in the fact that it is the special and appropriate function of the former to furnish and supervise the instrumentalities of his business, and the special and appropriate function of the servant to use those instrumentalities. duty of making a reasonably careful examination of the instrumentalities is a natural and necessary incident of the former function, but not of the latter.6 See the following subtitle.

In the opinion of the present writer, the practice of comparing the master's and the servant's means of knowledge has been productive of much confusion of thought, which is apt to operate to the servant's disadvantage by imposing upon him too high a standard of care. It would have been far preferable to refrain from importing into the discussions in this class of cases an element which is wholly unnecessary, inasmuch as the ultimate question in every instance must be simply whether a person who had the same natural and acquired capacities for observation, and had been placed in the same position, as the servant, would have discovered the danger by the exercise of ordinary care. The extent of the obligatory knowledge of the master under the given circumstances seems to be a wholly irrelevant consideration.

ger was not obvious from the place knew, but what each reasonably ought place that he could drive through the master seasonably to ascertain the exgateway in safety; that the plaintiff's tent of the danger involved in performattention was necessarily chiefly devoted ing the work in the manner ordered by to the management of the horses, and that he did not discover the danger until

6 In Louisville & N. R. Co. v. Kelly that he did not discover the danger until
it was too late to save himself; and that
ledefendant had better means of obthe defendant had better means of obthe danger, and either did not warn the
plaintiff at all, or warned him when it
was too late. On such findings, we canothers with whom he was required to
others with whom he was required to
others with that he had a required to

where the plaintiff started his team, in to have known, concerning the risk; and any such sense that it was not a reasonable opinion from observation at this duty rested on the servant and on the

not say that the plaintiff was not in ex- work, and to that end was bound to a ercise of due care, or that the defendant diligent use of its means of knowledge; was. The test is not only what each but the defendant in error was under

## E. SERVANT'S DUTY AS REGARDS INSPECTION AND INQUIRY.

408. Servant not ordinarily charged with the duty of inspection or inquiry.—From the remarks at the end of the preceding section it is apparent that an investigation into the meaning and effect of the doctrine there discussed conducts us directly to another doctrine which has been enunciated and applied with great frequency; viz., that, as a general rule, the servant is under no obligation either to inspect that part of the plant by which his safety may be affected, or to inquire into the details of the system adopted for the conduct of the master's business, for the purpose of discovering concealed dangers which would not be disclosed by superficial observation.1

The duty of inspection does not rest upon a superior servant, any more than upon mere subordinates, except in so far as it may be properly incident to the functions assigned to him.2

In some cases language is used which seems to imply that there is an essential distinction between the extent of a servant's obligations. according as the instrumentality in question was or was not one which he was required to use in the course of his employment. Thus, it has been said that he is entitled to assume that an instrumentality is safe, where the defect existed in a department of the work with which he had nothing to do by way of inspection or re-

duty of inspection devolved on the servinspecting the appliances about which he works, in search of hidden or unapprehended sources of danger. Atchison, time the servant was in charge, but, so T. & S. F. R. Co. v. Mulligan (1895) 14 far as appeared, it was caused by a de-C. C. A. 547, 34 U. S. App. 1, 67 Fed. fective construction.

That an employee is foreman of the cheek serviting into all the details of the cheek serviting the service of the cheek serviting the service of the cheek serviting the service of the cheek s instrumentalities with which he deals." (1892) 23 Or. 94, 31 Pac. 283. A server to see that they are kept in order ant is under no primary obligation to Nicholds v. Crystal Plate Glass Co. investigate the fitness and safety of the instrumentalities. Chicago & E. I. R. S. W. 991.

Co. v. Hines (1890) 132 Ill. 169, 23 N. A yardmaster is not bound to inspect E. 1021, Affirming (1889) 33 Ill. App. the ties in the yard where he is employed. Pennsylvania Co. v. Brush wicz (1899) 85 Ill. App. 407, Affirmed in (1900) 186 Ill. 1, 57 N. E. 864. See also cases cited in the ensuing notes.

of the business in his employer's store tunity to acquire knowledge of latent deuntil the latter is able to be out has a fects in the car, has the right to repose right to rely upon the employer's having confidence in the prudence and caution Vol. I. M. & S.—72.

no duty in that respect, and therefore put a proper elevator in the store, with-could be affected only by the knowledge out inspecting it. Eastman v. Curtis which he had, including what was within (1895) 67 Vt. 432, 32 Atl. 232. The his observation at the time of the in-contention of the master was that the duty of inspection devolved on the serv-

close scrutiny into all the details of the shop in which he works will not prevent his recovery for damages caused by de-

<sup>2</sup> One employed to take entire charge them, who has no knowledge or oppor-

pair; that the law requires the servant to know such defects as he ought to see by the exercise of diligence in his employment, but not defects in connection with which he is not obliged to labor; that it is incumbent on an employee to know whatever is embraced in his special line of employment, but that he is not required to know those things which belong to a different branch of service;<sup>5</sup> that he is not bound to look out for sources of danger entirely disconnected from his work;6 that the law does not under any circumstances exact of an employee the use of diligence in ascertaining defects in regard to such appliances or instruments as he is not himself engaged in using, but charges him with knowledge of such only as are open to his observation.7 It is obvious, however, from an examination of many of the decisions cited in § 411, infra, that these statements are not to be understood as embodying the doctrine that the only conditions in respect to which a servant is exempt from the duty of inspection are those parts of the plant which are thus designated. Such forms of expression were evidently suggested by the particular circumstances which happened to be under review.

In other cases a distinction has been taken between simple and complex instrumentalities, the theory being that a servant is bound to see that one of the former description is safe when it is placed in his hands, but that no such obligation is predicable with respect to the latter.8 If this distinction is intended to lead up to the conclusion that the responsibility for injuries caused by defects in simple appliances always rests upon the servant, it seems impossible to concede its validity. In such appliances, not less than in those of a more elaborate description, there may be latent defects which it is quite impossible for the servant to discover by means of any tests which he has the means of making. No logical reason whatever can be suggested why the general principle that a servant does not assume any abnormal risks of which he has neither actual nor constructive knowledge should in this instance be broken into.

of the railroad company in furnishing

22 Wash. 88, 60 Pac. 53.

<sup>7</sup> Missouri P. R. Co. v. Lehmberg (1889) 75 Tex. 61, 12 S. W. 838.

him a car in a reasonably safe condition.

(1889) 75 Tex. 61, 12 S. W. 838.

Chicago & E. R. Co. v. Branyan (1894)

10 Ind. App. 570, 37 N. E. 190.

Waldhier v. Hannibal & St. J. R.

Weldhier v. Hannibal & St. J. R. \*\*Watchier v. Hannibat & St. J. R. W. 991, distinguished between such appliances as a spade, hoe, hammer, or \*\*Pennsylvania Co. v. Burgett (1893) sledge, and a crane. It has been held 7 Ind. App. 352, 33 N. E. 914, 34 N. E. that a company does not owe an employee the duty of inspecting during its use a push pole 8 feet long and 6 inches in diameter, but may rely on the presumption that the one using it will first detect any defect. Miller v. Fixie R. Co. detect any defect. Miller v. Erie R. Co

409. Rationale of this doctrine. The doctrine which exempts servants from the duty of inspection may be referred to any one of three conceptions. Which of these conceptions is to be regarded as the primary one it is impossible to say. Nor is it a matter of any great practical importance. It will be sufficient to observe that they are interdependent in such a sense that any one of them may be deduced from either of the other two.

a. Servant not bound to take notice of concealed defects.— In the first place it is possible to view the doctrine as being simply a mode of expressing the idea that a servant is not chargeable with knowledge of conditions which may be described by the terms "concealed," "hidden," "latent," etc. Assuming this to be a fundamental principle, it is clear that the servant is not bound to make any attempt to discover such condition.1

there are latent defects that render their those conditions: "The distinguishing use more than ordinarily dangerous, but principle between these two classes of is only required to ascertain such defects cases is that in the one the defects are or hazards as are obvious to the senses." visible and apparent, and the dangers

not bound to observe "latent" defects. covered the track with earth and sand Faren v. Sellers (1887) 39 La. Ann. at a place where common prudence 1011, 8 So. 363. A servant is not would require that provision be made chargeable with knowledge of dangerous against the occurrence of such an obconditions which can only be discovered struction. He is not required to assume

v. Tracy (1895) 14 C. C. A. 199, 29 U. to render the track unsafe, or his work S. App. 529, 66 Fed. 931, the court, in more dangerous than it otherwise would declining to hold a trainman chargeable, be." as matter of law, with notice of an obstruction on a side track, created by a growth of brush, thus differentiated be-

(1897) 21 App. Div. 45, 47 N. Y. Supp. tween the position of such a servant in 285.

1 "The servant is not bound to inspect fixed conditions and in cases where the dangers were the result of changes in Yates v. McCullough Iron Co. (1888) 69 therefrom are presumed to be known and Md. 370, 16 Atl. 280. therefrom are presumed to be known and assumed, while in the other the danger "A servant is expected to observe such is not seen, and no such presumption objects only, in the absence of notice, as arises. The condition of the switches would in an instant convince him of and frogs, the degree of the curvature their danger." Johnston v. Oregon of the track, are all fixed conditions Short Line R. Co. (1892) 23 Or. 94, 31 which are visible to the eye. The experienced employee knows that he is to The case is for the jury where the serve the railroad company with its road risk was one which was "not open and and cars in the condition in which he patent or ordinarily discernible by the sees them, and he knows the danger that use of one's senses." Lund v. E. S. may attend such service. But he does Woodworth & Co. (1899) 75 Minn. 501, not necessarily know, and he cannot be 78 N. W. 81. The servant's duty to use expected to meet, dangers which arise "reasonable care" does not cast upon from changes in those conditions, how-Wabash & W. R. Co. v. Morgan (1892) produce them. He is not presumed to 132 Ind. 430, 31 N. E. 661. A servant is know that the rains and floods will have by a careful inspection. Rice & B. that ice and snow will be allowed negli-Malting Co. v. Paulsen (1893) 51 Ill. gently to accumulate upon the track and App. 123. In Oregon Short Line & U. N. R. Co. be placed on or about the same, so as

See also § 413, notes 4 to 9, infra.

b. Different standards of care in the case of master and servant.—In another type of statements in which the servant is declared not to be under any obligation to inspect the plant, the logical standpoint seems to be that the absence of that obligation is properly deducible from a principle, the correctness of which is in this connection taken to be axiomatic, viz., that, in view of the relative positions occupied by the parties to the contract of employment, the standard of duty implied by the phrase "ordinary" or "reasonable care" bears a different meaning according as the constructive knowledge of the master or of the servant may be in question. But it will be observed that, in some of these statements, the conception discussed in the next subdivision of this section is also quite prominent.2

"An employee is required to observe and serve carefully." Pennsylvania Co. v. avoid all known or obvious perils, even Witte (1896) 15 Ind. App. 583, 43 N. though they may arise from defective E. 319, 44 N. E. 377. machinery and appliances; but he is not

"Both master and servant must use "The duty of inspection is by law imreasonable care to ascertain defects and posed upon the master. He is under obdangers; but reasonable care upon the ligation to search for and discover, if part of the master demands inspection discoverable by proper examination, and search for latent and hidden defects those things which are hidden from even and causes of danger, while reasonable the careful observation of the servant in care upon the part of the servant rethe discharge of his ordinary duties. As care upon the part of the servant re-quires attention and observation of to those hidden or concealed defects, known or obvious defects and perils." master and servant are not upon an Louisville, N. A. & C. R. Co. v. Quinn equality of obligation. The master (1896) 14 Ind. App. 554, 43 N. E. 240. must search diligently; the servant ob-

machinery and appliances; but he is not bound to search for defects, or make a critical inspection of the appliances which are provided for his use. These are duties of the employer." Ohio & M. reference to a case like this, the true R. Co. v. Pearcy (1891) 128 Ind. 197, rule is that the duty of the master is 27 N. E. 479. "Both master and servant must exercise reasonable care, but reasonable care upon the part of the servant does not require of him an inspection to discover latent defects, while reasonable care upon the part of the master does require such inspection for him." Salem Stone & Lime Co. v. Tepps to master does require such inspection for him." Salem Stone & Lime Co. v. Tepps to some extent, at least, on the faithful performance of duty on the part of his employer, and therefore what might be servant will be held to know that which by the exercise of reasonable diligence to the same extent to guard against a In Guthrie v. Louisville & N. R. Co. by the exercise of reasonable diligence ent danger might well not be required they might have learned, still, this rule does not by any means place the master breach of duty on the part of another, and servant upon equality as to the acts necessary to constitute diligence. He is not bound to search for defects, or make to perform, under the facts in this case, a critical inspection of the appliances which are provided for his use. These are duties of the employer." Pittsburgh, whether the master might not have neg-C. C. & St. L. R. Co. v. Woodward lected his duties in this reference. There (1894) 9 Ind. App. 169, 36 N. E. 442. being no special care imposed by the

c. Servant entitled to assume that the master has performed his duties properly.—The most common conception of the doctrine is that which treats it as a deduction from the principle already developed under another aspect in a previous chapter (see §§ 354, 355, ante), that, in the absence of circumstances suggestive of the imprudence of such a course, a servant is warranted in acting upon the assumption that his master has fulfilled, and will continue to fulfil, either personally or by means of some employee who represents him ad hanc vicem, his duty to see that due precautions are taken to protect his servants against avoidable and unnecessary dangers.3

inspect the tools, there could be no want if by the exercise of ordinary care he of it, or negligence, or carelessness, in might know it. The servant has a right not doing what he was not bound to do to assume that the master has furnished by the nature of his employment and him safe machinery, unless its condition

of those dangerous defects of which he (1891) 105 Mo. 526, 16 S. W. 943. has knowledge and which are obvious to his senses, but he is not bound to investi- ercise the same degree of care and diligate for himself a department of work gence as the master in inspecting and in-

machinery, and to discover defects there-in. But the employee is not under like diligence required of the employer, said: in. But the employee is not under like diligence required of the employer, said: obligation to resort to means for the discovery of defects. He has a right to presume that his employer has done his duty, and complied with the requirements of the law. And it is only when he has knowledge of defects in the machinery which he is required to use, and continues to use them without objection, that he is presumed to waive the defect.

Kroy v. Chicago, R. I. & P. R. Co.

(1871) 32 Iowa, 357. . . . Of course, the situation of the plaintiff and his means of knowledge may be proved in order to enable the jury to determine the fact of his knowledge of the condition of fact of his knowledge of the condition of provide suitable and proper appliances, the machinery with which he works. the employee had the right to rely on the But it is his knowledge, and not his master having discharged his duty in means of knowledge, which affects his this respect, and he is not bound to right to recover." Muldowney v. Illi- search for defects." Ohio & M. R. Co. nois C. R. Co. (1873) 36 Iowa, 470.

"The difference in the duty of the mas- E. 479. ter and servant is, the master is bound to look for defects, while the servant is structed to commence work at a particubound only to discover what the ordi- lar place . . . is under no obliganary use of the appliance would make tion, in order to protect himself from known to a man of ordinary prudence. the charge of contributory negligence,

nature of his position, nor obligation to The master is held to know the defect, the legal obligations arising out of the is such that by the exercise of ordinary relations existing between the parties." care he would have discovered its de"The servant is bound to take notice fects." Gutridge v. Missouri P. R. Co.

That a servant is not required to ex-

with which he has nothing to do, and set vestigating risks was also recognized in up his judgment against that of his masport of the control of the control

v. Fearcy (1890) 128 Ind. 204, 27 N.

"A person when employed and in-

This confidence on the part of the servant is more especially justifiable where a promise to remove certain dangerous conditions has been given (see chapter xxII., post), or where the servant is complying with a direct order (see chapter xxiii., post), or where he has been assured that there is no danger (see chapter xxiv., post).

Where the employer's rules charge two servants with the control

first to go all through the building, and him." Little Rock, M. R. & T. R. Co. machinery, and the danger he may incur in case he comes in contact with it in him that in entering upon the active discharge of the duties assigned him he asthe dangers directly connected therewith, and he has a right to assume that, in the performance of that particular duty, reasonable facilities therefor will be afforded him, without coming in contact with other unforeseen or unsuspected dangers." Swoboda v. Ward (1879) 40 Mich. 423.
"The duty of the company to this

class of its employees is to provide a roadway in all respects reasonably safe for the running of its trains and the performance of the functions imposed upon them by the exigencies of the service, and they have the right to assume without inquiry or investigation, that this duty has been discharged. The onus of inquiry or investigation is not upon them." Georgia P. R. Co. v. Davis (1890) 92 Ala. 300, 9 So. 252, quoted with approval in Birmingham R. & Electric Co. v. Allen (1892) 99 Ala. 359, 20 L. R. A. 457, 13 So. 8.

"It is the duty of the master, and not App. 271. of the servant, to exercise due care and diligence to ascertain whether the appliances furnished are safe and suitable, and a servant has a right to assume, without inquiry or examination, that the appliances furnished him are safe and suitable." Carter v. Oliver Oil Co. (1890) 34 S. C. 211, 13 S. E. 419, citing Lasure v. Graniteville Mfg. Co. (1882) 18 S. C. 281.

The servant "is not bound to make an examination to find defects. There is no such legal obligation imposed upon him. That is the duty of the master. The servant is not bound to search for

make himself familiar with each piece of v. Leverett (1886) 48 Ark. 333, 3 S. W. 50.

"The duty of the employee to exercise its then condition. It is sufficient for ordinary care as to any risk or cause of danger does not serve to relieve the company of its duty of careful and vigilant certains what he is expected to do, and inspection, or devolve it on the employee; for the latter, while in the exercise of ordinary care, and until admonished in some manner to the contrary, has a right to assume that the company has properly discharged the duties it owes to him to secure his safe-Ward ty." Curtis v. Chicago & N. W. R. Co. (1897) 95 Wis. 460, 70 N. W. 665.

"The burden of furnishing safe machinery, appliances, surroundings, etc., is upon the master, and while the master is not to be held liable for defects and dangers of which the servant is fully informed, yet the servant is authorized to rely upon the acts of the master in that respect, and is under no primary obligation to investigate and test the fitness and safety of the ma-chinery, surroundings, etc., in the ab-sence of notice that there is something wrong in that respect." Chicago & E. I. R. Co. v. Hines (1890) 132 Ill. 169, 23 N. E. 1021, Affirming (1889) 33 Ill.

"We think it equally well settled that it is not incumbent upon the employee to search for latent defects in machinery or implements furnished him by the employer, but that without such investigation he has the right to assume that they are safe and sufficient for the purpose." Porter v. Hannibal & St. J. R. Co. (1879) 71 Mo. 66, 36 Am. Rep. 454; Dale v. St. Louis, K. C. & N. R. Co. (1876) 63 Mo. 459.

"There are cases where, in the use of machinery, or in the prosecution of a work involving some degree of technical knowledge, the servant cannot be presumed to know the risks and dangers as dangers, except those risks which are well as the master, and in such cases the patent to ordinary observation; he has servant can rely on the master's superior a right to rely upon the judgment and knowledge and his assurance of the abdiscretion of his master, and that he sence of danger. This is also true where will fully perform his duty toward the danger proceeds from a part of the

and management of a certain piece of machinery, and one of them assumes to attend to a duty incident to the functions thus imposed

the exercise of due care, the same as if City, M. & B. R. Co. v. Burton (1892) necessary examinations have been made (1898) 79 Ill. App. 469; Goodrich v. by the master, and is not required, New York C. & H. R. R. Co. (1889) 116 by him for the purpose, to examine the Bird v. Long Island R. Co. (1896) 11 machinery as to fitness and sufficiency." App. Div. 134, 42 N. Y. Supp. 888; Chi-

what on the expectation" that the mas- N. Y. Supp. 1043, Leave to Appeal Deter will provide safe machinery, and is nied (1900) 49 App. Div. 636, 63 N. Y. "not called upon to be overstrict in an Supp. 1105; Louisville, N. A. & C. R. examination into its safety." Myers v. Co. v. Wright (1888) 115 Ind. 378, 16 Hudson Iron Co. (1889) 150 Mass. 125, N. E. 145; Boyce v. Fitzpatrick (1881) 22 N. E. 631. "A servant has a right 80 Ind. 526, 529; Nord Deutscher Lloyd to assume that his employer will not, by S. S. Co. v. Ingebregsten (1894) 57 N. any act over which the servant has no J. L. 401, 31 Atl. 619. control, render his position extra-haz- Variants upon this form of expression ardous." Wills v. Cape Girardeau S. are exemplified in the statements that W. R. Co. (1890) 44 Mo. App. 51.

has the right to rely upon the belief that that the master has performed his duty, the master has made it safe. Hence, and hence, to a certain extent, to rely the obligation of the servant to be ac- on the superior judgment of his master" quainted with the danger is not the (Russell v. Minneapolis & St. L. R. Co. same as that of the master. The latter [1884] 32 Minn. 230, 20 N. W. 147; is liable if it might have known of the Austin v. Appling [1891] 88 Ga. 54, 13 danger by the exercise of due care. Il- S. E. 955); that a servant has the right linois Steel Co. v. Schymanowski (1896) to rely on the superior knowledge and 162 Ill. 461, 44 N. E. 876, Affirming judgment of his master, and to assume (1895) 59 III. App. 32.

make an examination where he has a proper precautions to guard him from right to expect safety and there is noth-danger (Furen v. Sellers [1887] 39 La.

been said, rests on the employer or his stances authorize the servant to rely representative, and the servant may upon him because of want of equal opwell trust something to them in determining whether he can work in safety. Hennessy v. Boston (1894) 161 Mass. 502, 37 N. E. 668.

work or the character of appliances master's proper performance of his duty which the servant's labor does not call is also adverted to as the rationale of the him in contact with, or make him con- servant's exemption from the duty of inversant with their condition." O'Con- spection in the following, among many nell v. Clark (1897) 22 App. Div. 466, other, cases: Comben v. Belleville 48 N. Y. Supp. 74. Stone Co. (1896) 59 N. J. L. 226, 36 "The master is chargeable with knowl- Atl. 473; Louisville & N. R. Co. v. Orr edge which he might have acquired by (1890) 91 Ala. 554, 8 So. 360; Kansas he actually possessed it; whereas the 97 Ala. 240, 12 So. 88; Pawnee Coal Co. servant has the right to assume that all v. Roycc (1900) 184 Ill. 402, Reversing either in person or by another employed N. Y. 398, 5 L. R. A. 750, 22 N. E. 397; Houston & T. C. R. Co. v. McNamara cago & E. R. Co. v. Branyan (1894) 10 (1883) 59 Tex. 258, quoted with approval in Texas & P. R. Co. v. Johnson Shaw (1897) 16 Tex. Civ. App. 290, 41 (1896) 89 Tex. 519, 35 S. W. 1042.

A servant has a right "to rely some-Constr. Co. (1900) 47 App. Div. 311, 61

the servant "has a right to assume, in It is the master's duty to see that the the absence of notice to the contrary, or place of work is safe, and the servant of something to put him on inquiry, that the latter will not expose him to A servant is not under any duty to evitable risk, and that he has taken ing to put him on inquiry as to the Ann. 1011, 3 So. 363); that a servant is existence of danger. Southern P. R. not bound to inform himself as to the Co. v. Markey (1892; Tex.) 19 S. W. safety of the premises or material to be used, "where the master has superior The primary responsibility, it has means of knowledge, and the circumportunity." (Bogenschutz v. [1886] 84 Ky. 330, 1 S. W. 578). (Bogenschutz v. Smith

The servant's reliance upon the knowledge or judgment of the employee in The servant's right to rely upon the charge of the given instrumentality has upon both of them, the other may rely upon the presumption that that duty has been properly performed.4

If an appliance has just been inspected by the proper employee, the obligation of the servant to examine it may be said to reach the vanishing point.5

410. Doctrine considered with reference to the sufficiency of the complaint.—The servant is not required to aver facts showing affirmatively that he had no means of knowledge; it is sufficient to aver that he had no knowledge. 1 Nor is it necessary for him to allege that he carefully examined the dangerous instrumentality before using it.2

A complaint is not demurrable where the defects alleged are of such a nature that the injured servant was not bound to look out for them.3

410a. Doctrine considered with reference to the propriety of the instructions.—a. Correct.—In any case where no evidence has been introduced which would warrant the inference that the functions of the injured servant were of such a nature as to cast the duty of inspection upon him (see §§ 413 et seq., infra), an instruction which directly enunciates the doctrine that he is not subject to that duty

law, that the servant ought to have known of the risk. Helfenstein v. Medart (1896) 136 Mo. 595, 36 S. W. 863, 37 S. W. 829, 38 S. W. 294; McDonald v. Chicago, St. P. M. & O. R. Co. (1889) 41 Minn. 439, 43 N. W. 380.

In one case it was said that a station writer has found no other example of the logical sequence of ideas indicated in this statement.

On this ground it has been held that an engineer had a right to assume that the conductor and trainmen had repaired a leaky air pipe without cutting off the air brake from part of the train. Merritt v. Great Northern R. Co. (1900) 81 Minn. 496, 84 N. W. 321.

note 1, subd. (dd), infra).

This was the situation in Chicago & 458, 39 N. E. 324, Affirming (1892) 48 the servant's opportunities for knowl-

been treated as an element which ren- Ill. App. 243; New Orleans & N. E. R. ders it impossible to say, as matter of Co. v. Clements (1900) 40 C. C. A. 465, 100 Fed. 415.

<sup>1</sup> Ohio & M. R. Co. v. Pearcy (1890) 128 Ind. 197, 27 N. E. 479. <sup>2</sup> Boyce v. Schroeder (1898) 21 Ind. App. 28, 51 N. E. 376.

<sup>8</sup>Corley v. Coleman (1901) 113 Ga. 994, 39 S. E. 558 (complaint alleging deagent required to set the brakes of cars railment caused by a rotten tree falling left at his station has the right to presume that they are in proper condition rable). A complaint alleging that the for use, since it is not his duty to inspect such appliances or to repair them. negligence of the master in allowing the Chicago, B. & Q. R. Co. v. Kellogg track and rails along which loaded cars (1898) 54 Neb. 127, 74 N. W. 454. The were pushed to become worn, rusty, and rotten is not demurrable as showing on its face that the defects to which the injury was due were obvious. Salem-Bedford Stone Co. v. Hilt (1901) 26 Ind. App. 543, 59 N. E. 97.

An averment that four consecutive bents had been torn down, leaving no support for the roof of a tunnel in a mine, is not demurrable on the theory that it admits constructive knowledge on See also Peoria, D. & E. R. Co. v. the plaintiff's part. Louisville, N. A. & Johns (1891) 43 Ill. App. 83 (§ 411, C. R. Co. v. Cornelius (1895) 14 Ind. App. 399, 43 N. E. 31.

A complaint cannot be excepted to on E. I. R. Co. v. Kneirim (1894) 152 Ill. the ground that it does not show that

is, of course, correct. So, also, is an instruction which explicitly affirms the right of the servant to act upon the assumption that the master has properly performed his obligations in the premises.2

b. Incorrect.—On the other hand it is error to give, and proper to refuse, instructions by which the jury is given to understand that it was the servant's duty to know whether the dangerous conditions existed.3 or that he cannot recover if the dangerous conditions which

edge were not equal to those of the defendant, where the danger arose, not from the bad repair or decayed condition of the structure, but from its negligent purchased on the structure, but from its negligent purchased on the structure, but from its negligent purchased on the structure, but look as a right to assume, without look and has a right to assume, without look and the structure, but look one in the structure, the master track has been performed. Choic and purchased on the structure, the structure is properly instructed that a fore he makes the coupling, although he more." Jones v. Shaw (1897) 16 Tex. is bound to use such care and caution Civ. App. 290, 41 S. W. 690. as a reasonably prudent man would use under like circumstances. Galveston, caused a switchman to fall in front of H. & S. A. R. Co. v. Briggs (1895; Tex. a train, it is proper to instruct a jury Civ. App.) 30 S. W. 933. A jury is that he is not precluded from recovery properly charged that it is not the duty by the fact that he might, by the exer-of a railroad brakeman to inspect the cise of ordinary care, have ascertained track to discover defects therein which the condition of the track, and that the

consider him as a person entitled to assume that the master had performed his duty. Nord Deutscher Lloyd S. S. Co. 128 Ind. 208, 27 N. E. 479 (brakeman v. Ingebregsten (1894) 57 N. J. L. 401, injured by defect in brake staff). It 31 Atl. 619. A jury is properly in is proper to refuse an instruction that structed that, in the absence of knowl- the servant's knowledge of the danger edge to the contrary, a train hand has of coupling cars with mismatched coup-

edge were not equal to those of the deduty to furnish a safe track has been

In a case where insufficient ballasting may result in injury to him. Texas & action may be maintained unless he had P. R. Co. v. Magrill (1897) 15 Tex. "equal opportunity" with defendant's civ. App. 353, 40 S. W. 188. Civ. App. 353, 40 S. W. 188.

<sup>2</sup> In instructing the jury it is proper to tell them that, in determining whether the servant was negligent, they should 1730, 56 S. W. 14. See also § 414, consider him as a present entitled to as

a right to presume that the employer's lings is a necessary inference from the

caused the injury were known to him, or could have been discovered by ordinary care,4 or by proper care,5 or by reasonable care,6 or by the use of diligence,7 or by "care and diligence." 8

See also § 407, note 3, supra, and § 412, note 1, ad finem, infra.

fact that they were of different heights. ing to his failure to examine it, the ver-Muldowney v. Illinois C. R. Co. (1873) Muldowncy v. Illinois C. R. Co. (1873) dict should be for the defendant. Keber 36 Iowa, 470. A charge (words not v. Tower (1881) 11 Mo. App. 199. stated) which would give the jury to understand that a brakeman is required 42 C. C. A. 334, 102 Fed. 264; Jackson to inspect the drawheads of cars handled v. Missouri, K. & T. R. Co. (1899) 23 by him is properly refused. Missouri, Tex. Civ. App. 319, 55 S. W. 376 (work-K. & T. R. Co. v. Cox (1900; Tex. Civ. Man injured by results of foreman's App.) 55 S. W. 354, Rehearing Denied act); San Antonio & A. P. R. Co. v. (1900; Tex. Civ. App.) 56 S. W. 97. Brooking (1899; Tex. Civ. App.) 51 S. An instruction (words not stated) re-W. 537. A master is not entitled to an equipment the servant to acquaint himself quiring the servant to acquaint himself instruction that a servant is bound to with the condition of a railway track use ordinary care to see whether the

through a defective fence on to a track: The jury are instructed that, if the defect in the fence was known to the plaintiff he cannot recover unless the evicompany of such defect, and was induced to remain in the employment by a promise that the defect would be repaired. Dickson v. Omaha & St. L. R. Co. (1894) 124 Mo. 140, 25 L. R. A.

320, 27 S. W. 476.

It is a misdirection to charge the jury that the risk of the dangerous con-

tion denying recovery because of the assumption of the risk of an obvious defect was held to have been properly sumption arises as to the dangers created by objects extraneous to that with which a trainman is working. Gulf, C. & S. F. Oo. v. Gray (1901; Tex. Civ. App.) 63 S. W. 927.

It is error to instruct to instruct to the sumption of the track, an instruct to the dangers created to the assumption arises as to the dangers created by objects extraneous to that with the property of the reason assigned for holding it to be error to instruct the jury that if plaintiff, by the exercise of ordinary care, "could" have known of the greasy condition of the step, he was debarred

form, it is his duty to keep it in safe the question of negligence depended, not condition, and that if he failed to know on what he "could" have seen, but what of any rottenness or defect therein, ow- he "would" have seen if he had used

dict should be for the defendant. Reber

was held to have been properly refused in Atchison, T. & S. F. R. Co. v. Swarts (1897) 58 Kan. 235, 48 Pac. 953.

The following instruction was held erroneous in a case where cattle strayed (1897; Tex. Civ. App.) 41 S. W. 196. It is not error to refuse to charge that plaintiff assumed all the risks from all defects in appliances used by him, of which he might have known by the use dence also shows that he notified the of ordinary care. Missouri, K. & T. R. Co. v. Baker (1900; Tex. Civ. App.) 58 S. W. 964.

In a case where the following charge was requested, it was held that, in giving it, the words in brackets were properly omitted: "Now, if you believe it was a custom of defendant company not to inspect or repair cars when thus ditions was assumed by the servant if brought over to be loaded and returned, they were known or ought to have been known to him. Houston & T. C. R. Co. could have known it by the exercise of v. Kelly (1896; Tex. Civ. App.) 35 S. ordinary care], then he assumed the W. 878 (brakeman injured by defective risk of being injured by any defect in said car." Texas & P. R. Co. v. Archi-with the arailway fireman was injured, bald (1896) 21 C. C. A. 520, 41 U. S. while standing on the side of the engine App. 567, 75 Fed. 802, Affirmed in the conder by being crushed against a coal (1898) 170 U. S. 665, 42 L. ed. 1188, 18

It is error to instruct a jury that, if from a recovery, was that the word an engineer is required in the perform- "could" tended to cast on plaintiff the ance of his duties to go upon a plat-duty of inspection or inquiry, whereas

411. Decisions illustrative of the doctrine.— In the subjoined note are collected a large number of cases in which the refusal of the court to impute knowledge, as a matter of law, is based upon one or other of the various phases of the doctrine developed in the last four sections.1 For other cases illustrative of situations in which servants

H. & S. A. R. Co. (1900; Tex. Civ. Conway (1897) 169 III. 505, 48 N. E. App.) 57 S. W. 919. But the distinc- 483, Affirming (1896) 67 III. App. 155 tion thus taken seems to be of more (train derailed by defective track ran than dubious propriety. It is submitted that an instruction in which the word at work); Corley v. Coleman (1901) "would" is used is not less likely to be 113 Ga. 994, 39 S. E. 558 (rotten tree

maul and struck a laborer, it was held that the defendant could not complain of an instruction that the plaintiff could not recover if the defect was known or "might have been known by the use of ordinary care." Guthrie v. Louisville & N. R. Co. (1883) 11 Lea, 372, 47 Am. Rep. 286.

<sup>5</sup> Gulf, C. & S. F. R. Co. v. Kelly (1896; Tex. Civ. App.) 34 S. W. 140. <sup>a</sup> Gulf, C. & S. F. R. Co. v. Warner (1899) 22 Tex. Civ. App. 167, 54 S. W. 1064 (switchman injured by defec-

Porter v. Hannibal & St. J. R. Co. (1875) 60 Mo. 160; Terrell Compress Co. v. Arrington (1898; Tex. Civ. App.) 48 S. W. 59; Gulf, C. & S. F. R. Co. v. Hohl (1895; Tex. Civ. App.) 29 S. W.

(1893) 94 Ky. 220, 21 S. W. 866.

1(a) Railway tracks and appurten-ances.—It has frequently been recog-nized that trainmen, having no duties to perform in respect to construction and larly spaced); Illinois C. R. Co. v. San-maintenance of the roadway, are not ders (1897) 166 Ill. 270, 46 N. E. 799, chargeable with notice of defects therein (Georgia P. R. Co. v. Davis [1890] 92 filled space between ties); Little Rock Ala. 300, 9 So. 252); and that diligence & M. R. Co. v. Moseley (1893) 6 C. C. in inspecting a roadbed is not required of any servants of a railway company tween the ends of the ties); Cregg v. except those whose duty it is to inspect Chicago & W. M. R. Co. (1892) 91 Mich. it (Southern P. R. Co. v. Aylward 624, 52 N. W. 62 (piles of snow shoveled [1891] 79 Tex. 675, 15 S. W. 697). from between the rails of a side track

injured either by an accident to the Ft. S. R. Co. v. Voss (1892; Ark.) 18 train on which they were working, or by S. W. 172 (landslide obstructed track); the dangerous condition of the roadbed Pennsylvania Co. v. Brush (1891) 130 considered as a footway: Pennsylvania Ind. 347, 28 N. E. 615 (split ties); Dev-R. Co. v. Zink (1889) 126 Pa. 288, 17 lin v. Wabash, St. L. & P. R. Co. (1885) Atl. 614 (brakeman in yard injured by 87 Mo. 545 (engineer, though knowing derailment resulting from rotten ties); that rails are old, light, and well-worn,

ordinary care. Bookrum v. Galveston, secured); Lake Shore & M. S. R. Co. v. against tower in which a gateman was misleading than one in which the word fell across track); Chicago & N. W. R. employed is "could."

Co. v. Swett (1867) 45 Ill. 197, 92 Am. In a case where a sliver flew from a Dec. 206 (train fell through a culvert in bad repair); Southern P. R. Co. v. Aylward (1891) 79 Tex. 675, 15 S. W. 697 (bolt in guard rail had become loosened, and, as it projected, caught the plaintiff's foot while he was sitting on the edge of a hand car); Texas, S. V. & N. W. R. Co. v. Guy (1893; Tex. Civ. App.) 23 S. W. 633 (rotten tie caused a subsidence of the track, the result being that a car which was about to be coupled was thrown over to one side, and its drawhead slipped past that of the car to which it was about to be united); Houston & T. C. R. Co. v. McNamara (1883) 59 Tex. 258 (rotten ties); Northern P. R. Co. v. Teeter (1894) 11 C. C. A. 332, 27 U. S. App. 316, 63 Fed. 527 (hole under ties concealed by slush); Porter v. Hannibal & St. J. R. Co. (1879) 71 Mo (no ballast); Cleveland, C. C. & St. L R. Co. v. Sloan (1894) 11 Ind. App. 401, 39 N. E. 174 (no ballast; ties irregu-Affirming (1896) 66 Ill. App. 439 (un-& M. R. Co. v. Moseley (1893) 6 C. C. A. 225, 56 Fed. 1009 (want of filling be-In the following cases trainmen were and left lying beside it); Little Rock & Mehan v. Syracuse, B. & N. Y. R. Co. is not bound to pursue the inquiry and (1878) 73 N. Y. 585 (rails not properly determine whether the road is fit for have been held excusably ignorant of the risks, see §§ 438-440, 453a, 457, notes 1, 2, post.

use); Dale v. St. Louis, K. C. & N. R. Co. (1876) 63 Mo. 459 (defective rail joint); Chicago & E. R. Co. v. Binkopski (1897) 72 Ill. App. 22 (hole 6 inches (switchman not expected to measure deep close to track); Bird v. Long carefully the distance between a switch Island R. Co. (1896) 11 App. Div. 134, target and the rail); Georgia P. R. Co. 42 N. Y. Supp. 888; Louisville, N. A. & v. Davis (1890) 92 Ala. 300, 9 So. 252 C. R. Co. v. Wright (1888) 115 Ind. (brakeman not bound to know that 378, 16 N. E. 145; Atchison, T. & S. F. there is a projecting rock so close to the R. Co. v. Swarts (1897) 58 Kan. 235, track as to be dangerous); Chicago, R. 48 Pac. 953; Jones v. Shaw (1897) 16 I. & P. R. Co. v. Cleveland (1900) 92 Tex. Civ. App. 290, 41 S. W. 690; Hous- Ill. App. 308 (for jury to say whether ton & T. C. R. Co. v. McNamara (1883) trainman should have known whether a 59 Tex. 255; Southern P. R. Co. v. Mar- building erected for the purpose of sigkey (1892; Tex.) 19 S. W. 392; Internaling trains was dangerously near the national & G. N. R. Co. v. Bonatz track).

(1898; Tex. Civ. App.) 48 S. W. 767.

A brakeman is not required to direct

cars is not bound to observe whether caused by impediments and structures in Curtis v. Chicago & N. W. R. Co. the road,—such as a post erected close (1897) 95 Wis. 460, 70 N. W. 665. A to the track by a station agent, for the similar doctrine seems to be adopted in purpose of supporting a clothes line used Trott v. Chicago, R. I. & P. R. Co. by his family. Kearns v. Chicago, M. & (1901) 115 Iowa, 80, 86 N. W. 33. But St. P. R. Co. (1885) 66 Iowa, 599, 24 the precise rationale of the decision is N. W. 231. not quite clear. The obligation to noed in several other cases. See § 403,

broken frog, since he was not bound to 88. inquire into the condition of the whole ties).

into the location of sidings with respect was struck by a car standing on the was not discussed. side track).

(b) Obstructions beside railway tracks.-Johnston v. Oregon Short Line R. Co. (1892) 23 Or. 94, 31 Pac. 283

That a switchman engaged in coupling his attention to the discovery of dangers guard rails are blocked was laid down in no way required in the operation of

tice such conditions is, however, assert- to perform manual labor in moving and placing cars on yard tracks, and not to determine their location or see that the note 1 (b), ante.

In Waldhier v. Hannibal & St. J. R. tracks are clear of obstructions, is not Co. (1885) 87 Mo. 37, where a brake guilty of contributory negligence beman's foot caught under the loose plate cause he did not ascertain that a car had been left standing in such danger. of a frog, he knowing that the point of had been left standing in such danger-the frog was broken, but not that the ous proximity to an adjacent track as plate was loose, it was held that he was to render it unsafe for him to perform entitled to recover, unless a prudent perhis duties. Kansas City, M. & B. R. Co. son would not have worked about a v. Burton (1893) 97 Ala. 240, 12 So.

A railroad switchman has the right to frog. Gulf, C. & S. F. R. Co. v. Hohl presume that a car which he is ordered (1895; Tex. Civ. App.) 29 S. W. 1131 to assist in moving is on the track, and (track was not properly surfaced; guard that he will not be caught between it rail was not at proper distance from and cars standing on an adjoining track main rail, and its ends were not on the because it has been started while one pair of wheels is off of the track. Chi-A brakeman is not bound to examine cago & E. I. R. Co. v. Driscoll (1897) 70 Ill. App. 91, Reversed in (1898) 176 to adjoining tracks. Pennsylvania Co. III. 330, 52 N. E. 921; but the reversal v. McCormack (1891) 131 Ind. 250, 30 was on the ground that negligence on N. E. 27 (space between main and side the defendant's part was not proved. tracks being insufficient, a brakeman The question of contributory negligence

(c) Obstructions aboverailwayTrain hands are not bound to exam- tracks.—A trainman has a right to asine into the condition of the fences along sume that overhead bridges are conthe track. Dickson v. Omaha & St. L. structed sufficiently high to be safe. St. R. Co. (1894) 124 Mo. 140, 25 L. R. A. Louis, Ft. S. & W. R. Co. v. Irwin 320, 27 S. W. 476.

## 412. Doctrine considered in relation to the servant's opportunities of knowledge.-A doctrine resting on such foundations as those explained

brakeman is not required to go over the that casting was defective, and a brakeroad on a tour of inspection looking for man's hand was caught); Mason v. dangerous bridges, before he enters the Richmond & D. R. Co. (1892) 111 N. C. service. Louisville, N. A. & C. R. Co. 482, 18 L. R. A. 845, 16 S. E. 698 (no v. Wright (1888) 115 Ind. 378, 16 N. E. bumpers to prevent cars from coming to-

Affirmed in (1894) 142 N. Y. 634, 37 N. so worn that the round of the ladder E. 566 (board forming brake step was sprung in such a way that the defect Fordyce v. Culver (1893) 2 Tex. Civ. was only visible from below); Galves- App. 569, 22 S. W. 237 (top of car to ton, H. & S. A. R. Co. v. Templeton (1894; Tex. Civ. App.) 25 S. W. 135, rotten); Jones v. Shaw (1897) 16 Tex. Affirmed in (1894) 87 Tex. 42, 26 S. W. Civ. App. 290, 41 S. W. 690 (defective 1066 (defect in brake which a switchman could have ascertained only by mounting the car); Louisville, N. A. & a side ladder is safe, where its appearance is not such as to awaken his doubts, 2 L. R. A. 520, 19 N. E. 453 (brakeman in line) of his duty. or refuse to venture on it injured owing to absence of reach rod on brake beam, a defect only discoverable by looking under the car); Chicago & E. I. R. Co. v. Kneirim (1894) 152 Ill. In a case where a brakeman was in-458, 39 N. E. 324, Affirming (1892) 48 jured owing to the fact that the ratchet the fact that the middle projection of of another that it could not have been

5. gether); Denver, T. & Ft. W. R. Co. v. (d) Railway cars.—It is no part of Smock (1897) 23 Colo. 456, 48 Pac. 681 the ordinary duty of a brakeman to in- (drawheads in such a condition that spect the various parts of the brakes they slipped past each other); Taylor which he handles; nor does he hold him- v. Missouri P. R. Co. (1891; Mo.) 16 self out as having sufficient skill to de- S. W. 206 (switchman not, as matter of termine by an inspection their fitness law, chargeable with knowledge of the for use. Central R. Co. v. Haslett danger of using a coupling consisting of (1884) 74 Ga. 59.

Haslett danger of using a coupling consisting of a piece of brake beam rod, partly bent, Knowledge was held not to be imput- but not sufficiently to stay in place when Knowledge was held not to be imputable to trainmen, as a matter of law, the cars came together); Louisville, N. in the following cases: Goodrich v. A. & C. R. Co. v. Howell (1897) 147 New York C. & H. R. R. Co. (1889) Ind. 266, 45 N. E. 584 (broken link); 116 N. Y. 398, 5 L. R. A. 750, 22 N. E. Bowers v. Union P. R. Co. (1885) 4 397 (bumpers of unequal height); Randel Utah, 215, 7 Pac. 251 (workman emsier v. Minneapolis & St. L. R. Co. ployed as "track-fixer," and to assist in (1884) 32 Minn. 332, 20 N. W. 332 replacing upon the track the cars which (ratchet was so much worn that it should get off a certain curve, not would not hold the ratchet wheel when chargeable with knowledge that the it was shaken by the movement of the couplings were made of iron of a bad it was shaken by the movement of the couplings were made of iron of a bad cars); Ohio & M. R. Co. v. Pearcy quality); Texas Mexican R. Co. v. King (1890) 128 Ind. 208, 27 N. E. 479 (1896) 14 Tex. Civ. App. 290, 37 S. W. (threads of screw on top of brake staff 34 (partition between upper and lower were so worn that they did not hold the part of drawhead was broken); Misnut which secured the wheel); Internasouri, K. & T. R. Co. v. Chambers tional & G. N. R. Co. v. Emery (1896) (1897) 17 Tex. Civ. App. 487, 43 S. W. 14 Tex. Civ. App. 551, 40 S. W. 149 1090 (wood in which the screw holding ("dog" intended to catch in the ratchet a round of a ladder was inserted was of brake was too loose to hold it); Van so rotten that the screw became loose); Tassell v. New York, L. E. & W. R. Co. Illinois C. R. Co. v. Hilliard (1896) 99 (1892) 1 Misc. 299, 20 N. Y. Supp. 708, Ky. 684, 37 S. W. 75 (top of bolt was Affirmed in (1894) 142 N. Y. 634, 37 N. so worn that the round of the ladder

of his duty, or refuse to venture on it. Goodman v. Richmond & D. R. Co. (1886) 81 Va. 576.

Ill. App. 243 (helper in yard, engaged of a brake would not hold, the court de-in switching, not bound to examine clined to set aside a verdict for the brakes); Bradshaw v. Chicago, R. I. & plaintiff, where answers to interroga-P. R. Co. (1897) 58 Kan. 618, 50 Pac. tories were conflicting, the purport of 876 (janney coupler slipped too far into one being that the defect could have been the casting which received it, owing to readily discovered by the plaintiff, and in § 409, supra, manifestly enures to the benefit of the servant, even though he may have had an opportunity to examine the instrumen-

Matchett v. Cincinnati, W. & M. R. Co. (1892) 132 Ind. 334, 31 N. E.

In a case where a car which the servant was ordered to mount careened, owing to the fact that the side bearings were missing and it was not properly blocked, it was held that he was not negligent in failing to examine into its condition before he obeyed the order. Southern R. Co. v. Hart (1901; Ky.) 64 S. W. 650.

The rule that trainmen are not bound to inspect cars is applicable to foreign cars, as well as to those belonging to their employer. New Orleans & N. E. R. Co. v. Clements (1900) 40 C. C. A. 465, 100 Fed. 415 (nut which held wheel of brake on the rod was missing); Southern R. Co. v. Duvall (1900) 22 Ky. L. Rep. 56, 56 S. W. 988 (car dangerously high compared with the eleva-

tion of overhead bridges).

A brakeman in a repair yard is not required to inspect a car returned to the ordinary tracks for use after being repaired, before attempting to couple another car thereto. Jennings v. New York, N. H. & H. R. Co. (1895) 12 Misc. 408, 33 N. Y. Supp. 585.

The risk occasioned by the want of stakes or cleats on a car loaded with stone and to be coupled to another is not so obvious that a brakeman is jury whether a brakeman is justified in fect not stated). assuming that the load is properly se-

discovered if an examination had been 999 (engineer injured by top-heavy locomotive); St. Louis & S. F. R. Co. v. McClain (1891) 80 Tex. 85, 15 S. W. 789 (fireman injured); Tyler S. E. R. Co. v. Rasberry (1896) 13 Tex. Civ. App. 185, 34 S. W. 794 (fireman not necessarily negligent in continuing to work on locomotive with defects inside the boiler); Sabine & E. T. R. Co. v. Ewing (1892) 1 Tex. Civ. App. 531, 21 S. W. 700 (fireman injured by defective coupling between engine and tender); Atchison, T. & S. F. R. Co. v. Mulligan (1895) 14 C. C. A. 547, 34 U. S. App. 1, 67 Fed. 569 (helper of engine hostler injured by a cracked footboard); Gulf, C. & S. F. R. Co. v. Kelly (1896; Tex. Civ. App.) 34 S. W. 140 (coal heaver injured, while cleaning out the ash pan, by a defective damper).

(f) Hand cars.—Section hands are not chargeable with a knowledge of latent defects in hand cars. Siela v. Hannibal & St. J. R. Co. (1884) 82 Mo. 430 (section hand allowed to recover where he was injured by the breaking of a brittle handle of a hand car, the defect not being obvious to him by reason of the fact that he was near sighted and the handle was covered with paint); Covey v. Hannibal & St. J. R. Co. (1885) 86 Mo. 641, S. C. (1887) 27 Mo. App. 170 (handle was made of brittle wood); Gulf, C. & S. F. R. Co. v. Silliphant (1888) 70 Tex. 623, 8 S. W. 673 (break chargeable, as matter of law, with in lever covered by iron socket); East knowledge of it, where it is shown that Tennessee, V. & G. R. Co. v. Smith the company's rules required the stones (1882) 9 Lea, 685 (latent unsoundness to be thus secured. Under such circum- in lever); Burton v. Missouri P. R. Co. stances it is at least a question for the (1888) 32 Mo. App. 455 (particular de-

(g) Scaffolds, platforms, etc.-A servcured. Austin v. Fitchburg R. Co. and working on a scaffold has a right to (1899) 172 Mass. 484, 52 N. E. 527 (con-assume that it is safe, and is not bound cussion of coupling threw a stone off to examine it. Benzing v. Steinway & Sons (1886) 101 N. Y. 547, 5 N. E. 449 A car repairer going under a car (defect on lower side of plank); Reber which is raised up for the purpose of repairs does not assume the risk of latest defects in the car, which he has not been ordered to repair, but on account Edward Hines Lumber Co. v. Ligas of which it falls and crushes him. G. (1896) 68 Ill. App. 523 (1898) 172 Ill. H. Hammond Co. v. Mason (1895) 12 Ill. App. 523 (1898) 172 Ill. H. Hammond Co. v. Mason (1895) 12 Ill. App. 523 (1898) 172 Ill. H. Hammond Co. v. Mason (1895) 12 Ill. App. 523 (1898) 172 Ill. Lapp. 523 (1898) 172 Ill. H. Hammond Co. v. Mason (1895) 12 Ill. App. 523 (1898) 172 Ill. App. 523 (1898) 172 Ill. H. Hammond Co. v. Mason (1895) 12 Ill. App. 523 (1898) 172 Ill. App. 68 Ill. App. 69 Ill. App. 69 Ill. App. 523 (1898) 172 Ill. App. 69 Ill. App. 123 Use, or have occasion to be on, locomotives are not bound to inspect them. and tipped up when the servant stepped Galveston, H. & S. A. R. Co. v. Smith on it); Chicago & A. R. Co. v. Maroney Galveston, H. & S. A. R. Co. v. Smith on it); Chicago & A. R. Co. v. Maroney (1900) 24 Tex. Civ. App. 127, 57 S. W. (1896) 67 Ill. App. 618 (insufficient

bracing and other defects not specified); N. Y. S. R. 626, 21 N. Y. Supp. 874 (cross-grained plank gave way under an iron worker); Cunningham v. Sicilian Asphalt Paving Co. (1900) 49 App. Div. pair defects. 380, 63 N. Y. Supp. 357 (rotten and wormeaten plank broke under servant); Cole v. Warren Mfg. Co. (1899) 63 N. to be negligent in standing on the end planks of a scaffold which supported a line of overhead shafting).

A common laborer employed in bringing timbers and in carrying a heavy girder, although a carpenter by trade, is not bound to inspect the materials in not bound to examine into the condition a scaffold which he helps to build for the purpose of carrying such timber over it. Goldie v. Werner (1893) 50 Ill. Atl. 368 (charge to jury). App. 297, Affirmed in (1894) 151 Ill. 551, 38 N. E. 95 (knot in a joist).

A servant working on or near a pile of lumber is not bound to examine it for the purpose of ascertaining whether it has been safely constructed. Zintek v. Stimson Mill Co. (1894) 9 Wash. 395, 37 Pac. 340; Rigdon v. Allegany Lumber Co. (1891) 37 N. Y. S. R. 514, 13 N. Y. Supp. 871.

A servant set to work beside a pile of ore from which material is to be loosened by the use of explosives is not since the accident would have happened bound to study the conditions affecting without his fault, if the existence of acthe stability of the ore at the sides of tual danger could not have been ascerthe pile. Illinois Steel Co. v. Schyman- tained without an examination of the owski (1896) 162 Ill. 447, 44 N. E. 876. under side of the floor or of the parts

bound to examine a gangway before going on it. Alabaster Co. v. Lonergan (1900) 90 Ill. App. 353 (defect not

specified).

Whether a break in a plank guarding a tank was obvious to the servant was held to be a question for jury, as it was only 3 inches high, and liable to be concealed by accumulations of dirt. Moore v. St. Louis Wire Mill Co. (1893) 55 Mo. App. 491. A servant has been allowed to recover where a bracket supporting the plank footpath on which he was working was knocked away by a passing wagon, the result being that the footpath fell. The grounds assigned for the decision were that the liability of the structure to be injured in this way was not a risk "open to observa-tion," and that the servant was not required to notice the manner in which the planks were sustained underneath. Sellick v. J. Langdon & Co. (1891) 37 N. Y. S. R. 511, 13 N. Y. Supp. 858.

(i) Runways.—An employee McLean v. Standard Oil Co. (1893) 50 brewery has the right to rely on the safety of a run down which beer kegs are permitted to slide into the cellar, where it is not part of his duty to re-Mayer v. Liebmann (1897) 16 App. Div. 54, 44 N. Y. Supp. 1067.

(j) Buildings.—A factory hand hired J. L. 626, 44 Atl. 647 (plaintiff held not to do knitting not required to examine into the safe construction of a privy provided for his use, or chargeable with knowledge whether it was or was not safely constructed. Ryan v. Fowler (1862) 24 N. Y. 410, 82 Am. Dec. 315.

> A carpenter hired to work on a roof of the building. Giles v. Diamond State Iron Co. (1887) 7 Houst. (Del.) 453, 8

A servant not a carpenter entitled to assume that roof of building in which he works is strong enough to protect him from ice which may fall from an adjacent building. Gaul v. Rochester Paper Co. (1893) 72 Hun, 485, 25 N. Y.

Supp. 443.

The mere fact that a servant knows that the floor of his master's shop is decayed will not, as a matter of law, prevent him from recovering for injuries received by its giving way under him, (h) Gangways.—A servant is not of the building under it. Hulddleston v. Lowell Machine Shop (1871) 106 Mass. 282.

> In a case where the moving of a loaded truck over the ends of the loose boards of a defective floor caused them to tip up, and thus throw a bale of cotton on the plaintiff, it was held that he was not, as a matter of law, guilty of negligence in having knelt down underneath the bale just before the accident. Norman v. Wabash R. Co. (1894) 10 C. C. A. 617, 22 U. S. App. 505, 62 Fed. 727.

> (k) Seats.—A servant is not chargeable with knowledge that a seat is liable to tip up, where the amount of leverage can only be ascertained by looking underneath it. Spaulding v. Forbes Lithograph Mfg. Co. (1898) 171 Mass. 271, 50 N. E. 543.

(1) Unguarded openings.—A servant who, while employed at a part of the premises where he had never worked before, stepped back into an uncovered barv. Tacoma Mill Co. (1900) 22 Wash. 88, 60 Pac. 53.

A servant who has been working for one day on a trestle within a few feet of an uncovered hole leading down into a coal bunker is not, as matter of law, negligent in assuming, when his duties require him on a subsequent occasion to work near it during the night and with near a knot in the side piece, is an obinsufficient light, that it will be kept vious risk, is for the jury. Flanigan v. covered when not in use. Boyle v. Degnon-McLean Constr. Co. (1900) 47 App. J. L. 647, 44 Atl. 762. Div. 311, 61 N. Y. Supp. 1043, leave to appeal denied in (1900) 49 App. Div. employee who injures his hand while 636, 63 N. Y. Supp. 1105. Where a hole engaged in rubbing off the cylinder had been dug in the floor of a boiler known as a "beater" is not negligent in room in preparing a foundation for a failing to examine it with a view to dispiece of machinery, and left partly cov- covering dangers of which there is no ered, but in an insecure and dangerous outward indication. Howard Oil Co. v. condition, a fireman had a right to rely Farmer (1882) 56 Tex. 301. A servon the general appearance of safety, and ant is not bound to inspect the condition the presumption that his employer had of a pressing machine which he is operprovided him a safe place in which to ating. Pioneer Cooperage Co. v. Rowork, and was not bound to examine manowicz (1899) 85 Ill. App. 407, Afthe hole critically before stepping on the firmed in (1900) 186 Ill. 9, 57 N. E. covering. Frye v. Bath Gas & Electric 864 (spring so loose that it did not stop Co. (1900) 94 Me. 17, 46 Atl. 804.

A stevedore injured by falling into an taken off the treadle). unguarded trimming hole in a dark place between decks was justified in assuming that the place was as safe as on the last preceding workday. The Protos (1891) 48 Fed. 919.

A member of an ice gang employed to put ice on board a ship is not necessarily negligent in assuming that a hatchway covered by a tarpaulin for the purpose of receiving the ice is in proper condition, notwithstanding one of the hatch covers has been removed, where there is nothing from its appearance to indicate such removal, and that is the customary way of preparing a ship for taking on ice. Perkins v. Furness, W. & Co. (1897) 167 Mass. 403, 45 N. E.

(m) Telegraph poles.—A lineman who is ordered to climb a trolley pole and cut a guy wire is not imprudent in taking it for granted that the pole is planted sufficiently deep to stand without the support of the wire, where noth-So. 284. The contributory negligence of 204 (worn link). the servant was held to be for the jury,

rel of hot water close by, the top of where the arm of a telegraph pole broke, which was level with the surface of the owing to a defect which was obvious on ground, cannot be debarred from recov- inspection, but which was partially conery on the ground that he should have cealed by an insulator and obscured to looked out for such a pitfall. Johnson some extent by paint. McDonald v. v. Tacoma Mill Co. (1900) 22 Wash. 88, Postal Teleg. Co. (1900) 22 R. I. 131, 46 Atl. 407.

(n) Ladders.—As such a defect is not ascertainable without inspection, the question whether the breaking of a ladder, caused by a cross piece therein breaking because a nail that fastened its left end to the side piece was driven Guggenheim Smelting Co. (1899) 63 N.

(o) Machinery. — An inexperienced the press when the operator's foot was

An oiler on a steamship is not chargeable with knowledge of the condition of the cushion valves of the feed-pump cylinder, where, although it was his duty to examine the pump to see that it was all right, it was not his duty to examine the cushion valves, which were adjusted when the pipe was set up, and not thereafter touched. Hoes v. Ocean S. S. Co. (1900) 56 App. Div. 259, 67 N. Y. Supp. 782. A servant is not chargeable with knowledge of a fracture in the leg of a steam drill at a place where it is concealed by the socket. Salem Stone & Lime Co. v. Tepps (1894) 10 Ind. App. 516, 38 N. E. 229. Knowledge of the defective condition of a "jack" not imputed, as a matter of law, to a servant, where it is only by taking the apparatus apart that the defect can be discovered. Missouri, K. & T. R. Co. v. Young (1896) 4 Kan. App. 219, 45 Pac. 963.

(p) Elevators.—A workman who is merely employed to load, ride on, and ing indicates that the planting is too unload an elevator is not necessarily shallow to be secure without the wire. negligent in assuming that the elevator Bland v. Shreveport Belt R. Co. (1896) chain is sound. Mulvey v. Rhode Is-48 La. Ann. 1057, 36 L. R. A. 114, 20 land Locomotive Works (1885) 14 R. I.

(q) Derricks.-A quarryman operat-

ing a derrick did not assume the risk v. Schroeder (1898) 21 Ind. App. 28, of being injured by the breaking of the 51 N. E. 376. mast, where it was dry-rotted in the centre, but sound on the surface. Jar- singletree of a wagon is such an obvious vis v. Northern New York Marble Co. defect as to charge a driver with conservant had any notice that a derrick caused by the breaking of the clip was which fell on him was defective, or of held to be for the jury in Bowman v. the danger attending its use, a finding, Texas Brewing Co. (1897) 17 Tex. Civ. in an action for the resulting injuries, App. 446, 43 S. W. 808, but the nature that the manner of its construction and of the defect is not stated. the danger attending its use were as apparent to the servant at the time it fell, the excavating of a tunnel is not bound and prior thereto, as to defendant, is er- to look for hidden defects in the roof. roneous. Westbrook v. Crowdus (1900; Louisville, N. A. & C. R. Co. v. Cor-Tex. Civ. App.) 58 S. W. 195.

(r) Other hoisting appliances. — A E. 31. servant shoveling coal into tubs which are elevated by machinery to be emptied not, as a matter of law, chargeable with is not bound to make a personal inspec-knowledge that there is a defect in a tion of a tub before using it, to see if pipe which carries to the open air the there is any defect in a clasp or fasten- smoke from the furnace of an engine ing for automatically dumping or empty- boiler on one of the lower levels, and ing (1894) 54 Ill. App. 622. An un- Mountain Gold Min. Co. (1880) 57 Cal. derground laborer in a mine is not, as 20. matter of law, chargeable with notice of a defect in the hoisting machinery, ticular place in a mine is not required Myers v. Hudson Iron Co. (1889) 150 to make a critical examination of that Mass. 125, 22 N. E. 631. A stevedore's place. Consolidated Coal Co. v. Bruce employee is not bound to examine hoisting appliances. The Carolina (1886) 30 Fed. 199. A workman is not re- v. Shanley (1900) 185 Ill. 390, 56 N. quired to examine into the strength of a E. 1105, Affirming (1899) 86 Ill. App. steel loop used for raising the spans of 144. a bridge. Mexican C. R. Co. v. Murray (1900) 42 C. C. A. 334, 102 Fed. 264.

(s) Chains.—The foreman of a blacksmith shop is not, as matter of law, 159, 31 N. E. 585. chargeable with knowledge that a chain used to support iron and steel bars while rooms was broken through by a blast they are being manufactured into va- was not imputed to a miner. Summit rious implements was fractured and cor-Nicholds v. Crystal Plate Glass Co. (1894) 126 Mo. 55, 27 S. W. 516, 28 S. W. 991.

(t) Vehicles.—A porter is not chargeable with knowledge of a defect in a been discovered by examining the lower those of one who, while making an exside of the bed. Missouri P. R. Co. v. cavation in loose earth, sand, or gravel, Crenshaw (1888) 71 Tex. 340, 9 S. W. is required to take precautions to pre-262.

In an action by a servant to recover for injuries sustained from the falling of a load of lumber from a cart which he was driving, by reason of a wheel Hancock v. Keene (1892) 5 Ind. App. separating from the axle, it need not be 408, 32 N. E. 329. averred that the plaintiff carefully examined the truck before using. Boyce safe gangway with new timbers just put Vol. I. M. & S.—73.

Whether or not a crack or flaw in the (1900) 55 App. Div. 272, 67 N. Y. Supp. tributory negligence precluding recovery 78. Where there is no evidence that a for injuries sustained in a runaway

> (u) Tunnels.-A servant assisting in nelius (1896) 14 Ind. App. 399, 43 N.

(v) Mines.—A laborer in a mine is Pennsylvania Coal Co. v. Kelly that the timbers of the mine may conse-(1895) 156 Ill. 9, 40 N. E. 938, Affirm- quently be set on fire. Beeson v. Green

> A servant directed to work in a par-(1893) 47 Ill. App. 444, Affirmed in (1894) 150 Ill. 449, 37 N. E. 912; Ross

> A miner is not bound to search for hidden defects in a tunnel. Parke County Coal Co. v. Barth (1892) 5 Ind. App.

> Knowledge that a rib between two Coal Co. v. Shaw (1896) 16 Ind. App. 9, 44 N. E. 676.

The driver of a coal car in a mine is not bound, equally with his employer, to inspect the roof of a passage through which the car is driven. The obligations baggage truck, which could only have of such an employee are different from vent injury to himself through the giving way of the sides or top of such excavation, which he has deprived of support in the prosecution of the work.

A workman who sees an apparently

in place, and knows that under the eye mixture of sand and minerals therein, of his employer experienced miners have although its true character could have just finished the work of making the been determined by the use of tools, the gangway safe, and is commanded by his employer to work in a particular place, is not required to enter upon an inspection of the place between the timbers to determine whether such workmen have performed their duty with care, or have left loose material liable to fall upon him. him. Vanesse v. Catsburg Coal Co. (1893) 159 Pa. 403, 28 Atl. 200.

Where an examination of defendant's mine was made, but the record did not show that all the conditions were safe, and plaintiff was permitted to enter the mine to work, and was injured, the fact that he did not examine the record did. not prevent him from charging defendant with a wilful violation of the mining act, § 4, providing that all mines shall be examined every morning, and that no one shall be permitted to enter until all the conditions are reported to be safe. Pawnee Coal Co. v. Royce (1900) 184 Ill. 402, 56 N. E. 621, Reversing (1898) 79 Ill. App. 469.

In Eddy v. Aurora Iron Min. Co. (1890) 81 Mich. 555, 46 N. W. 17, it was recognized that a servant might be guilty of contributory negligence in "failing to find out" a defect in the timbering of a mine; but it was held that, under the circumstances, such negligence could not be attributed to him as a mat-

ter of law.

For other mining cases, see subd. (r), supra; and § 413, notes 1, 4, infra; and 210, 51 S. W. 16).

§ 410, note 1, supra.

servant's duties to study the conditions lathe, by the fall of an unfastened plank affecting the stability of the earth at the reaching from a runway to the counsides of a trench in which he is set to tershaft timbers, and used to obtain acwork. Hennessy v. Boston (1894) 161 cess to a pulley for the purpose of ad-Mass. 502, 37 N. E. 668; Bartolomeo v. justing a belt, will not be declared. as McKnight (1901) 178 Mass. 242, 59 N.

(x) Banks of earth, etc.—An employee engaged in shoveling dirt into a ment. Quimby v. Boston & M. R. Co. car from a bank of hardpan so hard (1898) 69 N. H. 334, 41 Atl. 266. that it has to be blasted is not, as matployee in a quarry is not, as matter of distinguished from stone, was not open outside of a building, where his business to visual inspection because of the ad- is on the inside, and his attention has

evidence being that both stone and mud banks were to be met with in the quarry. Peerless Stone Co. v. Wray (1898) 152 Ind. 27, 51 N. E. 326.

(y) Quarries.—In view of the principle that the servant has a right to assume that his employer has fulfilled his duty, it is for the jury to say whether a quarryman should have appreciated the danger created by the sagging of a drag rope. Comben v. Belleville Stone Co. (1897) 59 N. J. L. 226, 36 Atl. 473.

(z) Electric appliances.—In a case where a servant while lubricating a dynamo box came in contact with a charged wire, it was held that, as no proof was made that he appreciated the danger, the presumption was that he did not appreciate it, for in that case he would have avoided the risk of contact. Myhan v. Louisiana Electric Light de P. Co. (1889) 41 La. Ann. 964, 7 L. R. A. 172, 6 So. 799.

(aa) Risks from the fall of heavy objects.—(See also subd. (r), (w), (x) Recovery has been allowed supra).where a door fell on a servant, owing to the fact that the rope which supported it was not properly fastened (Austin v. Appling [1891] 88 Ga. 54, 13 S. E. 955); and where a tank fell on a laborer, owing to the fact that a nut slipped off a bolt (Champion Ice Mfg. & Cold Storage Co. v. Carter [1899] 21 Ky. L. Rep.

A machinist of several years' experi-(w) Trenches.—It is no part of a ence who is hurt, while working at his justing a belt, will not be declared, as matter of law, to have been injured as the result of an obvious danger or a risk assumed as an incident to his employ-

A servant employed to dress stone is ter of law, chargeable with knowledge not required to examine the stones in of the risk of injury from an unexpect- proximity to that upon which he is ed fall of earth, where the evidence is working, to ascertain if they are secure-that the bank looked solid, but was ly placed and free from danger of fallreally seamed with cracks, the result of ing over upon him. Blondin v. Oolitic previous blasts. Hill v. Winston (1898) Quarry Co. (1894) 11 Ind. App. 395, 37 73 Minn. 80, 75 N. W. 1030. An em. N. E. 812.

(bb) Inadequate provision against fire. law, chargeable with knowledge of the -An employee in a factory is not, as a risk from the fall of an overhanging matter of law, chargeable with knowlmud bank, the character of which, as edge that there is no fire escape on the never been called to the absence of the R. Co. v. Johns (1891) 43 Ill. App. 83. escape. Gorman v. McArdle (1893) 67 Hun, 484, 22 N. Y. Supp. 479.

(cc) Incompetency of fellow servants. -In the absence of specific knowledge or information putting him on inquiry, a servant is not required to examine into the competency of the servants employed to work with him. He is warranted in acting upon the assumption that the master has performed his duty in selecting and retaining those serv-Texas & P. R. Co. v. Johnson (1896) 89 Tex. 519, 35 S. W. 1042; St. error to instruct the jury that, if the Louis, A. & T. H. R. R. Co. v. Corgan plaintiff had the same means of know (1891) 49 Ill. App. 220; Charles Pope ing the incompetency as defendant had, Glucose Co. v. Byrne (1895) 60 Ill. App. 20; Pennsylvania Co. v. Roney (1883) 89 Ind. 453, 46 Am. Rep. 173; Chicago & E. I. R. Co. v. Beatty (1895) 13 Ind. App. 604, 40 N. E. 753.

In United States Rolling Stock Co. v. Wilder (1886) 116 Ill. 100, 5 N. E. 92, the law was thus laid down: "The contention of appellant, as we understand it, is that where one is employed as an operative in a particular branch of service he is bound to investigate and find out, at his peril, whether the common master has used reasonable care and prudence in the selection of those already employed in the same branch of service. The law imposes no such duty. One thus employed is warranted in assuming that the master has discharged his duty in this respect, and until notice to the contrary is brought home to the employee he may safely act upon that hypothesis. All that the law demands of one thus employed is that he keep his eyes open to what is passing before him, and avail himself of such information as he may receive with respect to the habits and characteristics of his fellow servants."

A switchman who has complained of (See § 202, ante.) Same case on secthe incompetency of a fireman, and reond appeal, Texas & P. R. Co. v. Johnceived a promise that he shall be reson (1897) 90 Tex. 304, 38 S. W. 520, moved, is not necessarily negligent be- Denying Writ of Error in (1896) 14 cause, on a subsequent occasion, when Tex. Civ. App. 566, 37 S. W. 973. he has to signal to the same engine, he does not look closely at the fireman for who is not notified that a horse furthe purpose of ascertaining whether the nished for his use is vicious, has a promised change of employees has been prima facie right to recover damages made. Galveston, H. & S. A. R. Co. v. for injuries caused by the animal. Eckles (1900; Tex. Civ. App.) 60 S. W. Helmke v. Stetler (1893) 69 Hun, 107, 830.

duty by a fellow servant.—A servant is 29 L. R. A. 708, 64 N. W. 382; Leigh not bound to ascertain whether a coem- v. Omaha Street R. Co. (1893) 36 Neb. ployee who is not consociated with him 131, 54 N. W. 134; George H. Hammond has discharged his duty to report the Co. v. Johnson (1893) 38 Neb. 244, 56 existence of a defect. Peoria, D. & E. N. W. 967. (In the last two cases the

As a servant may, in the absence of actual knowledge of the incapacity of a colaborer, assume that he is competent, it is improper, in an action for injuries caused by his negligence, to instruct the jury that plaintiff would be put on inquiry to ascertain, before engaging in work with such laborer, whether he was a man of ordinary intellect and understood the English language. B. Lantry Sons v. Lowrie (1900; Tex. Civ. App.) 58 S. W. 837. So, it was he could not recover. International & G. N. R. Co. v. Cook (1897) 16 Tex. Civ. App. 386, 41 S. W. 665.

As a servant is not charged with the same obligation of inquiry as the master, the general reputation of the delinquent servant for carelessness, recklessness, or other bad qualities is not in itself evidence from which the injured servant's knowledge of his incompetency can be inferred. Olsen v. North Pacific Lumber Co. (1900) 40 C. C. A. 427, 100 Fed. 384, holding it to be error to give an instruction from which the jury might be led to suppose that such a reputation charged the injured servant, not less than the master, with notice of the incompetency.

To escape liability on this ground, the defendant must go further and show that the injured servant knew of the general reputation, or had at some time been placed in such a position that a jury might reasonably infer that he did actually know of it. Texas & P. R. Co. v. Johnson (1896) 89 Tex. 519, 35 S. W. 1042, contrasting the different principle which prevails when the master's constructive knowledge is in question.

(ee) Vicious animals.—An employee 23 N. Y. Supp. 392; Lane v. Minnesota (dd) Nonperformance of a specific State Agri. Soc. (1895) 62 Minn. 175, tality which caused his injury. There are, of course, still stronger grounds for holding him to be relieved from any obligation to inspect the plant, where he had no time for such inspection because his attention was absorbed in engrossing duties which demanded rapid action, or because, for some other reason, an examination was

in regard to inanimate appliances.)

(ff) System.—An employee is not the employer in carrying on his busi-shot by a person who is in adverse posness, or because, by ordinary care, he session. Baxter v. Roberts (1872) 44 might have known of the methods, and Cal. 188, 13 Am. Rep. 160. inferred therefrom that danger from in-\*\*Masters and Servants are not equally sufficient appliances might arise. Texas chargeable with knowledge merely for & P. R. Co. v. Archibald (1898) 170 U. the reason that both have equal oppors. 65, 42 L. ed. 1188, 18 Sup. Ct. Rep. tunities for acquiring knowledge. Sa-777, Affirming (1896) 21 C. C. A. 520, lem Stone & Lime Co. v. Tepps (1894) 41 U. S. App. 567, 75 Fed. 802. A serv- 10 Ind. App. 516, 38 N. E. 229. ant is not bound to inquire what regulations have been made to secure his knowledge of a defective rail joint merepresumed to know whether or not the upon it for a year or more. Tewas & rules and schedule provided for the run- P. R. Co. v. Magrill (1897) 15 Tex. Civ. fective and ambiguous. Georgia R. & loose spikes).

69 N. W. 67.

is one with regard to which he has a ficiency of the handle, and was, under right to expect to be warned. Guirney the evidence, guilty of contributory negv. St. Paul, M. & M. R. Co. (1890) 43 ligence in failing to observe its unsafe Minn. 496, 46 N. W. 78. The court recondition. The fact that a servant marked that the liability of the prinhad an opportunity to inspect the latch cipal does not, in such a case, depend of a bucket for some time before it

special point made by defendant's coun- upon the ultimate determination of the sel and negatived by the court was that question whether an alleged trespass by the rule where animals were concerned or upon the servant is or is not legally was different from that which prevailed justifiable, or whether the issuance of the injunction is legal and proper.

(ii) Danger from acts of violence by deemed to accept the danger of using de-strangers.—A master is negligent if he fective appliances because of his knowl- fails to warn a workman employed to edge of the general methods adopted by erect a fence, as to the risk of being

<sup>1</sup> Masters and servants are not equally

lations have been made to secure his knowledge of a defective rail joint meresafety. Missouri, K. & T. R. Co. v. ly because he had ample opportunity to Hannig (1897) 91 Tex. 347, 43 S. W. examine it. Dale v. St. Louis, K. C. & 508, Reversing (1897; Tex. Civ. App.) N. R. Co. (1876) 63 Mo. 455. That a 41 S. W. 196; International & G. N. R. brakeman had opportunities to learn the Co. v. Hall (1892) 1 Tex. Civ. App. 221, condition of a track cannot be inferred 21 S. W. 1024. A baggage master is not from the fact that he had been working ning of his employer's trains were de App. 353, 40 S. W. 188 (rotten ties and

Bkg. Co. v. Rhodes (1876) 56 Ga. 645. A brakeman is not charged with the A servant is not bound to examine duty of examining cars to discover into the safety of the method adopted latent defects, merely because his opporfor taking down a building. Faren v. tunities for discovering such defects are Sellers (1887) 39 La. Ann. 1011, 3 So. equal to those of the company and his 363. superiors. Pittsburgh, C. C. & St. L. R. (gg) Contagious diseases.— Negli Co. v. Woodward (1894) 9 Ind. App. gence is inferable where an employer al- 169, 36 N. E. 442 (drawbar). An emlows an employee to work in a room ployee has the right to assume, in the where one of the household is sick with absence of knowledge to the contrary, typhoid fever, and neglects to inform that the handle for working a hand car her what the malady is. Kliegel v. Aities reasonably safe, and he does not asken (1896) 94 Wis. 432, 35 L. R. A. 249, sume the risk arising from unknown latent defects, or defects not obvious to (hh) Illegality of act which servant him while using ordinary care and obis required to do.—The danger of being servation. Banks v. Wabash Western arrested for obeying orders which put R. Co. (1890) 40 Mo. App. 458. Dethe servant in the position of violating fendant's contention was that plaintiff an injunction not actually known to him had opportunities of knowing the insufimpossible under the circumstances.2 Excusable ignorance may, of course, be inferred on this ground, although the defect is one of which

he is chargeable with notice of the condition of the latch. The court said:

"It was the unquestioned duty of the defendant to furnish plaintiff a safe bucket, and he had a right to assume 584, it was contended on demurrer that, that it had performed that duty, and because it was alleged that the defect in was not bound to make a personal inspection of the same before using it.

If the servant must, at his inspection of the defendant if an examination of the same had been made," it peril, examine for himself, what becomes of the primary duty of the master to see that safe and suitable machinery careful observation. Perry v. Ricketts (1870) 55 Ill. 234.

In Louisville, N. A. & C. R. Co. v. Howell (1896) 147 Ind. 266, 45 N. E. because it was alleged that the defect in a coupling was "patent and open to the inspection of the same had been made," it peril, examine for himself, what because it was obvious "to ordinary observation or dinary observation. he is chargeable with notice of the con- ordinary observation. Perry v. Rickett's

in shifting the cargo had an opportunity careful examination by appellant's infor seeing the winch before the ship spectors. There is nothing in the comsailed does not create a conclusive preplaint to show that appellee had any sumption that he sailed with knowledge thing to do with the coupling link. Had of its condition. Eldridge v. Atlas S. S. he coupled the cars between which the Co. (1890) 58 Hun, 96, 11 N. Y. Supp. link was used, and thus handled the de-468. An employee who has no knowledge fective appliance, and so had opportuwhich would suggest his looking for nity to observe it, there might be some dangerous projections from a car over propriety in holding him accountable for an otherwise safe walk on the employ- a knowledge of its condition. . . . 

falling down an open hatchway had previously worked upon the vessel, and had 367. had an opportunity to learn the position of the hatchway and that it was open on ant had the opportunity to observe the such occasions as that on which he was degree of danger, he cannot recover. Ft. injured, is not conclusive of knowledge Worth & D. C. R. Co. v. Wilson (1893) on his part that the hatchway was open, 3 Tex. Civ. App. 587, 24 S. W. 686 but is to be considered by the jury in (This decision was reversed in 85 Tex. connection with the other evidence. 516, but merely on a point of practice.) Smith v. Occidental & O. S. S. Co. It is error to instruct a jury that if (1893) 99 Cal. 462, 34 Pac. 84. they find from the evidence that plain-

chargeable with knowledge of a defect, knew that the roof of an entry was unwhere the evidence tends to show that it safe, or had the means and opportunity was one which would not be discovered to ascertain its defective condition, and simply by using it, but that it was dis- did not avail himself of such opportucoverable only by an examination made nity, or use the means at hand, he was by a competent person. Nicholds v. guilty of negligence. Wellston Coal Co. Crystal Plate Glass Co. (1894) 126 Mo. v. Smith (1901) 65 Ohio St. 70, 55 L. R. 55, 27 S. W. 516, 28 S. W. 991.

An employee in a mine is not chargeAn employee in a mine is not charge
2"It is not expected that the servant

able, after only twenty days' work, with will make close scrutiny into all the deknowledge of a defect in a hoisting rope, tails of the instrumentalities with which

caused an accident does not show that which could not have been discovered by

to see that safe and suitable machinery careful observation," and consequently and implements are furnished his emone which the servant should have seen ployee?" Pennsylvania Coal Co. v. and avoided; but the court said: "The Kelly (1895) 156 Ill. 16, 40 N. E. 938. words used, and their context, plainly The fact that a seaman injured while indicate that the defect was one which operating a defective steam winch used could have been easily discovered on a

edge are equivalent to actual knowledge Evidence that a stevedore injured by is erroneous. Norfolk & W. R. Co. v. Nunnally (1892) 88 Va. 546, 14 S. E.

It is error to charge that, if the serv-

The servant is not, as matter of law, tiff, at the time of and before his injury,

the servant would otherwise have been bound to make an examination.3

he should thus spend his time. If the 604, 15 S. E. 928. rule were otherwise, the management of a great railway system would be need-upon a railroad bridge, and hurried in lessly slow." Johnston v. Oregon Short his work, is not guilty of negligence in Line R. Co. (1892) 23 Or. 94, 31 Pac. failing to inspect a maul handed to him 283.

A brakeman is not chargeable with contributory negligence in coupling defective cars, where the defects are of such a character as to appear only on inspection, and where, in the hurry incident to his work, he cannot discover such defects, and he is not warned thereof. Chesapeake & O. R. Co. v. Lash (1896; Va.) 24 S. E. 385; S. P. Louisville & N. R. Co. v. Foley (1893) 94 Ky. 220, 21 S. W. 866 (brakeman unexpectedly called upon at midnight to make a coupling of cars in a train recently made up.)

promptitude in coupling cars, has a right to assume without inspection that the couplings are in a proper state of repair. King v. Ohio & M. R. Co. (1882) 11 Biss. 362, 14 Fed. 277, per Gresham, J. A servant who has to select a block for checking the speed of cars, from among a number which are so soiled that it is practically impossible to distinguish the sound from the unsound, without a more careful examination than his work permits him to make, does not assume the risk of selecting a wornout block. Lehigh Valley Coal Co. v. Warrek (1898) 28 C. C. A. 540, 55 U. S. App. 437, 84 Fed. 866.

A servant is not chargeable with knowledge of a knot in a plank forming part of a platform on which he was about to work, when he had no opportunity of inspecting it, and it is quite doubtful whether he could have discovered it even if he had made such an examination, since there was a covering of paint on the upper surface, and it was difficult, as the plank was placed, to inspect its under side. Benzing v. Steinway & Sons (1886) 101 N. Y. 547, 5 N. E. 449.

An operator of a "former" machine in an oil mill, who is compelled to work with such great rapidity that he cannot quires constancy of attention to other carefully examine all bags furnished him matters. Chicago & E. I. R. Co. v. and placed by other employees on top Hines (1890) 132 III. 161, 23 N. E. 1021. of the machine, and which for his safety should be free from holes, has the right to assume without examination that the bags furnished him are free from holes.

he deals. His employment forbids that Carter v. Oliver Oil Co. (1892) 37 S. C.

A workman in a dangerous position by a foreman under whom he is employed. Chicago, K. & W. R. Co. v. Blevins (1891) 46 Kan. 370, 26 Pac.

Compare also the following cases: Great Northern R. Co. v. McLaughlin (1895) 17 C. C. A. 330, 44 U. S. App. 189, 70 Fed. 669 (no opportunity to examine skids used for loading rails upon flat cars); Louisville, N. A. & C. R. Co. v. Howell (1896) 147 Ind. 266, 45 N. E. 584 (defective coupling link caused injury to brakeman); Stewart v. Ferguson (1898) 34 App. Div. 515, 54 N. Y. Supp. 615 (servant had no reason or op-A brakeman, being obliged to act with portunity to observe that the uprights of a scaffold were not properly braced); Chicago & A. R. Co. v. Scanlan (1897) 170 Ill. 106, 48 N. E. 826, Affirming (1896) 67 Ill. App. 621 (brick mason not chargeable with knowledge of the defective construction of a scaffolding prepared for his use, where he passes from another portion of the building directly to the scaffolding without an opportunity to inspect it); Baldwin v. St. Louis, K. & N. W. R. Co. (1887) 72 Iowa, 45, 33 N. W. 356 (failure to examine pile of lumber which fell on plaintiff, not negligence, as matter of law, where his view of it was obstructed by another pile; Chicago K. & W. R. Co. v. Blevins (1891) 46 Kan. 370, 26 Pac. 687 (servant received from his foreman a defective tool when he was hurried in his work and in a specially dangerous position which limited the opportunities for making an examination); Higgins v. Williams (1896) 114 Cal. 176, 45 Pac. 1041 (servant had no opportunity to examine hoisting machinery before going to work in a trench).

In one case the doctrine that a servant may assume that adequate provision has been made for his safety has been declared to apply with especial force where the performance of his duties re-

Obviously, a similar reason might be, even if it is not, assigned in many of the railway cases cited in § 411, supra. In an Illinois case (see § 414, note 9,

413. Limits of the servant's exemption from the duty of inspection; generally.— The scope and effect of the doctrine discussed in the preceding sections must be considered with due reference to the existence of the servant's general obligation to exercise ordinary care. He is manifestly not warranted in assuming that he is not exposed to any abnormal dangers, where he has actual knowledge that one of the master's duties has not been performed; nor where he has been expressly warned to examine the appliance in question.2 He will not be heard to say that his ignorance of a danger was excusable if it could have been discovered by a reasonable use of his faculties of observation.3

prompt action is mentioned as one of of which, considering his employment, he the reasons why a yard hand is not might reasonably take notice; and he bound to examine brakes before using may not forget or omit precautions

for example, *Illinois C. R. Co.* v. *Sanders* herence to duty by the employer, yet he (1897) 166 Ill. 270, 46 N. E. 799; *Lou-* may not repose that blind confidence in isville & N. R. Co. v. Orr (1890) 91 Ala. the performance of the employer's duty

v. Shannon (1893) 52 Ill. App. 420, an "The servant is culpable if he fail to instruction was condemned by which the discover such a defect as would have required in the first instance to know amination, if he had used ordinary dili-that tracks were properly constructed, gence to discover it." Chesson v. John but had a right to rely on the implied L. Roper Lumber Co. (1896) 118 N. C. undertaking of the company to make and 59, 23 S. B. 925. undertaking of the company to make and keep them safe. "Given actual knowledge," said the court, "there remains no rely blindly on the presumption" that room for presumptions."

<sup>2</sup> Senior v. Ward (1859) 1 El. & El. 385, 28 L. J. Q. B. N. S. 139, 5 Jur. N. S. 172, 7 Week. Rep. 261 (hoisting tackle of mine). See §§ 363, 364, ante.

3 "A man cannot decline to see, and then hold the master liable, excusing his own negligence by saying that he was under no primary obligation to investigate." Illinois C. R. Co. v. Sanders (1894) 58 Ill. App. 117. "It is his [i. e., the servant's duty to use ordinary care in informing himself of the dangers more is meant than that no duty of and responsibilities attending his employment, and to take the same degree of care in avoiding accident and injury. work in a trench is bound to exercise a . . . He may not close his eyes to reasonable degree of vigilance in regard serious defects or weaknesses in ma- to the safety of the place of work.

infra), the fact that his duties require chinery or appliances, occasioned by use, them. Chicago & E. I. R. Co. v. Kneir-which, under the circumstances, as a rea-im (1894) 152 Ill. 458, 39 N. E. 324. sonable and prudent man, he ought conim (1894) 152 III. 458, 39 N. E. 324. sonable and prudent man, he ought continually to exercise." Wells v. Coe ated, this necessary qualification is frequently recognized by the introduction "While the employee may repose confined clauses of a restrictive tenor. See, dence in the prudent and cautious ad-548, 8 So. 360; Fordyce v. Yarborough which fails to observe the patent defects (1892) 1 Tex. Civ. App. 260, 21 S. W. which an ordinary observation of the 421; Chicago & E. I. R. Co. v. Hines employee's duty would readily disclose." (1890) 132 Ill. 161, 23 N. E. 1021.

Evansville & T. H. R. Co. v. Duel (1893) 890) 132 Ill. 161, 23 N. E. 1021. Evansville & T. H. R. Co. v. Duel (1893) In East St. Louis Connecting R. Co. 134 Ind. 156, 33 N. E. 355.

"The servant is culpable if he fail to jury was told that the servant was not been apparent, without a thorough ex-

> A servant cannot be "permitted to the master has provided a safe working place, "to the utter disregard of the plain and palpable evidence of his own senses." Muncie Pulp Co. v. Jones (1894) 11 Ind. App. 110, 38 N. E. 547. In one case it was remarked, ar-

> guendo, that the servant is not bound "to exercise care" to know defects, unless it is in the line of his duty. Taylor, B. & H. R. Co. v. Taylor (1890) 79 Tex. 104, 14 S. W. 918. This statement is plainly erroneous, if taken literally. But the context shows that nothing active inspection lies on the servant.

> An experienced laborer when going to

The limiting operation of this principle is often recognized by the use of phraseology which is either actually or by implication of a qualifying significance, in connection with the statements in which the servant's exemption from the obligation to inspect the plant is asserted. Thus, we find it laid down that a servant is not required to use diligence to discover defects, and is chargeable with notice thereof only when they are so obvious that it imports gross negligence to overlook them; that he is not bound to use more than "ordinary care and watchfulness" in discovering defects in the plant; 5 that he is only required to notice obvious defects and such as he has an opportunity of noticing;6 that the law demands nothing more than that he shall keep his eyes open to what is passing before him, and avail himself of such information as he may receive with respect to such conditions as may expose him to danger;7 that he is not bound to search for latent, concealed, or hidden defects or sources of danger;8 that he is not chargeable with knowledge of concealed defects not discoverable by "ordinary observation." In other cases it is declared that a servant has a right to rely upon the safe condition of the plant unless the danger is one of which he must be presumed to be aware;10 or unless the defects are so glaring as to be open to the observation of prudent men; 11 or where the defect cannot be readily detected; 12 or the danger is not patent; 13 or not obvious; 14

Bartolomeo v. McKnight (1901) 178 Mass. 242, 59 N. E. 804.

exercise of reasonable care and difference where it was laid down that the servant could have known, the reputation of a is entitled to presume that the master negligent coservant, "he was chargeable has done his duty with respect to makwith notice of whatever that reputation was." Western Stone Co. v. Whalen (1894) 151 Ill. 472, 38 N. E. 241.

632 Servant (1994) 189 Col. (1990) 55 App. Div. 272, 67 N.

\*\*\* Ind. 250, 30 N. E. 27. \*\*\* Bradbury v. Goodwin\*\* (1886) 108 (1893) 6 C. C. A. 225, 12 U. S. App. \*\*\* Austin v. Applies\*\* (1991) 100 (1893) 6 Fed. 1009. 514, 56 Fed. 1009.
United States Rolling Stock Co. v.

Wilder (1886) 116 III. 100, 5 N. E. 92.

Bartolomeo v. McKnight (1901) 178

Mass. 242, 59 N. E. 804.

The ignorance of a section hand of the le is helping to carry a heavily laden hand car does not relieve him from exercising due care in observing where he is going, and looking out for snags.

Terry v. Louisville, N. A. & C. R. Co. (1893) 175 IN. E. 688, Af (1896) 15 Ind. App. 353, 43 N. E. 273, firming (1897) 75 III. App. 145; Parke Rehearing Denied (1896) 15 Ind. App. 356, 44 N. E. 59.

In one case the law was said to be that, if the servant knew, or by the exercise of reasonable care and diligence where it was laid down that the servant could have known, the reputation of a section hand of the Northern P. R. Co. v. Teeter (1894) 11 C. C. A. 332, 27 U. S. App. 316, 63 Fed. 527; Covey v. Hannibal & St. J. R. Co. (1885) 86 Mo. 635; Porter v. R. Co. (1885) 86 Mo. 635; Porter v. P. R. Co. (1885) 86 Mo. 635; Porter v. P. R. Co. (1889) 86 Mo. 635; Porter v. P. R. Co. (1891) 39 N. Y. S. R. 674, is going, and looking out for snags. 15 N. Y. Supp. 400; Leonard v. Kinnare (1896) 15 Ind. App. 159, 31 N. E. 585. See also Union P. R. Co. v. O'Brien (1892) 5 Ind. App. 159, 31 N. E. 585. See also Union P. R. Co. v. O'Brien (1896) 161 U. S. Where it was laid down that the servant could have known, the reputation of a section hand of the fed. 527; Covey v. Hannibal & St. J. R. Co. (1887) 71 Mo. Hannibal & St. J. R. Co. (1889) 86 Mo. 635; Porter v. Co. (1889) 86 Mo. 635; Porter v. P. R. Co. (1891) 39 N. Y. S. R. 674, is going, and looking out for snags. 15 N. Y. Supp. 400; Leonard v. Kinnare (1896) 15 Ind. App. 159, 31 N. E. 585. See also Union P. R. Co. v. O'Brien (1896) 161 U. S. Co. (1891) 39 N. Y. S. R. 674, is going, and looking out for snags. 15 N. Y. Supp. 400; Leonard v. Kinnare (1896) 161 U. S. Supp. 400; Leonard v. Kinnare (1896) 161 U. S. Co. (1891) 39 N. Y. S. R. 674, is going, and looking out for snags. 15 N. Y. Supp. 400; Leonard v. Kinnare (1896) 161 U. S. Supp. 400; Leonard v. Western (1894) 17 N. Y. Supp. 400; Leonard v. Western (1894) 17 N. Y. Supp. <sup>6</sup> Northern P. R. Co. v. Teeter (1894)

\*Silveira v. Iversen (1900) 128 Cal. Y. Supp. 78.

187, 60 Pac. 687.

\*Pennsylvania Co. v. McCormack (1892) 131 Ind. 250, 30 N. E. 27.

\*Intelligence of the problem of the

<sup>13</sup> Edward Hines Lumber Co. v. Ligas (1898) 172 III. 315, 50 N. E. 225, Afor where there is no such obvious and palpable defect as to attract his attention.15

In several cases the character of the inspection which the servant is not bound to make is particularized by the addition of the epithet "critical."16 Such an epithet obviously implies a standpoint similar to that which is indicated by the various forms of expression collected above.

The correctness or incorrectness of an instruction will frequently depend upon whether the jury were or were not informed in appropriate terms that the servant's right to rely upon the safe condition of the plant is not an absolute one.17

Such examination of an appliance as is necessary to enable a serv-

going up and down the ladder, with a ous which will probably lead the jury to candle, to his work, to investigate and suppose that a servant is not bound to discover its condition as to safety or notice the condition of the appliances otherwise, is not ground for reversal, used by him. Wells v. Coe (1886) 9 where qualified by a statement that the Colo. 165, 11 Pac. 50.

firming (1896) 68 Ill. App. 523; Mc-employee was bound to use his eyes, and Donald v. Chicago, St. P. M. & O. R. Co. to take reasonable care to avoid known (1889) 41 Minn. 439, 43 N. W. 380. dangers and those which could be seen "The employee is not required to look by the use of ordinary care. Reese v. for defects, but such as are patent, or known to him." Norton v. Louisville 489, 54 Pac. 759. A jury is properly & N. R. Co. (1895) 16 Ky. L. Rep. 846, charged that a servant has a right to presume that an appliance is safe for use where the defect is not retained. de N. R. Co. (1895) 16 Ky. L. Rep. 846, 30 S. W. 599.

"Devlin v. Wabash, St. L. & P. R.
Co. (1885) 87 Mo. 549.

"McLean v. Standard Oil Co. (1893)
50 N. Y. S. R. 626, 21 N. Y. Supp. 874;
Baltimore & O. S. W. R. Co. v. Amos
(1898) 20 Ind. App. 378, 49 N. E. 854.

"Cincinnati, H. & D. R. Co. v. Moo
Mullen (1889) 117 Ind. 439, 20 N. E.
287; Consolidated Coal Co. v. Bruce
(1893) 47 Ill. App. 444; Ross v. Shanley (1900) 185 Ill. 390, 56 N. E. 1105;
Chicago, R. I. & P. R. Co. v. Cleveland
(1900) 92 Ill. App. 308; Alabaster Co.
(1900) 92 Ill. App. 308; Alabaster Co.
In any case where the defect was a visible one which might possibly have been discovered by a person in the servant's position, if he had been ordinarily observant; it is error to charge the jury, without qualification, that the servant had the right to presume that the appliance is safe for use, where the defect is not patent, and he has used due diligence to discover defects (Missouri, K. & T. R. Co. v.
50 N. Y. S. R. 626, 21 N. Y. Supp. 874; Crowder [1899; Tex. Civ. App.] 55 S.
Washing the same, without looking for latent defects, that the master has done his duty in providing safe instrumentalities, unless he has or can obtain knowledge to the contrary by reasonable observation (Summit Coal Co. v. Shaw Chicago, R. I. & P. R. Co. v. Cleveland (1896) 16 Ind. App. 9, 44 N. E. 676). In any case where the defect is not providing safe instrumentalities, unless he has or can obtain knowledge to the contrary by reasonable observation, if summit Coal Co. v. Shaw Chicago, R. I. & P. R. Co. v. Browe discovered by a person in the servant's position, if he had been ordinarily observant, it is error to charge the jury, without qualification, hat the servant had the right to presume that the appliance is and that he was not required to inspect the same for defects, frordyce v. Edwards (1895) 60 Ark. 438, 30 S. W. 758, second appeal (1898) 65 Ark. 98, 44 S. W. 1034 (pilot of engine was hung so high that it failed to throw a horse from the track, and a derailment wa

ant to understand the dangers incident to its use under normal conditions is perhaps always obligatory,—at least in the case of adults.<sup>18</sup>

413a. Duty of inspection; when predicable from circumstances indicative of danger.—A situation in which the doctrine which relieves the servant from the duty of inspection frequently comes into conflict with, and gives way to, the paramount principle that he must exercise proper care, is indicated by those cases in which it is laid down that he is entitled to assume the existence of safety in the absence of anything to excite special apprehension of danger; or where the appearance of the appliance was not such as to awaken his doubts and make him hesitate in the discharge of his duty or refuse to undertake it;2 or unless he had knowledge which should have warned him that it was unsafe to act on such an assumption.3 It

there should be a finding in his favor. est when it produced the profoundest Breckenridge & P. Syndicate v. Murphy ignorance."

(1897) 15 Ky. L. Rep. 915, 38 S. W. 18 A servant engaged in the first place

In Way v. Illinois C. R. Co. (1875) 40 Iowa, 341, it was held error to refuse several of those condemned in § 410a, several of these contemned in § 410a, as to the proper method of operating its supra. But the court was able to disvass laid down in Millar v. Madison Car tinguish the instruction under review Co. (1895) 130 Mo. 517, 31 S. W. 574. from that which was refused in Mullowney v. Illinois C. R. Co. (1873) 36 Co. (1892) 23 Or. 94, 31 Pac. 283. Iowa, 470 (see section just mentioned), 2 Goodman v. Richmond & D. R. Co. upon the following grounds: "A brake- (1886) 81 Va. 576. Iowa, 470 (see section just mentioned), upon the following grounds: "A brakeman, although he may have the means

An unqualified charge to the effect sonable use of his senses, and if a defect that a servant may assume that a tele-phone pole which he is required to climb been discovered by the exercise of reais safe and suitable is erroneous. Cum- sonable and ordinary care in view of the berland Teleph. Co. v. Loomis (1889) 87 position which the brakeman occupies, Tenn. 504, 11 S. W. 356. It is error to the law conclusively presumes that he instruct the jury that if the defendant's possesses the knowledge which reasoncontract obliged him to inspect the place able attention would furnish. Any other of work, then it was no part of plain-rule would be opposed to, rather than tiff's employment to look after its promotive of, the interests of humanity, safety, and, if he was injured by reason as it would encourage the grossest in-of defendant's omission to inspect it, attention, and would reward it the high-

to feed a machine, and incidentally to clean it up, is bound to examine it with a view to ascertain the characteristics to give an instruction that the servant which render this operation dangerous could not recover if he had gone on Stubbs v. Atlanta Cotton-Seed Oil Mills working when he had knowledge, or (1893) 92 Ga. 495, 17 S. E. 746. That might "by the exercise of due care" have a servant who is sent to do a piece of had such knowledge. This ruling cerwork with a machine with which he is tainly seems difficult to reconcile with not familiar is bound to make inquired to the concentration of the content of the which render this operation dangerous. Stubbs v. Atlanta Cotton-Seed Oil Mills (1893) 92 Ga. 495, 17 S. E. 746. That a servant who is sent to do a piece of as to the proper method of operating it

<sup>3</sup> James v. Emmet Min. Co. (1884) 55 and opportunity of doing so, is not re-Mich. 335, 21 N. W. 361. An instruc-quired to go around and under the tion to the effect that, "while the master trucks, with lantern and hammer, for is not to be held liable for dangers and the purpose of ascertaining whether defects of which the servant is fully in-there be any flaw or crack in a wheel formed, yet the servant is authorized" or axle. The company employs parties to rely upon the master's performance to perform this duty, and the brakeman of his duty to furnish safe appliances, is has the right to suppose that they will misleading, as it amounts to a statement perform it properly, and he is justified that the converse of this proposition is in leaving the performance of it to them. true; that is to say, that the master is At the same time he must make a rea- liable even though the servant may have

is well settled that a duty of inspection or inquiry is predicable whenever the character of the environment would suggest to a man of average prudence that there is a possibility or a probability of being injured in a certain way.4 Such possibility or probability is also frequently assumed to have been suggested with sufficient distinctness to show the servant that some further examination into the conditions was prudent, where he had observed circumstances or incidents which pointed to the existence of that particular danger to which his injury was traceable, and which were therefore to be

reasonably prudent man on his guard, be coupled on each occasion. Henry v. provided that information did not Bond (1888) 34 Fed. 101.

amount to full information, or, as the average juror would understand the language, absolute certainty. Illinois C. R. which he may have to couple may have Co. v. Sanders (1894) 58 Ill. App. 117. draw bars of different heights, is bound 'It is negligence not to take notice so as to observe whether an event known hurry—to evanine all the couplings he

edge that an appliance is in bad condition, his failure to examine it before 53 Am. Rep. 292, 23 N. W. 890, the

the supposition that the track on a siderushed him to death. A demurrer to a ing is fully ballasted, and step between complaint alleging the want of adaptathe cars in motion, without first examition of the cars to each other, and

railroad company is in good repair and intestate did not or could not have dissupplied with proper brakes, if he knows covered this apparent want of adapta-that other cars so furnished have, many tion of the coupling irons of the caboose

by a brakeman in the ordinary operation have been as observable and readily seen of a railway is the misfit of links and as the entire absence of coupling irons, pins, and the possibility that an attempt one or both. It is not to be inferred to couple cars may be unsuccessful. that this was the only instance when the

had such information as would put a caution to ascertain the kind of cars to

as to observe whether an event known hurry—to examine all the couplings he to be likely to occur has occurred. Barn- has to handle, with a view to ascertainard v. Schrafft (1897) 168 Mass. 211, ing their condition before he ventures 46 N. E. 621.

Where a servant has a general knowlCo. v. Black (1878) 88 Ill. 112.

using it is negligence. The Truro (1887) coupling iron of a foreign car passed 31 Fed. 158. over those of a caboose to which the A brakeman has no right to rely upon plaintiff's intestate was coupling it, and ining the character of the roadbed the negligence of the defendant company Ragon v. Toledo, A. A. & N. M. R. Co. in allowing the foreign freight car to be (1893) 97 Mich. 265, 56 N. W. 612. brought on its track and requiring it to A servant is not justified in assuming be coupled, was sustained, the court say-that a car furnished his employer by a ing: "There is no reason stated why the of them, been defective. Roddy v. Misand car. It was presumably in the day-souri P. R. Co. (1891) 104 Mo. 234, 12 time, as it is not stated that it was in L. R. A. 746, 15 S. W. 1112. the night. That the coupling irons were One of the dangers to be apprehended so widely mismatched would seem to to couple cars may be unsuccessful. that this was the only instance when the Hence, a railroad brakeman who atcars of different roads, brought together tempts to couple a car without inspect to be coupled, were so mismatched. It ing the coupling pin and link to see if might rather be inferred that not unthe former is loose, when he has the frequently they have coupling irons opportunity to do so, is guilty of conhigher or lower than each other, and tributory negligence. Renninger v. New that there is no reasonable assurance York C. & H. R. R. Co. (1896) 11 App. that they are always adapted to each other, in this respect. This would seem Div. 565, 42 N. Y. Supp. 813.

The foreman of a switch engine in a to impose the duty upon the brakeman, railroad yard assumes the increased risk in coupling cars with drawheads of different makes, and must use all necessary is employed, to couple them together, to

regarded as carrying a definite cautionary or monitory significance.<sup>5</sup> Compare §§ 135–138, ante.

or pass each other. There is no allega- gent if he fails to examine it at reasontion that he even looked to see, or that able intervals for the purpose of ascer-

know its condition he is bound to as- to clean out is negligence. Sexton v. sume that it may be disabled, and act Turner (1892) 89 Va. 341, 15 S. E. 862. accordingly. Arnold v. Delaware & H. Canal Co. (1890) 125 N. Y. 15, 25 N. E.

Where it was a part of the regular notice to him that it was probably denotice to him that it was probably de- on another point. Reading Iron Works fective, which cast upon him the risk in v. Devine (1885) 109 Pa. 246. handling it, and the duty of examining (1899) 38 C. C. A. 307, 96 Fed. 713.

tiff was handling.

observe more closely and to use more 45 N. E. 742. A man who has sufficient caution than if he was attempting to skill to perform the duties of a sawyer couple the cars of his own road, which is chargeable with knowledge of the fact are adapted to each other by construct hat a rope used to hold back a saw set tion or selection, in order to ascertain in a swinging frame, when it is not in whether their coupling irons would meet use, is liable to wear out, and is neglition that he even looked to see, or that able intervals for the purpose of ascerhe could not have seen, if he had looked, taining its condition. Schulz v. Johnson this clearly apparent difference in the (1893) 7 Wash. 403, 35 Pac. 130 (here elevation of these coupling irons, or that the rope had never been examined at his attention was diverted." In Scott v. all). A miner who fails, after a blast, Oregon R. & Nav. Co. (1886) 14 Or. to examine the roof of the drift in which 211, 16 Pac. 98, this decision was embedies and place necessary props phatically condemned as one which went to support it, is negligent. Christner v. "far towards legalizing manslaughter." Cumberland & E. L. Coal Co. (1892)

A servant, part of whose emplo, ment 146 Pa. 67, 23 Atl. 221. The failure of is to handle and remove disabled cars, a servant engaged in drilling holes for is to handle and remove disabled cars, a servant engaged in drilling holes for has no right to assume that the coup-blasting to ascertain whether a blast has lings of a car are perfect. If he does not exploded in a hole which he is directed

In a case where a loose beam was shaken off the joists on which it was lying, by the jarring movement caused by a steam hammer, and fell on a servduties of a switchman to handle defect- ant who was operating the hammer, it ive and broken cars, which were taken was declared to be at least a question from trains and placed upon special side for the jury whether he should not have tracks used for the purpose, the mere examined the beams overhead before he presence of a car on such tracks was began to work. But the decision went

Where a certain kind of coupling has sound cars, improperly loaded, were octained it is being united, a brakeman who has casionally placed on the same tracks. been handling it is chargeable with Chesapeake & O. R. Co. v. Hennessey knowledge of its defective condition. 899) 38 C. C. A. 307, 96 Fed. 713. Thompson v. Missouri P. R. Co. (1897) It is not negligence for a foreman to 51 Neb. 527, 71 N. W. 61. There can be order an employee to paint a machine, no recovery for the death of an engineer, without informing him that others are caused by the collision of his engine with also at work upon it, where, by the exercise of reasonable care, he can himself through a defective fence, where the evisee that other workmen are so engaged. dence is that stock were frequently seen Williams v. Hensler (1890) 38 Ill. App. on such track at or near the point of 584. One of those workmen unexpected-collision; that it was decedent's duty to ly put in motion a cogwheel which plain-keep a constant lookout for them, and f was handling. that, according to his reports, he had, A coal shoveler familiar with the fact that tubs used in hoisting coal from a dent, struck stock eight times. Quill v. barge are liable to be unlatched on striking the bulkhead, where they have a 616, 57 S. W. 948, Affirming (1900; Tex. loose catch, assumes the risk of using Civ. App.) 55 S. W. 1126. An employee such a tub while the hold is so full that in charge of a saw which is intended to he cannot get out of the way if a tub drop back beneath planking after its use should dump, if he has an opportunity is guilty of contributory negligence if to examine the tubs before using them. he does not look to see whether the saw Dolan v. Atwater (1897) 167 Mass. 274, has gone down, where he knows that it

The rationale of this principle shows that it is inapplicable where the servant was excusably ignorant of the circumstances or incidents which pointed to the existence of dangerous conditions.6 it be adduced as a foundation for ruling against the servant, as a matter of law, where the evidence is susceptible of the inference that the previous incident upon which the master relies was not produced by the same cause as that to which the injury was due. 7 Nor,

Johnson v. Hovey (1894) 98 Mich. 343, Galveston, H. & S. A. R. Co. v. Lempe 57 N. W. 172. A miner is guilty of neg- (1883) 59 Tex. 19. ligence if he proceeds to work under a A servant who has the supervision of tained by the latter in jumping from a Bolton v. Georgia P. R. Co. (1889) 83 platform to avoid the splashing of mol-ten lead out of a kettle without a hood, Ga. 659, 10 S. E. 352.

bursting of bottles of ale which he is engaged in packing, where two bottles,

165 Mass. 233, 42 N. E. 1125.

a canvas stretched on a third-story floor sees it sag down, and supposes the can- erated by a fellow workman, the servant on it. Muncie Pulp Co. v. Jones (1894) ger, so as to prevent a recovery from the 11 Ind. App. 110, 38 N. E. 547.

truss during the demolition of a building terior, and it appeared that he had seen cannot recover, where It is shown that no bricks or material falling from the while the trusses had already fallen wall prior to the injury, the question while the work was in progress, and whether he assumed the risk of such intheir condition was perfectly apparent jury was for the jury. Witkowski v. to all the workmen. Carcy v. Sellers George W. Carter & Sons Co. (1901) 60 (1889) 41 La. Ann. 500, 6 So. 813.

A before distingt a well the sides of Theorem of the property of the sides of the sid

A laborer digging a well, the sides of which have fallen several times while he ing on an elevated platform, endeavoring has been engaged on the work, assumes to adjust a hood on a smokestack, was

frequently fails to drop back after use. the risk of another similar occurrence.

loose rock after he has observed indica- another employee, and knows that he is tions of danger which he thoroughly un- an incompetent and careless workman, derstands. Evans v. Chessmond (1890) is not free from negligence if he trusts 38 Ill. App. 615. An employer is not himself upon a ladder constructed by liable to an employee for injuries sus- the employee, without examining it.

near which he was at work, where he nace, which was not a part of his usual was thoroughly familiar with the pro- duties, cannot be held, as a matter of cess of lead melting, had repeatedly seen law, to have assumed the risk of being the lead splash out of that particular burned because of the blowing open of kettle, and exposed himself to the danger the furnace door by the explosion of gas, without complaint, objection, or remon- where the risk was not an obvious one, strance. Farrell v. Tatham (1899) 36 and he had had but slight opportunity App. Div. 319, 55 N. Y. Supp. 199. to learn of the condition of the furnace, A servant assumes the risk from the and had never known of the door being blown open before, although it had occurred several times. La Fortune v. to his knowledge, have previously ex- Jolly (1896) 167 Mass. 170, 45 N. E. 83. ploded. Lehman v. Van Nostrand (1896) Where work in a machine shop, which caused small pieces of chipped iron to Knowledge that there is a hole under be thrown from the machinery, was so carried on that no chips were thrown is imputed to a servant who sees his towards a servant, to his knowledge, till fellow workmen walk around, and not the day he was injured by a piece of across it, shoves a plank over it, and chipped iron thrown from a machine opvas to be there to catch one if he steps had not assumed the risk of such danmaster for the failure of the latter to A servant who knows that portions of debris which is being discharged down ton against such injury. Smith v. Lida chute have previously scattered cannot recover if he is struck by a piece. 528, 67 N. Y. Supp. 533. Where plain-Fannessey v. Western U. Teleg. Co. tiff was injured by material falling from (1893) 6 Misc. 322, 26 N. Y. Supp. 796. the walls of a building while he was engaged up in excavating sand from the intrust during the demolition of a building terior, and it appeared that he had seen

Whether or not an employee stand-

speaking generally, is the servant necessarily debarred from maintaining an action, unless the previous incident was of such a nature that any reasonably intelligent man would have understood the warning which was thus conveyed, and taken appropriate steps to protect himself from injury.8

414. Duty of inspection inferred from the nature of the functions discharged by the servant.—The decisions cited in the last two sections deal with situations in which all servants, without respect to their particular functions, are not justified in acting upon the assumption that they are not exposed to any abnormal dangers arising from a breach of the master's duties. In another group of cases the dom-

guilty of contributory negligence pre- not, as matter of law, notice to an emcluding recovery for injuries caused by ployee that it will not stand when dethe slipping of a knot uniting two pieces tached from the wires which he is orof rope sustaining a piece of timber on dered to remove. Southern Bell Teleph.
which a tackle used in adjusting the & Teleg. Co. v. Clements (1900) 98 Va.
hood was fastened, is for the jury upon 1, 34 S. E. 951. evidence that shortly before the accident

<sup>8</sup> The mere fact that it was known to the servant that other machines which were of the same character as that which caused the injury had started automatically will not charge him with knowl-675.

a coupling pin furnished for use in maka coupling pin furnished for use in making a coupling is too large is not, as safe place to work. The fall of the
matter of law, guilty of contributory rock in such a case is a circumstance
negligence in attempting to use it in
from which it is possible to draw both
making the coupling, and in continuing
the inference that the place will thenceto insert it after the first failure to
make it enter the hole, where it often
happens that a pin difficult to insert
v. Risher (1895) 13 Ind. App. 98, 40 N.
at first can be made to go down. An
instruction is erroneous which proceeds
on the assumption that a defective condition had been discovered when the pin
two different occasions for the nursess dition had been discovered when the pin

condemned and marked for removal is

An employee whose business it is to he noticed that the rope had slacked, and instructed the men below to tighten the same, it not appearing whether the loading and firing is not, as a matter of slacking was due to the slipping of the law, bound to examine one that is reknot or to some unexplained cause. Folk v. Scheeffer (1898) 186 Pa. 253, 40 ploded cartridge, although the tester has Atl. 401. First appeal (1897) 180 Pa. left one in on a former occasion. Anderson v. Duckworth (1894) 162 Mass. 251, 38 N. E. 510.

A miner is not, as matter of law, guilty of negligence merely because he made no attempt to inform himself of the actual condition of the roof of an edge of the risk of such an occurrence, entry from which slate fell on him. if it appears that those machines were Blazenic v. Iowa & W. Coal Co. (1897) not attached to the same pulleys and 102 Iowa, 706, 72 N. W. 292. A miner belts as the one which he was handling ordered by the boss to go into a speciwhen the accident occurred. Donahue fied room in the mine is not required v. Drown (1891) 154 Mass. 21, 27 N. E. to test the safety of the roof, although he knows that rock and slate have fallen A switchman who does not know that from the roof before he enters the room, as it is the master's duty to furnish a

The fact that a gang plank had been put out from a vessel to the wharf on two different occasions, for the purpose did not go down at the first attempt. of transferring the captain's daughters Missouri, K. & T. R. Co. v. Hauer (1897; to the wharf, does not constitute notice Tex. Civ. App.) 43 S. W. 1078. Tex. Civ. App.) 43 S. W. 1078. to a workman that the rigging is an un-The fact that a pole supporting the safe means of exit. McDonald v. Sven-wires of a telephone company has been son (1901) 25 Wash. 441, 65 Pac. 789.

inant conception relied upon is that, in view of the nature of the work assigned to the servant, it may reasonably be inferred that it was the understanding of the parties to the contract of employment that he should discharge the duty of inspection to a certain extent.<sup>1</sup> The existence of such a duty has been inferred on the following grounds:

(1) That the servant had been put in charge of that part of the plant which was defective or abnormally dangerous.2

<sup>1</sup> It is the duty of the master to furnish and maintain suitable material and appliances for the prosecution of his business, and, in the absence of notice to the contrary, the employee had the (1892) 134 Ind. 226, 33 N. E. 795. A right to presume that the employer had servant injured by a defective track on complied with its duty in this respect, and to act upon this presumption, uncannot recover. White v. Kennon less the character of his employment (1889) 83 Ga. 343, 9 S. E. 1082. An was such as to devolve upon him the employee whose duty it was to operate duty of examining and seeing that the cars upon an elevated tramway, and also particular material and appliances were from time to time to inspect said tramin proper condition. If such was the way and report any defects therein, canduty of the employee, and he neglinot recover for injuries caused by a disgently assumed they were in proper conplaced rail in the tramway, which he gently assumed they were in proper condition when they were not, and the injury arose from his own failure in this respect, he would be guilty of contributory negligence. Louisville & N. R. Co. v. Orr (1890) 91 Ala. 554, 8 So. 360. For other examples of similar So. 360. For other examples of similar exceptive language, see Clapp v. Minneapolis & St. L. R. Co. (1886) 36 Minn. 6, 29 N. W. 340; Pennsylvania Co. v. Brush (1891) 130 Ind. 347, 28 N. E. 615; Mayer v. Liebmann (1897) 16 App. Div. 54, 44 N. Y. Supp. 1067; Missouri P. R. Co. v. Crenshaw (1888) 71 Tex. 340, 9 S. W. 262; Austin v. Appling (1891) 88 Ga. 54, 13 S. E. 955; Curtis v. Chicago & N. W. R. Co. (1897) 95 Wis. 460, 70 N. W. 665.

An instruction to the effect that a servant had a right to assume that the

servant had a right to assume that the the business of a foreman or boss of a defective appliance was safe and suitable, and that it was not his duty to know whether the horses are fit to work inspect it, is erroneous where there is a or not, and, if they are not, to send question of fact as to whether his duties them back to the stable; and he cannot question of fact as to whether his duties required him to inspect it. Cumberland recover against the employer for an in-Teleph. Co. v. Loomis (1889) 87 Tenn. 504, 11 S. W. 356.

injuries to a brakeman on a freight 449. train, alleged to have been due to a defective lantern which he used in giving sent, undertakes as a part of his employ-signals, if the company did not know ment the duty of determining when an and had no means of learning of the defect, and the brakeman, although not become unsafe or insufficient from such knowing of it, had the sole care and use,—especially where he has shown

custody of the lantern, and by proper diligence might have known its defective condition and reported the fact to the company. Pennsylvania Co. v. Congdon a tram road of which he had charge had negligently failed to observe and report. Cooper v. Butler (1883) 103 Pa. 412. On the ground that a section master in temporary charge of a hand car must note such defects in it as are discoverable by ordinary care, it was held that he could not recover for in-juries caused by a derailment result-ing from the fact that the wheel was not properly attached to the axle. Central R. & Bkg. Co. v. Kenney (1877) 58 Ga. 485. A servant has been refused recovery for an injury from a defective staircase not under the special care of any employee except himself and a fellow workman. Stroble v. Chicago, M. & St. P. R. Co. (1886) 70 Iowa, 555, 31 N. W. 63, 59 Am. Rep. 456. It is gang of men with carts and horses to jury to his foot by one of the horses in use which becomes unmanageable. Smith A railway company is not liable for v. Drake (1889) 125 Pa. 501, 17 Atl.

> An employee who, with his own conappliance which he constantly uses has

(2) That the function of selecting materials to be used for a certain purpose was an incident of the servant's employment. Some, at least, of the cases under this head, might not inaptly be classified with those just cited.3

so doing,—cannot hold his employer the management of the train, but also in liable for an unforeseen accident resulting from its expected and inevitable cars, machinery, and apparatus, as to impairment. Oil Co. (Cal. 1898) 53 Pac. 1086 (bottom of still was defective).

Where a watchman in a building, knowing that hatchways, which it was laid down that there is no legal prehis duty to close when left open, were sumption that it is the duty of the conunguarded, fell through a hatchway, from his negligence in not looking to ascertain whether it was open, the master is not liable. Gleeson v. Excelsion Mfg. Co. (1887) 94 Mo. 201, 7 S. W.

An employee whose duty it is to see that a certain appliance is put in good order, and who orders a subordinate to attend to it immediately, is guilty of negligence if he subsequently uses the appliance without ascertaining whether 287 (held proper to refuse an instruc-

Rep. 250.

An employee who for a long period had had charge of a rope and tackle which it was his duty to inspect was held to have had equal means of knowledge with the employer as to a latent defect in the rope. Erskine v. Chino Valley Beet-Sugar Co. (1895) 71 Fed. 270. See also Week v. Fremont Mill Co. (1892) 3 Wash. 629, 29 Pac. 215, where the understanding of the servant that he was in charge of an appliance, and bound to notice and report defects, was one of the elements adverted to.

In Nelling v. Industrial Mfg. Co. (1886) 78 Ga. 260, an instruction was approved by which the jury were told that, "if the plaintiff was in charge of this machine for the purpose of managing it and working with it, it was his duty to discover any defect and report

it to his superior."

Contrast with the above cases the ruling that a section foreman is not chargeable with knowledge of a defect in a part of a track which is not under his charge. Taylor, B. & H. R. Co. v. Taylor (1890) 79 Tex. 104, 14 S. W. 918.

ductor is bound to use ordinary and rea- a knot was held to be imputable to an

himself capable from long experience of sonable skill and diligence, not simply in supervising the due inspection of the Wright v. Pacific Coast their sufficiency and safety, while under his charge. Mad River & L. E. R. Co. v. Barber (1856) 5 Ohio St. 541, 67 Am. Dec. 312. But in Minnesota it has been ductor of a railway freight train to inspect the cars and machinery of his train, or that he is chargeable with negligence in using unsafe cars if the defect was such that it might have been discovered by inspection. Ransier v. Minneapolis & St. L. R. Co. (1884) 32 Minn. 332, 20 N. W. 332. This ruling has been expressly approved in Indiana. Cincinnati, H. & D. R. Co. v. McMullen (1888) 117 Ind. 439, 20 N. E. his orders have been carried out. Tru-tion that a conductor, being in charge man v. Rudolph (1895) 22 Ont. App. of the train, is bound to use ordinary care in inspecting the cars).

It would seem that an employee who is an independent contractor, who by permission of his employer uses a structure erected on the premises of the latter by another independent contractor. uses it at his own risk, as his obligation to examine it is the same in extent as that of the employer. Matthes v. Kerrigan (1886) 21 Jones & S. 431 (cornice gave way and allowed a stone

trimmer's scaffold to fall).

A master is not liable for an injury to a servant, caused by his fall from a staging by reason of its being defectively attached to a building, when the servant-a mature workman-had built and attached the staging, and had not asked or received any instructions from the master, and had had a full opportunity to make such an examination as would indicate the safest method of holding up the staging. up the staging. Arnold v. Eastman Freight Car Heater Co. (1900) 176 Mass. 135, 57 N. E. 209. For the reason that, under the given circumstances, it was understood to be a part of the servant's functions to reject obviously unsound material, knowledge of the fact that a tie beam used in a building under In Ohio it has been held that a con- construction was rendered defective by

- (3) That the servant was assigned to work which involved as one of its essential features the function of remedying certain abnormally, dangerous conditions.4 This class of cases has been considered under another aspect in § 29, ante.
- (4) That, in view of the system on which the business of the employer was conducted, it was manifestly intended that the function of inspection should be discharged to a limited extent by the servant.5

Mass 557, 36 N. E. 581.

has been inspected, and it is not a any other person.' natural interpretation of the order to As a lineman m take it as implying that the superior be inexpedient and impracticable to have knows that it is safe." A carpenter a man or company of men to go and ordered to go and brace joists is bound examine each pole upon which a line-to see that they are in a condition to man is about to work, and it is easy be braced. Mentzer v. Armour (1883) to determine very quickly whether a 18 Fed. 373.

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experienced carpenter who had assisted Reversing (1891) 15 N. Y. Supp. 400, in selecting it from a quantity of maselecting it from a quantity of maselecting it to its place. Were assigned by the court for holding Griffiths v. New Jersey & N. Y. R. Co. that an action could not be maintained (1893) 5 Misc. 320, 25 N. Y. Supp. 812, for the death of the foreman of a gang Affirmed in (1894) 8 Misc. 3, 28 N. Y. engaged in inspecting the defendant's Supp. 75 and in (1896) 140 N. Y. 505. Supp. 75, and in (1896) 149 N. Y. 595, lines, the accident being due to the fact 44 N. E. 1124. The primary duty to that a cross arm on one of the poles know whether a piece of timber which broke under him: "He had all the has been used for a considerable time opportunity which any inspector could as a lever for raising the door of a have to know the condition of this arm, furnace has become unfit for that pur- having frequently inspected that portion pose rests upon the servant who is in of the defendant's line where this arm immediate charge of the furnace, and was. He saw it when he went upon it, not upon any superior officer. Allen v. and careful inspection was the first G. W. & F. Smith Iron Co. (1894) 160 thing then suggested to him. He knew that he was in a place of danger, and 'In Kanz v. Page (1897; Mass.) 46 thus was bound, before resting his N. E. 620, a servant was held unable to weight upon the arm, to examine it to recover for injuries caused by the fall see if it was sound and probably ade-of a fragment of a fly wheel which had quate to support him. He knew preburst. Holmes, J., said: "When a room cisely how the defendant inspected its has been shattered by an explosion, it poles and the arms on them, and that it is plain to everybody that things are was not its custom to cause the arms on not in their normal condition, that the poles to be inspected by someone usual support of part by part has been climbing up the poles, and hence as to shaken or interfered with, and that him carelessness in not inspecting the some portion may have been weakened arms cannot be attributed to it. He to the point of being ready to fall. If knew that no one knew the condition the explosion was of an iron wheel, it of the arm which broke better than he is plain that the fragments probably did, and no one in fact knew better than here flower in the state of the st have flown in different directions, and he its sufficiency to bear his weight. If that they may have lodged above or be- he gave the matter a thought, he knew low. When a workman is sent into such that he must rely upon his own judga room on the day of the explosion to ment in placing his weight upon the clear away the ruins, it is manifest that arm, but before placing his weight he is taking one of the steps which are thereon he ought to inspect it and see necessary to disclose just what has hap- if it was sound and strong enough to pened. It is not a natural inference on hold him, and that he had no right to the part of one so sent that the place rely upon the judgment or inspection of

As a lineman must know that it would pole is badly decayed a little below the <sup>5</sup> In Flood v. Western U. Teleg. Co. surface of the ground, and no skill or (1892) 131 N. Y. 603, 30 N. E. 196, experience is required to do it beyond

- (5) That it was the customary practice of employees engaged in the same kind of work as the injured person to make an examination under the given circumstances.6
- (6) That the instrumentality which caused the injury was one which the servant was required to use in the course of his employment. In some cases language is used which is broad enough, if taken literally, to cast upon the servant an unqualified obligation.7 He is said to be bound to take notice of abnormally dangerous conditions, for the reason that a person who is constantly using an appliance is in a more favorable position than anyone else for detecting such conditions. See § 406, note 2, supra. By no courts has the existence of a duty of inspection, considered as an incident merely of the use of instrumentalities, been asserted more explicitly than by those of Illinois.8

Mass. 89, 51 N. E. 524.

It cannot be held as an abstract proposition of law that linemen of telegraph and telephone companies have the right to rely upon the soundness and safety of poles upon which they are working, and that it is the duty of the companies to test and inspect poles, and support such as are insecure, before permitting their linemen to climb them; but the question upon whom the duty of inspection rests is usually one of fact, depending upon the terms of the contract of employment, the lineman's knowledge of the hazards of the work, work five or six days about a yard and his ability and opportunity to dis-

it is the duty of the persons engaged Bridge in doing the blasting, as well as of W. 44. the foreman, to make an examination 5 It is

that which is possessed by ordinary line- safe condition at the point where the men, he will be presumed to have ac- injury occurred, as the most that plaincepted the risk that some pole of uncer- tiff could ask was a submission of the tain age may break and fall when a question to the jury whether, under the lineman is working on it, if he does not custom of the mine and the contract take measures to ascertain its condition between plaintiff and defendant, it was before going on it. McIsaac v. North- the duty of defendant or that of plainampton Electric Light Co. (1898) 172 tiff to keep the roof in safe condition.

Mass. 89, 51 N. E. 524.

Sandy River Cannel Coal Co. v. Caudill

and his ability and opportunity to discover the dangers incident thereto and which he knew he might have to use at avoid them, and other circumstances. Any moment; and he cannot recover if McGorty v. Southern N. E. Teleph. Co. (1897) 69 Conn. 635, 38 Atl. 359.

\*Under the general rules of mining of it. Goulin v. Canada Southern of it. Goulin v. Canada Southern Bridge Co. (1887) 64 Mich. 190, 31 N.

<sup>8</sup> It is the duty of a servant to see the foreman, to make an examination of the purpose of ascertaining whether that the machinery which he uses is in every blast has been exploded. Kelley repair, and, when it is not, to report v. Cable Co. (1889) 8 Mont. 440, 20 it to the employer. Toledo, W. & W. Pac. 669.

Where plaintiff was injured by the Illinois C. R. Co. v. Jewell (1867) 46 falling of a rock from the roof of de-Ill. 99, 92 Am. Dec. 240, where recovery fandant's wine it is error; in instructing was devied for an accident severed by fendant's mine, it is error, in instructing was denied for an accident caused by the jury, to assume that it was the the fact that the nut which kept a brake duty of defendant to keep the roof in wheel in its place on the upright shaft

415. When this inference is not drawn.—An examination of the facts involved in the decisions cited under the last section shows that, however sweeping the phraseology may be which the courts have employed in declaring the servant to be subject to a duty of inspecting the instrumentalities, the duty contemplated is far from being one of the same peremptory nature, or of the same scope, as that which is incumbent on the master. Those decisions contain nothing which is in conflict with the principles explicitly laid down in other cases, that a servant is not required to make a more searching examination than is reasonably possible, taking into account the functions discharged by him and the exigencies of his work; and

that it came into collision with a plank A helper in switchyards, whose duties that it came into collision with a plank beside the track and threw him, it was held error to instruct the jury that the switching it from one train to another servant was not bound to test the safety in the yards, is not chargeable with and fitness of the plank. Peoria, D. & knowledge of the fact that the nut E. R. Co. v. Hardwick (1892) 48 Ill. which secures a brakewheel to the staff App. 562. In another case it was said, is missing. Chicago & E. I. R. Co. v. arguendo, that, if the defective side Kneirim (1894) 152 Ill. 458, 39 N. E. ladder which gave way had been used on the road while he was a brakeman on the train of which it was a part, he man, who is required to be watchful as would be presumed to have known of its to the condition of the brakes. See condition. Chicago & N. W. R. Co. v. this note, supra. condition. Chicago & N. W. R. Co. v. this note, supra.

Jackson (1870) 55 Ill. 495, 8 Am. Rep.

661. Where a fireman was injured by son (1870) 55 Ill. 495, 8 Am. Rep. 661, the fall of the "shaker bar" of his en
it was urged that the servant was gine, owing to the fact that the key guilty of negligence in not seeing that a which secured it to its post had fallen side ladder on a railway car was defectout, and the evidence tends to show that tive, and, in attempting to descend, in the defect had existed for six weeks, it not placing his feet upon the two lower is misleading to instruct the jury that rounds of the ladder. The court said:
a servant has a right to assume that an "This was a question fairly falling
appliance furnished him is reasonably within the province of a jury to deterappliance rurnished nim is reasonably within the province of a jury to detersafe. Chicago & E. I. R. Co. v. Garner mine. But when it is remembered that (1898) 78 III. App. 281. A servant's he occupied a subordinate, although a omission to examine the strength of highly responsible, place requiring vigiwindow fastenings by which it is necessary for him to support himself while be expected or required that he should washing the window from the outside is act with that deliberation and circumstants.

became loose and allowed the wheel to statement in a recent case, that a servbecame loose and allowed the wheel to statement in a recent case, that a servcome off when the brake was operated. ant is not bound to investigate and
The court said that "the condition of inspect any part of the property except
the brake was a matter under the special that which pertains to and is connected
care of the brakeman, and it was his with his employment. Lake Shore &
business at all times to see that it was
in a fit condition for use, and report
defects to the company."

In a case where a yard hand who
had been at work for a considerable
time and had ridden many times a day
hound to examine into the condition of
raise and lower many
to the condition of
raise and lower the property except
that a servman is not bound to investigate and
inspect any part of the property except
that a servman is not bound to investigate and
inspect any part of the property except
that which pertains to and is connected
that which pertains to and is connecte time, and had ridden many times a day bound to examine into the condition of on a footboard which was hung so low the tower and machinery.

negligent. Chicago Consol. Bottling Co.

Mitton (1891) 41 Ill. App. 154.

The extent of the servant's obligations in this jurisdiction is made still charge of his duties on a switch he must more clear by the exceptive form of keep a constant watch for the signal

that he is not bound to make such an examination as is necessary if invisible defects are to be discovered.<sup>2</sup> Compare §§ 407, 408, supra.

It will sometimes happen that, even where the servant is charged with a specific duty of inspection, circumstances may occur which will justify him in acting upon the assumption that there is no abnormal danger to be apprehended, and for that reason omitting the inspection which would otherwise be made.3

Whether a servant is bound to look for defects other than those open to his observation in the prudent use of the appliance is ordinarily a question for the jury,4 as is also the question whether, sup-

for the derrick, and said he would note that he would have been if he had been him responsible for its proper care, told that he was to make the primary Jarvis v. Northern New York Marble and sole examination."

Co. (1900) 55 App. Div. 272, 67 N. Y.

\*Nicholds v. Crystal Plate Glass Co.

Supp. 78. In a case where the injured (1894) 126 Mo. 55, 27 S. W. 516, 28 servant could not have discovered the S. W. 991; Habishaw v. Standard Quick-defective leading of a car by inspection. defective loading of a car by inspection, silver Co. (1901) 131 Cal. 430. 63 Pac, it is error to give an unqualified charge 728. to the effect that, if it was his duty to

from his superior, which to him is a see that the loads on cars were in proper peremptory order requiring instant condition, he was chargeable with knowl-obedience. This being so, we could not edge of the condition of the load which expect him to deliberately examine a caused the injury. Galveston, H. & S. ladder to see whether it was in repair." A. R. Co. v. McCray (1897; Tex. Civ. It was then remarked that the rule laid App.) 43 S. W. 275. That a servant is down in Illinois C. R. Co. v. Jewell not, by the mere fact of his using an (1867) 46 Ill. 99, 92 Am. Dec. 240 (see appliance, charged with the duty of in-\$ 415, note 9, supra), was to be deemed specting it for latent defects, was also applicable only in cases where the brake-recognized in Missouri P. R. Co. v. Cren-

§ 415, note 9, supra), was to be deemed applicable only in cases where the brakeman knew, or could by reasonable precaution know, of the defect. If the defect was inherent from improper material or from unskilful workmanship, and had not been developed, he should not be held to have known the fact.

A brakeman whose duty it is to examine a brake chain every trip before starting is not required to go under the car and examine the chain link by link, but has a right to suppose that it was placed on the car. Morton v. Detroit, B. C. & A. R. Co. (1890) 81 Mich. The car in question came from a private 423, 46 N. W. 111 (not chargeable with knowledge that the links were not properly welded together). Where an employee in a quarry whose duty it was hoisted by the derrick, was killed by the breeking of the mast which was hoisted by the derrick, was killed in Missouri P. R. Co. v. Crentanovic P. R. Co. (1888) 71 Tex. 340, 9 S. W. 262 (porter injured by defective beggage truck, the defect being such that it could no was hoisted by the derrick, was killed information to the contrary, had a right by the breaking of the mast, which was to take this view of the situation, and dry-rotted inside, it was held that the that the care and diligence which could defendant was still liable for the in- be required of him should be measured spection of hidden defects, although the by such fact. While he was bound to superintendent when he set the deceased look at the car and lumber, he was not to work instructed him how to care bound to make the strict examination for the derrick, and said he would hold that he would have been if he had been

posing him to have made an examination, the defect in question was one which he ought to have discovered by the exercise of reasonable care.<sup>5</sup> In the absence of positive evidence establishing the devolution of such a duty upon the particular employee who was injured, a court will not presume that it rested upon him.6 The mere fact that it is proved to have been his duty to report any defect of which he obtained knowledge, or to repair it himself, is not enough to excuse the employer.7 Nor is the right of a servant to recover defeated by the mere fact that he is himself a foreman, and has helpers under him in the performance of the duties for which such appliances are required to be used.8

416. Duty of inspection under rules, special notices or orders, and express contracts; generally.—The duty of inspection may be cast on the servant by express contract, or by general rules, or by special orders of which he is notified. In other words, it is permissible for the master to impose, and for the servant to accept, by mutual understanding, the burden of such an inspection as the latter is competent to make.2 A breach of the duty thus assumed constitutes, within the limits explained in subd. b, infra, a bar to the

's Louisville & N. R. Co. v. Pearson (1892) 97 Ala. 211, 12 So. 176.

Where in a suit against a mining company for the death of an employee, caused by the falling of rock from the mine roof, it appears that it was the duty of certain other employees called "inspectors," to examine the roof, and that it was also decedent's duty as a driller to examine the roof above and in the vicinity of his drill before setting the latter up, and that the fall of rock causing the accident took place some brakeman's duty, and does not necessarily rest upon him. In the absence of all evidence upon the subject, we can not, therefore, presume that the examination and inspection of the particular arm in question had been committed to the plaintiff."

A millwright employed in a mill is not, simply from his employment as driller to examine the roof above and in the vicinity of his drill before setting the machinery. Cole v. Warren Mfg. Co. (1899) 63 N. J. L. 626, 44 Atl. 647.

"There is notices arily rest upon him. In the absence of all evidence upon the subject, we can not, therefore, presume that the examination and inspection of the particular arm in question had been committed to the plaintiff."

A millwright employed in a mill is not, simply from his employment as driller to examine the roof, and in the vicinity of his drill before setting the plaintiff."

There is not not of the particular arm in question and inspection of the particular arm in question had been committed to the plaintiff."

A millwright employed in a mill is not, simply from his employment as driller to examine the roof above and in the vicinity of his drill before setting the plaintiff." the latter up, and that the fall of rock causing the accident took place some 10 or 12 feet from the drill, it is a question for the jury whether a proper inspection by deceased within the limits of the roof he was bound to inspect implied promise to furnish him safe would have disclosed its dangerous condition, so that a failure to discover it ant's duty to inspect the tools and approach of the servant and the

dition, so that a failure to discover it would constitute contributory negligence. Fisher v. Central Lead Co. (1900) 156 Mo. 479, 56 S. W. 1107. In Goodrich v. New York C. & H. R. R. Co. (1889) 116 N. Y. 398, 5 L. R. A. 750, 22 N. E. 397, the court, speaking with particular reference to the duties of railroad servants, said: "While in the case of corporations the performance of this duty must be committed to employees, there is no presumption that employees, there is no presumption that it rests upon any particular individual. It is not within the apparent scope of a

pliances furnished him." Texas & P. R. Co. v. O'Fiel (1890) 78 Tex. 486, 15 S. W. 33.

<sup>7</sup> Condon v. Missouri P. R. Co. (1883)

78 Mo. 567.

<sup>5</sup> Nicholds v. Crystal Plate Glass Co. (1894) 126 Mo. 55, 27 S. W. 516, 28 S. W. 991.

<sup>1</sup> Chicago & A. R. Co. v. Merriman (1900) 95 III. App. 628. <sup>2</sup> Chicago & A. R. Co. v. Merriman (1900) 95 III. App. 628.

maintenance of an action for an injury due to conditions which would have been discovered if an inspection had been made.

Some of the cases deal with the responsibility arising out of express stipulations entered into either at the time when the servant began work or afterwards.3 Others exemplify the obligations imposed by a special order or notice addressed to the employee in question, whether as an individual or as one of a class.4 But most of the decisions which exemplify its operation involve the infraction of rules which prescribe that employees shall examine certain specified instrumentalities. Such rules do not, of course, affect the servant's responsibility where he is neither actually nor constructively

where it was his duty, as the rear man of the coupling apparatus while of a switching crew, to examine the cars the train was in motion. Louisville & and see that they were all in proper position, and no other person is shown to have had knowledge of the condition of the car. Chicago & E. I. R. Co. v. Law (1893) 14 Ky. L. Rep. 850, 21 S. W. 648.

A lineman cannot recover of an electric wires on account of degree of the car. Chicago & E. I. R. Co. v. tric light company for injuries received Driscoll (1898) 176 Ill. 330, 52 N. E. from electric wires on account of degree of the plaintiff should be set to inspect and keep in good condition aside when his injury was the result of a drawheads of two cars, and he himself though they were thrown him from a drawheads of two cars, and he himself though they were thrown him from a drawheads of two cars, and he himself though they were thrown him from a drawheads of two cars, and he himself though they were thrown him from a drawheads of two cars, and he himself though they were thrown him from a drawheads of two cars, and he himself though they were thrown him from a drawheads of two cars, and he himself though they were thrown him from a drawheads of two cars, and he himself though they were thrown him from a drawheads of two cars, and whose direction was more Norfolk & W. R. Co. v. Emmert (1887) La. Ann. 869, 17 So. 346. 83 Va. 640, 3 S. E. 145. Where a brakeing of cars, and, if the manner in which Co. v. Harmes (1893) 52 Ill. App. 649 they are loaded makes it unsafe to (note 7, infra). couple them, to report the matter to the

See cases cited in note 9, infra. roadmaster, with a view to having the A railway servant who has been load adjusted, he becomes to some extent A railway servant who has been load adjusted, he becomes to some extent directed by the trainmaster to examine an inspector of the cars, and, if he in cars used for a special work, and have fact sees that they are improperly them repaired if not in good order, and loaded, and undertakes to couple them who is injured while using a car which in that condition, he does so at his peril. he knows to be imperfect, is guilty of Scott v. Oregon R. & Nav. Co. (1886) contributory negligence. Shields v. 14 Or. 211, 13 Pac. 98 (railroad iron New York C. & H. R. R. Co. (1892) projected over the ends of the cars). 133 N. Y. 557, 30 N. E. 596 (chain A locomotive engineer, whose duty it is which held up trap door in the bottom to inspect his engine and to minute in a coal car broke and trap door gave book any repair needed assumes the of a coal car broke and trap door gave book any repair needed, assumes the way; employee had undertaken to mend risk of an obvious defect which he fails it instead of sending it to the shop, as to report. Peppett v. Michigan C. R. he should have done). Co. (1899) 119 Mich. 640, 78 N. W. 900 In the cases cited below, no rule is (worn centre casting). In a case where, adverted to by the court, and it may owing to the loss of bolts attached to a perhaps be assumed that the duty was imposed by a special order.

The cases cited below, no rule is (worn centre casting). In a case where, adverted to by the court, and it may owing to the loss of bolts attached to a drawhead, a car, when pushed, struck the car next it, and thus injured a No recovery can be had for the death brakeman, recovery was denied on the of a brakeman, caused by a car being ground that it was the peculiar business off the track at the end of a stub switch of a brakeman, and not the special duty when the train was about to be moved, of the conductor, to look to the condi-where it was his duty, as the rear man tion of the coupling apparatus while

the cars and their couplings so as to gloves, and whose direction was more determine, before attempting to couple advisory than anything else. Smart v. them, what kind of link should be used. Louisiana Electric Light Co. (1895) 47

For a case in which the duty was man has authority to examine the load- imposed by a notice, see Mobile & O. R. aware of their existence.<sup>5</sup> See § 227, ante. But if his knowledge of a particular rule is established, the extent of his responsibility must be determined with reference to its provisions, so far as they are valid, and not with reference to the common-law doctrine that he is not bound to inspect the master's plant.6

brakeman who is required by the rules dition of drawheads cannot recover, of the company to inspect the brakes of where the drawhead which caused his if he is injured owing to the fact that dangerous. Brooks v. Northern P. R. the ratchet wheel and dog of a brake Co. (1891) 47 Fed. 687. Where a rule were defective, and the defect was such required employees to see for themselves that it would have been apparent if the that machinery, etc., was in good conbrake had simply been tried. Chicago dition, a conductor cannot recover & A. R. Co. v. Bragonier (1886) 119 where the cause of his injury was Ill. 51, 7 N. E. 686. A brakeman who a defective fastening of an end gate on omitted to comply with a rule requiring a gondola car, the result being that the the hand brakes on cars to be tested begate fell backward when he jumped on fore the train starts, and was injured to it. Louisville & N. R. Co. v. Orr in consequence of the train's running (1890) 91 Ala. 548, 8 So. 360 (doctrine away on a steep grade when the brakes laid down, arguendo, in sending back failed to work, was held unable to recover, in La Croy v. New York, L. E. A fireman who has been sixteen & W. R. Co. (1892) 132 N. Y. 570, months in the employ of a railway company. has frequently done switching of

tempting to couple cars while standing and is required by the rules to take between them on the short side of a note of all dangerous points on the line, curve is guilty of contributory neglically represented by the proximity of the to observe that the drawheads were structure to the track. New York, C.

<sup>5</sup> Where a rule forbade brakemen to about one third of the usual length, "Where a rule forbade brakemen to about one third of the usual length, attempt to make a coupling unless the and a rule of the company known to coupling appliances were known to be in good order, and there was evidence examine all drawheads before making that the plaintiff did not know of this prohibition, it was held erroneous to Co. (1891) 2 N. D. 112, 13 L. R. A. charge the jury that there could be no 465, 49 N. W. 408. An experienced nead brakeman, whose duty under a make the coupling when the coupling appliances were not known to him to make the coupling when the coupling arrangements of cars before attempting be in good order. Fordyce v. Yarborough (1892) 1 Tex. Civ. App. 260, lessness where he failed to see a defect in the coupling which would have been about one third of the usual length, at unle of the company known to him required employees to take time to in required employees to take time to him required employees to take time to in required employees to take time to in required employees to take time to him required employees to take time to in required employees to take time to him required employees to take time to him required employees to take time to in required employees to take time to him required employees to take time to in required employees to him required employees to him required employees to him required employees to him required employees to A brakeman who agrees to observe a rule requiring him to make an inspection of the brakes is chargeable with (1889) 76 Mich. 400, 43 N. W. 370 contributory negligence, if he fails to discover that the ratchet of a brake discover that the ratchet of a brake proper level). Where it is the duty of wheel is loose. Matchett v. Cincinnati, a conductor, under the rules, to know W. & M. R. Co. (1892) 132 Ind. 334, that each car is in proper running conditto where a brakeman was injured by fails to make an inspection and is instate, where a brakeman was injured by fails to make an inspection, and is in-the breaking of a coupling pin, it was jured by a defect that might have been laid down that negligence was predicable discovered, he cannot recover for an in-of his failure to comply with a rule re-quiring him to examine the couplings to act properly when a flying switch is of cars; but the case went off on the being made. Alexander v. Louisville & point that the rule was unknown to him. N. R. Co. (1886) 83 Ky. 589. A switch-Louisville, E. & St. L. R. Co. v. Utz man required by a rule to inspect and (1892) 133 Ind. 265, 32 N. E. 881. A take notice of the construction and concars which he handles cannot recover injury was manifestly so short as to be

N. E. 391. pany, has frequently done switching on A railway employee injured in at-

417. Limits of the duty under these circumstances.—The general effect of express contracts to examine instrumentalities is to narrow the domain of facts within which the servant is entitled to claim the benefit of the principle that he is entitled to rely upon the proper performance of the master's duties. But it seems to be a legitimate inference from the decisions that, in regard to such examination as may be undertaken in compliance with contracts of this description, they do not impose upon him the obligation of using a higher degree of diligence than that which would otherwise have been incumbent upon him. He is required to take notice of apparent defects like those involved in the cases cited in note 5 to this section. But he is not bound to look for concealed defects. A fortiori he cannot be declared negligent, as a matter of law, on the ground that he failed to observe merely sporadic and transitory conditions resulting from the acts or omissions of his coemployees.2 The extent of his undertaking is

& St. L. R. Co. v. Ostman (1896) 146 Ind. 452, 45 N. E. 651.

A mistraction that, in the absence of 10 Ind. App. 570, 37 N. E. 190. notice of defects, a servant is under no
A rule requiring an engineer to inprimary obligation to investigate and spect his engine has no reference to detest the fitness and safety of the mafects in the mechanical construction of
chinery, etc., although it is correct in the engine. Galveston, H. & S. A. R. Co.
some states of the evidence, is not appliv. Smith (1900) 24 Tex. Civ. App. 127,
cable in a case where the injured servtweether engine of the evidence o ant was charged by the rules of the emover a defective track).

a right to presume that the railroad ate superior at once.

See also cases cited in the following notes.

<sup>1</sup> The foreman of a derrick car who is required by a rule of the company em-An employee of a railway company ploying him to see for himself before cannot recover for injuries caused by a using them that the "machinery, tools, failure to inspect a defective foreign and material" provided for him are in car, where by the rules of the company proper condition for the intended emknown to plaintiff the duty of inspect-ployment, is not, as a matter of law, known to plaintiff the duty of inspectployment, is not, as a matter of law,
ing foreign cars was cast upon him. guilty of contributory negligence in failft. Wayne, C. & L. R. Co. v. Gruff
ing to discover a latent defect in the
(1892) 132 Ind. 13, 31 N. E. 460 (preframework of the car, which is concealed
cise defect not mentioned); Illinois C. by the floor, where it does not appear
R. Co. v. Barslow (1901) 94 Ill. App. that he was the inspector of the car.
206 (cracked coupling link).

An instruction that, in the absence of
10 Ind. App. 570, 37 N. E. 190.

A brakeman on a railroad train who ployer to inform himself as to the con- uses reasonable care to inform himself dition of the instrumentality in ques- of the safety of the appliances to be tion, and it is a possible inference from used by him is not, as matter of law, the testimony that he might, by taking chargeable with such negligence as bars notice of his surroundings, have ascerbis right to recover, in failing to distained that it was defective. *Illinois* cover a defect in a brake chain which C. R. Co. v. Sanders (1894) 58 Ill. App. gave way, notwithstanding a notice to 117 (brakeman had made several runs the employees of the company that it is the duty of every employee to "know" Where there is a rule requiring train- that the property with which he has to men to examine the cars, it is error to work is in good and safe condition, and, instruct the jury that a brakeman had if not, to report the fact to his immedihad used reasonable care to furnish does not change the standard of care reasonably safe appliances. Terre Haute which the servant is required to attain & I. R. Co. v. Pruitt (1900) 25 Ind. in regard to inspection. Mobile & O. R. App. 227, 57 N. E. 949.

Co. v. Harmes (1893) 52 Ill. App. 649. Co. v. Harmes (1893) 52 Ill. App. 649. 2 Neither the rule of a railway com-

pany requiring employees to see that the

that he will make such an inspection as is practicable, taking into account the exigencies of the employment. This implied qualification of his responsibility is not infrequently recognized in the phraseology of the rules on this subject.3 If such phraseology is used, the construction put upon the rule is that the servant is bound to make such an examination as his information and opportunities permit.4 But even if a limiting clause of this tenor is not used, it

premises upon which they work are safe, dark for defects in a car which he had foot, slightly protruding from the footboard of an engine on which he is riding, whereby he is thrown and killed.

Louisville & N. R. Co. v. Bouldin (1898)

121 Ala. 197, 25 So. 903.

Indication was injured by a handhold so badly bent that it could not be grasped).

Where a brakeman, in his application for employment, undertakes, as soon as possible, to make a careful examination

held that a brakeman whose agreement to examine the appliances was made at the accident. Quinn v. New York, N. the time when he entered the employment, and included a clause stating that circumstances to take sufficient time," was entitled to recover. Pratt v. Lake Shore & M. S. R. Co. (1892) 63 Hun, 616, 18 N. Y. Supp. 682. The court said: "It is quite clear that it would not have been practicable for the decased to have performed the duty of an expert examiner before using the machinery of the cars he was required to use in the discharge of his duties. The cars composing the trains he was required to work on were frequently deliberation which would obviously be necessary to a proper examination of the car, necessary to a proper examination of the necessary to a p

premises upon which they work are sate, tark for defects in a car which he had discover and remove from near a track been inspected by the company the same in the yards in which he works an oil day. Lake Shore & M. S. R. Co. v. box which it is the duty of another Ryan (1897) 70 Ill. App. 45 (jury warworkman to remove, and which, by rearranted in finding that there was no conson of nearness to the track, catches his tributory negligence where the servant foot eligibility prattricting from the foot.

<sup>8</sup> In a case where the cause of the in-jury was that four of the six spokes may understand the dangers attending which connected the hub with the rim them, he assumes at least the risk of of a brake wheel were broken off, it was all the permanent structures which he held that a brakeman whose agreement had had a chance of examining before

agreement."

A railroad brakeman whose contract able to discover defects to the same exof employment provides that he will, for tent, as that expected and required of his own safety, examine the things in the employer or master, or persons inconnection with which he works before trusted generally with this duty for the using them, to ascertain as far as he public safety or safety of employees; reasonably can their "condition and but the character of the general duties soundness," is not required to look after to be performed by conductors and

seems to be an unavoidable deduction from the general principles discussed in §§ 408 et seq., supra, that a master cannot shift upon his employees his responsibility to them for injuries resulting from defects due to wear and tear, by devolving upon them the duty of inspection, unless they are given time and opportunity to make such an inspection as would reveal the defects. And this may be said to be the effect of the decisions.<sup>5</sup> It is considered that such rules should receive a

other duties, and the circumstances atthe duties, and the circumstances attending, they should observe and obey the rule." Memphis & C. R. Co. v. Graham (1891) 94 Ala. 545, 10 So. 283. In Louisville & N. R. Co. v. Pearson (1893) 97 Ala. 211, 12 So. 176, this passage was cited with approval, and it was held that a rule of this tenor impacted within the limit than 13 d. posed, within the limits there laid down, a duty upon the servants.

chargeable with notice of a defect in a

a detailed examination.

A railroad brakeman is not, as a matrequiring him to inspect the appliances which he is to use, which will prevent brake, where the defects are not so open 334, 31 N. E. 792. and visible as to be detected at a glance. and visible as to be detected at a glance, and his only opportunity for an inspec-tion is while the train is standing at a station waiting for a connecting train, and is liable to start at any moment. O'Malley v. New York, L. E. & W. R. Co. (1893) 67 Hun, 130, 22 N. Y. Supp.

48. "We are of the opinion that the duties put upon the brakeman by the rule in the brake staff which caused the inin question adds very little to the duties jury; that it was dark, that the yard placed upon him by the rules of law. was not lighted; and that he had only Something more than the mere making an ordinary lantern, which was insuffiof a rule requiring brakemen to make cient. Chicago, St. L. & P. R. Co. v.
inspection of the implements and machinery used by them is necessary in orIn jurisdictions where the servant has der to shield the master from the conse-quences of a failure to perform the du-ther actual nor imputed knowledge of

brakemen is such that they necessarily machinery imposed by law upon him. become more or less familiar with the He must have the appliances and opappliances and machinery constantly in portunity for making such inspection. their use and under their supervision, The duty imposed by law upon railway and know, to some extent, when they companies of furnishing reasonably safe are not in proper condition for safe use. cars and appliances for the use of brake-To the extent of their information, and men in its employ, is for the protection the opportunities afforded to make such of life and limb, both of which are examination consistently with their sacred in the eye of the law; and public policy forbids that the master should be, in any manner, relieved of that duty without providing for the performance of the same by some other agency as fully as required of the master." Chicago, St. L. & P. R. Co. v. Fry (1891) 131 Ind. 329, 28 N. E. 989.

Compare, also, Holmes v. Southern P. Co. (1898) 120 Cal. 357, 52 Pac. 652, where it was held that an employer is <sup>6</sup>In McKnight v. Brooklyn Heights not entitled to an instruction that, pro-R. Co. (1898) 23 Misc. 527, 51 N. Y. vided the plaintiff would not have been Supp. 738, a servant was held not injured if he had followed a certain rule, then the mere fact that such rule was hame strap, which was visible only upon impracticable or not observed will not excuse him for not following it.

A brakeman receiving a car into a ter of law, guilty of negligence in fail-train out on the line cannot be held to ing to observe a rule of the company the same degree of care as a regular intrain out on the line cannot be held to spector or a man in a shop properly supplied with tools. Matchett v. Cin-

It has been held error to sustain a demurrer to a reply to an answer which alleges that the plaintiff, a brakeman, was called only a short time before his train went out; that he was engaged continuously, until it started, with his lamps and signals, and in coupling and loosening brakes, and therefore had no time to examine and discover the defect

ties of furnishing safe implements and the dangerous conditions, it is error to

reasonable interpretation, and that the obligations of the servant should be determined with reference both to the character of the defect and to his ability to make an examination.6 Upon this basis the validity of rules or agreements of the ordinary tenor by which servants are obligated to examine appliances may often be upheld.<sup>7</sup> But if they are couched in terms which indicate a clear and absolute intention on the employer's part to impose a more extensive obligation upon the servant than is thus declared to be permissible, they will be treated—by most courts at all events—as an illegal attempt to subject the latter to the duty which is incumbent on the former, of seeing that the plant is in a reasonably safe condition.8

A theory of responsibility which is less favorable to the servant than that which is outlined in the cases so far cited is possibly indicated by the conclusions arrived at, or the language used, in some cases. But it is doubtful whether the standpoint of the courts was in reality materially different from that exemplified in the decisions already cited.9

v. Pruitt (1900) 25 Ind. App. 227, 57
N. E. 949.

The fact that the servant had ample opportunity for examination is emphasized in Bennett v. Northern P. R. Co. (1891) 2 N. D. 112, 13 L. R. A. 465, 49 N. W. 408 (note 6. supra).

Gon this ground the contributory negligence of the servant was held to be for the jury, where he was injured by reason of his failure to observe a crack extending half way through a brake staff, about 3 inches above the dog, such a defect not being discoverable without a rather minute inspection. Myers v. Erie R. Co. (1899) 44 App. Div. 11, 60 N. Y. Supp. 422. rails, tracks, and roadbed are in a good, There a brakeman had set the brake on a car, and four hours later, during which time he had no specific duties to perform, he was injured, while again lattempting to set the same brake, by the breaking of the staff.

TI has been held proper to refuse an instruction that a railway servant was negligent if he violated a rule prescribing that he should not attempt to couple or uncouple a car, unless he knows the coupling is in proper condition. Missouri, K. & T. R. Co. v. Wood (1896; Tex. Civ. App.) 35 S. W. 879.

A requirement that, before a switchman shall couple or uncoupled cars, he must "examine and see that the cars or engines to be uncoupled or coupled, the pins, links, drawheads, and other appliances connected therewith, the ties, after a brakeman had set the brake on a car, and four hours later, during loaded that such work may be safely done,"—has also been held invalid. II-linois C. R. Co. v. Cocby (1896) 69 Ill. attempting to set the same brake, by the breaking of the staff.

TI has been declared that rules of (1886) 119 Ill. 51, 7 N. E. 688, holding a railroad company requiring its emphasized in a handhold which gave held instruction that a railway company is not entitled ployees to examine the cars, machinery, to an instruction that, if its officers in

instruct the jury that a brakeman is not and appliances which they are expected instruct the jury that a brakeman is not bound by a rule requiring him to examine the appliances, unless it is shown that he had been given sufficient time an employer to furnish and maintain and proper facilities to fully examine suitable appliances, and the right of and know that such parts and appliances were safe, as such instruction been done. Louisville & N. R. Co. v. places the burden on the defendant to prove that sufficient time for inspection (knowledge not imputable, as matter of was afforded. Terra Haute & I. R. Co. law, where a bolt fastening the end of v. Pruitt (1900) 25 Ind. App. 227, 57

The fact that the servant had ample opportunity for examination is em-

An employee upon whom the duty of inspection is imposed by a rule is not relieved from liability for its nonperformance by the mere fact that other agents of the employer who are charged with a similar duty in respect to the same subject-matter have also been negligent with regard to its performance. 10

In Texas, the principle accepted seems to be that it is always for the jury to say whether the failure of the servant to examine, in com-

charge of freight trains habitually cause failed to discover a defect. Mobile & out affording brakemen an opportunity to examine the brakes, that will not excuse the brakemen for their failure to perform the duty of inspection, the controlled by the principle that an employee is not relieved of his obligations by the fact that other employees disclosed the defect from which his inhave failed to do their duty. (See next juries resulted, and he failed to make note.) But when the context of the prescribed examination, he cannot passage in which the brakeman was recover; while, if the defect was latent, thus declared unable to recover is examined, it will be seen that nothing barred, as the accident was an assumed man was still bound to perform his duty of inspection, so far as was practicable, and that the lack of opportunity of a present of the prescribed examination, he cannot passage in meant than that the brakeman was still bound to perform his duty of inspection, so far as was practicable, and that the lack of opportunity for such inspection before the this doctrine was enunciated in regard out affording brakemen an opportunity 649. nity for such inspection before the this doctrine was enunciated in regard starting of a train would not excuse to a foreign car, as to which the cursory him for failing to make a due examinainspection made by employees en route tion of the brakes while the train was is, as was said, "about the only inspecon the road. It may fairly be said, tion practicable." tion of the brakes while the train was in, as was said, "about the only inspecton the road. It may fairly be said, therefore, that from the standpoint of this court the extent to which a rule as to inspection is to be treated as operative is really determined with reference to the ability of the servant to comply with such a rule, consistently gradient and reasonably expeditious performance of his work. That this is the actual effect of the doctrine laid down by the Illinois supreme court failed to report it, held not to excuse plaintiff). Chicago & A. R. Co. v. laid down by the Illinois supreme court by appeals in that state, as it has decided, the effect that the employment of local with reference to a notice declaring it to be the duty of an employee to know that the property with which he has to work is in good condition, that, if he cars, relieved the deceased from the duty used reasonable care to inform himself, considering the opportunities afforded him, and the appliance in question appeared safe, he cannot be charged with negligence on the ground of his having negligence on the ground of his having

them to be made up and sent out with- O. R. Co. v. Harmes (1893) 52 Ill. App.

pliance with a rule, the appliance by which he was injured, was culpable.<sup>11</sup>

\*\*\* \*\*Galveston, H. & S. A. R. Co. v. ment of switches); \*\*Bookrum v. Galves-Nicholson (1900; Tex. Civ. App.) 57 S. ton, H. & S. A. R. Co. (1900; Tex. Civ. W. 693 (engineer did not see that a App.) 57 S. W. 919 (servant did not switch was properly adjusted after his examine engine step, and slipped in contrain had backed on to a siding, though the company's rules provided that engrease; rule required him to examine gineers were responsible for the adjust-all appliances before trusting them).

## CHAPTER XXII.

- RIGHT OF ACTION FOR INJURIES CAUSED BY DANGEROUS CONDITIONS WHICH THE MASTER HAD PROMISED TO GUARD AGAINST OR REMEDY.
  - 418. Introductory.
  - 419. Necessity of proving that a promise was given.
    - a. Generally.
    - b. Promise to furnish a new instrumentality.
  - 420. Whose promise is binding on the master.
  - 421. Recovery dependent upon proof that the servant was induced by the promise to continue working.
    - a. Generally.
    - b. Promise having no reference to the servant's safety.
  - 422. Reliance upon promise given before work was begun.
  - 423. Reliance upon promise given after the work was begun.
    - a. Generally.
    - b. Sufficiency of complaint.
    - c. Admissibility of evidence.
  - 424. Rationale of the relations between the parties after the giving of the promise.
    - Responsibility for conditions temporarily undertaken by employer.
    - b. Presumption of waiver by servant rebutted.
    - c. Servant absolved from charge of contributory negligence.
  - 425. Assumption of risks as a defense.
    - a. During the period covered by the promise.
    - b. After the expiration of the period covered by the promise.
  - 426. Volenti non fit injuria, as a defense.
  - 427. Contributory negligence as a defense in cases where a promise was given; generally.
    - a. During the period covered by the promise.
    - b. After the expiration of the period covered by the promise.
  - 428. Contributory negligence, as inferred from the gravity of the risk encountered.
  - 429. Contributory negligence, as inferred from the length of time the servant worked after the giving of the promise.

430. Illustrative cases.

431. Decisions restricting or ignoring the doctrine as to the effect of a

432. Duty of servant to exercise care with respect to the defective instrumentality.

As to the necessity of showing that the breach of the promise was the approximate cause of the injury, see chapter xLII., post.

418. Introductory.—It has already been explained that the fact of a servant's having entered or continued in an employment with knowledge of the abnormal risk to which his injury was due may be considered from two standpoints, viz., as being indicative either of the conclusion that he had voluntarily undertaken that risk, or of the conclusion that he was guilty of contributory negligence in subjecting himself to that risk. See chapters xvII., xvIII., ante. It is manifest that the situation is not altered in these broader aspects where the work is continued for the reason that the servant is assured by the master, or by some agent authorized to speak for him, that steps will be taken to remedy the defective conditions to which the abnormal risk is trace-That the promise was made and that the servant's conduct was influenced by it, are circumstances which merely introduce new factors into the investigation. Both the defenses suggested by the servant's action in exposing himself to a new peril will therefore be equally available to the master, where he has undertaken to remove the cause of that peril.2

In this connection it may be remarked that, in cases of the type under consideration, as well as in those which do not involve the effect of a promise, the unfortunate ambiguity of the phrase "assumption of risks" has produced a confusion between the two defenses.3 See the discussion of this subject in §§ 309, 310, ante.

fault.

2 See Clarke v. Holmes (1862) 7

Hurlst. & N. 937, 31 L. J. Exch. N. S.

3 See, for example, Schlitz v. Pabst
356, 8 Jur. N. S. 992, 10 Week. Rep.
405, more especially the opinion of Crompton, J., who stated that he founded his judgment on two propositions, A. 728, 48 N. W. 1092; Taylor v. Star viz., that there was no defense under Coal Co. (1899) 110 Iowa, 40, 81 N.

<sup>1</sup>Adverting to the effect of such a the principle of law laid down in promise in relation to the defense of Priestly v. Fowler (1837) 3 Mees. & contributory negligence, the court remarked, in Union Mfg. Co. v. Morrissey (1883) 40 Ohio St. 148, 48 Am. and that the plaintiff had not contributed to his injury by his own negligence. The statement in the text is which it is given out of the operation of also supported by Lewis v. New York the general principle that one who & N. E. R. Co. (1891) 153 Mass. 73, voluntarily and knowingly exposes himself to danger by using dangerous instruments cannot be said to be without fault.

2 See Clarke v. Holmes (1862) 7 tions.

The effect thus ascribed to a promise to remove a specific cause of danger is analogous to that ascribed to an express or implied assurance that there is no present danger. See chapters xxIII., xxIV., post. Not infrequently, indeed, the evidence shows that the servant relied both on an assurance of present safety and on a promise to remedy the dangerous conditions.4

An analysis of the decisions involving the effect of a promise shows that the servant is deemed to have no cause of action unless he proves the following facts:

- (1) That a promise was given, either to the effect that the dangerous condition which caused the injury would not be permitted to come into existence, or that such condition would be remedied.
- (2) That the promise was given either by the master himself or by some agent authorized to make it in his behalf.
- (3) That the servant's reliance upon the promise was the inducing motive for his consenting to subject himself to the given risk.

If these facts are satisfactorily proved the master may still escape liability by establishing one or other of the following propositions:

- (1) That the servant was chargeable, in spite of the promise, with an assumption of the given risk.
- (2) That the servant was chargeable, in spite of the promise, with contributory negligence in having undertaken, or in having continued to perform, the work in question.
- (3) That, in view of his knowledge of the risk to which the promise related, the servant did not exercise proper care in performing the duties which he undertook or continued to perform after the promise was given.
- 419. Necessity of proving that a promise was given.—a. Generally. -As there must have been something amounting to a promise by the master it follows that a simple protest or complaint by the servant, not followed by an assurance that the defect will be remedied, will

W. 249. "Where the master promises promise or assurance." Virginia & N. or gives the servant reasonable ground C. Wheel Co. v. Chalkley (1900) 98 to infer or believe that the defect will Va. 62, 34 S. E. 976. be repaired, the servant does not as "Hawley v. Northern C. R. Co. (1880)

sume the risk of an injury caused thereby within such period of time after J. & C. B. R. Co. (1883) 78 Mo. 195, the promise . . . as would be rea- 47 Am. Rep. 99; Sendzikowski v. Mcsonably allowed for its performance, unless the danger is so palpable, immediate, and constant, . . . that no one R. Co. (1887) 5 Utah, 344, 15 Pac. 262; but a reckless person would expose Miller v. Bullion-Beck & C. Min. Co. kimself to it, even after receiving such (1898) 18 Utah, 358, 55 Pac. 58.

not cast the responsibility upon the master. Much less will the responsibility be shifted where the complaint is merely that the certain defect increases the difficulty of the work, and not that it is dangerous.<sup>2</sup> Nor will that result follow where there has been merely a surmise or expectation on the servant's part, based on no specific promise.3 In order to entitle the servant to recover, the master or his representative must have said something which could reasonably be construed as a stipulation to prevent or to remedy the dangerous conditions in question.4 But the mere fact that no formal promise was given is not sufficient to exclude the inference of an agreement by the master to furnish or restore normally safe conditions. Any acts or expressions by which the servant gives the proper agent of the employer to understand that he is unwilling to continue in the employment, unless the cause of the danger is removed, constitute a sufficient complaint; and any acts or expressions by which such agent gives the servant to understand that the cause of the danger will be removed, constitute a sufficient promise.<sup>5</sup> Even a conditional promise

Civ. App. 68, 21 S. W. 563.

A promise cannot be implied where the only remark made by the master's representative in regard to the defective appliance was more in the nature of a rebuke for using it in its then condition than an assurance that it would be repaired. Shackelton v. Manistee & N. E. R. Co. (1895) 107 Mich. 16, 64
N. W. 728 (assistant superintendent, on being informed by a freight conductor that a hand rail was missing on a servant cannot recover where the evidence merely shows that he put to his foreman the question: "Why not get to new one, and that he expected a new tana Union R. Co. (1895) 15 Mont. (1891) 82 Iowa, 148, 47 N. W. 1017.
A notification issued to engineers by the master mechanic, directing them to modify their speed on a certain section of the road "until the track can be got into better condition," operates as declaration that the defects will be remedied, and an enginer has a right to rely on such an assurance. Flynn Vol. I. M. & S.—75.

<sup>1</sup> East Tennessee, V. & G. R. Co. v. man remarked: "That might do." Duffield (1883) 12 Lea, 67, 47 Am. Rep. 219; Texas & N. O. R. Co. v. Bingle (1898) 2 Ind. Terr. 169, 47 S. W. 311. (1895) 9 Tex. Civ. App. 322, 29 S. W. The fact that the master mechanic of 674; Weld v. Missouri P. R. Co. (1888) a railway company, when replying to 39 Kan. 63, 17 Pac. 306; Alexander v. a complaint as to the construction of Tennessee & L. C. Gold & S. Min. Co. a car, stated that it ought not to be (1884) 3 N. M. 255, 3 Pac. 735; Galmade use of for coupling with the veston, H. & S. A. R. Co. v. Drew coupling apparatus on other cars, is not (1883) 59 Tex. 10, 46 Am. Rep. 261. See, generally, § 290, ante.

Balle v. Detroit Leather Co. (1889) 73 Mich. 158, 41 N. W. 216. Compare Gildersleeve (1876) 33 Mich. 133. A § 421, subd. b, infra. § 421, subd. b, infra.

§ McKelvey v. Chesapeake & O. R. Co. will relieve a railroad employee's use (1891) 35 W. Va. 500, 14 S. E. 261; of a defective car from constituting Southern P. Co. v. Leash (1893) 2 Tex. contributory negligence, is not established by evidence that the foreman directed the amployee to the contributory negligence.

will be sufficient, in some cases, to fasten responsibility upon the master.<sup>6</sup> But the servant is, of course, not justified in relying upon such a promise, where it is made by a fellow employee who has already admitted that he could not do what was required without directions from some superior officer. See § 420, infra.

Reason and analogy are in favor of the position expressly taken in one case that, in order to justify a servant in relying upon his master's promise to repair defective machinery, it is not necessary that any time for making repairs should be fixed, as a reasonable time will be implied in the absence of an express arrangement.8

It is not necessary that the promise should have been addressed to the plaintiff individually, provided it was made in his presence, and the stipulated repairs would have removed a danger to which he was exposed.9

Whether there was actually a promise to remove the danger is a question for the jury, when it is a matter of implication. 10

b. Promise to furnish a new instrumentality.—There is apparently no adequate ground upon which it can be maintained that a promise to furnish other instrumentalities in place of those from which the servant apprehends danger should not be deemed equivalent in its legal effect to a promise to remedy a defect in some instrumentality the use of which is to be continued. Such equivalence has been asserted or taken for granted in several cases. 11 But in some cases there

servant was negligent in remaining in the defendant's employ. Laning v. New York C. R. Co. (1872) 49 N. Y. 521, 10 Am. Rep. 417.

v. Kansas City, St. J. & C. B. R. Co. Atchison, T. & S. F. R. Co. v. Lannigan (1883) 78 Mo. 195, 47 Am. Rep. 99. (1895) 56 Kan. 109, 42 Pac. 343; 
<sup>6</sup> It has been held that where the serv. Atchison, T. & S. F. R. Co. v. Sadler ant complained of the incompetency of (1887) 38 Kan. 128, 16 Pac. 46; Sioux his foreman, and was told that, if such foreman did not do better in the future, he would have to be discharged, it was for the jury to say whether the C. A. 190, 12 U. S. App. 574, 56 Fed. 973; Chicago Drop Forge & Foundry Co. v. Van Dam (1894) 149 III. 337, 36 N. E. 1024, Affirming (1893) 50 Ill. App. 470; Southern Kansas R. Co. v. Croker (1889) 41 Kan. 747, 21 Pac. 785.

Am. Rep. 417.

Am. Rep. 417.

Wilson v. Winona & St. P. R. Co. (1889) 41 Kan. 747, 21 Pac. 785.

(1887) 37 Minn. 326, 33 N. W. 908.

Swift & Co. v. Madden (1897) 165

III. 41, 45 N. E. 979, Affirming (1896)

N. W. 188, the court said: "The cases in which the rule has been applied have been cases where there was a promise ler (1887) 38 Kan. 128, 16 Pac. 46;

Alton Lime & Cement Co. v. Calvey defect. But we can see no difference (1892) 47 III. App. 343.

Stoutenburgh v. Dow, G. H. Co. (1894) 57 Minn. 303, 59

N. W. 188, the court said: "The cases in which the rule has been applied have been cases where there was a promise defect. But we can see no difference in principle between such cases and those where, upon the servant's object-(1891) 82 Iowa, 179, 47 N. W. 1039.

Pieart v. Chicago, R. I. & P. R. Co. his own convenience and purposes, in duces the servant to continue it for a

are intimations of a theory which would put promises of these two descriptions upon different footings.12

420. Whose promise is binding on the master.—In one case it was laid down that, in determining whether the injured servant was justified by a promise in continuing in his employment, the essential inquiry is not what authority the employee who gave the promise really possessed, but what authority the servant supposed him to have.1 The soundness of this ruling, which is not sustained by any precedents, seems fairly open to question, unless—which is not apparent from the words of the opinion-it is to be taken as being subject to the qualification that a promise has no obligatory effect where the servant's supposition was not a warrantable one, in view of the circumstances upon

An employee cannot be held to assume the risk of bolts protruding from a coupling of a revolving shaft notwithstanding a promise of the foreman to cover it, on the ground that such promise is not to repair an existing defect in the machinery, but to supply a new or additional appliance which the employer is under no obligation to furnish. Homestake Min. Co. v. Fullerton (1895) sumes the risk of injury as one thence-for the incident to the service, and is not in the same position as if he had used it. Fed. 923.

12 In Sweeney v. Berlin & J. Envelope until promised repairs should be comCo. (1886) 101 N. Y. 520, 54 Am. Rep. pleted. But that ruling was changed on
722, 5 N. E. 358, the court expressed its rehearing (1894) 11 Ind. App. 564, 38 N.
opinion, arguendo, that a promise which
E. 842, 39 N. E. 529. merely concerns a new appliance not at tached to the particular machine whose sufficiency is complained of, nor to any W. 161, the court thought that the gentached to the particular machine whose sufficiency is complained of, nor to any machines of the same make, does not fall within the general rule, but it was ise was not applicable where a section held that, upon the evidence, there was not applicable where a section hand was told that a defect in a hand no promise made, nor any inducement offered him, to take the risk, and the transferred to another car, was injured case was finally decided in favor of the defendant on the ground that the server. and the ground that the servant had simply been requested to continue working with an old machine of a certain type, with the peculiarities of which he had been familiar ever since he had begun work, and therefore assumed the risk of any injury which he might thereafter receive in a service was another car, was injured by the defective car running into it.

1 Dells Lumber Co. v. Erickson (1897)
25 C. C. A. 397, 46 U. S. App. 697, 80
Fed. 257 (no error in refusing to instruct that promise was not binding, unless the promisor was in charge of the concern "so as to represent the defendant").

short time, upon the promise that the which he was at liberty to quit. Conuse shall be discontinued at the end of sidering the actual ground of the decisuch time. What, for instance, could sion, it seems not unreasonable to infer be the difference on the matter of assuming the risk between a promise to about the effect of the promise to furnish a new instrumentality are not to wagon and a promise to furnish another wagon and a promise to furnish another wagon and a promise to furnish another be taken in a general sense, but are intended to be applicable merely to a case like that before the court, in which it was considered that the master was not sume the risk of holts protruding from bound to improve the quality of the

in the same position as if he had used it

which it was founded. The precise point thus decided does not seem to have been raised in any other case. So far as can be inferred from the language of the American courts, the theory upon which they proceed is that a promise by an employee is or is not binding upon the employer, according as he had or had not, as a matter of fact, authority to take such steps as were appropriate, under the circumstances, to secure the safety of the complaining party.<sup>2</sup> The essential question in this connection, therefore, is whether the party who made the promise was the agent of the employer or a mere fellow servant.<sup>3</sup> In this point of view a binding effect may be ascribed to a promise, al-

47 N. W. 1066.

The employer has been held liable for the promise of the undermentioned emone which has become dangerously slippery (Weber Wagon Co. v. Kehl [1892] 139 III. 644, 29 N. E. 714, Affirming [1891] 40 III. App. 584); of a railway superintendent to repair a switch (Patterson v. Pittsburg & C. R. Co. [1874] 76 Pa. 380 18 Am Ben. 4130. 76 Pa. 389, 18 Am. Rep. 412); of an 16, 64 N. W. 728). assistant general roadmaster, to repair a switch (Lake Shore & M. S. R. Co. v. Winslow [1894] 10 Ohio C. C. 193); of a yardmaster to have running boards put a yard engine (Pieart v. Chicago, R. I. & P. R. Co. [1891] 82 Iowa, 148, 47 N. W. 1017); of a section foreman to supply new tools (Atchison, T. & S. F. R. Co. v. Sadler [1887] 38 Kan. 128, 16 Pac. 46); of a conductor, that a defect in a car will be repaired (Louisville & N. R. Co. v. Kenley [1893] 92 Tenn. 207, 21 S. W. 326); of a foreman in charge of the work in which certain machinery is used, to remedy a defect therein (Ray v. Diamond State Steel Co. [1900] 2 Penn. [Del.] 525, 47 Atl. 1017); of a foreman with power to discharge an incompetent servant, that he will be re-

who merely makes repairs which have \*Jones v. New American File Co. been determined upon by a person in (1898) 21 R. I. 125, 42 Atl. 509.

<sup>2</sup>This principle is laid down in authority (Ehmcke v. Porter [1891] 45 Ehmcke v. Porter (1891) 45 Minn. 338, Minn. 338, 47 N. W. 1066); nor by the promise of an agent other than the one whom the servant knew to be in charge of such matters (Chesapeake, O. & S.  $\bar{W}$ . ployees as respects the matters referred R. Co. v. McDowell [1894] 16 Ky. L. to: Of a general superintendent of a Rep. 1, 24 S. W. 607); nor by the promfactory to put in a new floor, to replace ise of an employee who is a mere fellow servant acting under the instructions of the plaintiff himself, and not a representative of the master, qualified to give directions as to the continued use of the defective appliance (Shackelton v. Manistee & N. E. R. Co. [1895] 107 Mich.

> There was held to be no promise such as the rule contemplates, where a section foreman to whom a yardmaster applied to improve a defective track in the yard, so as to lessen the risk, notified him that he could not do it without orders from his superior, but, upon a subsequent application, promised conditionally "that he would do it if he got time some Saturday afternoon." Wilson v. Winona & St. P. R. Co. (1887) 37 Minn. 326, 33 N. W. 908.

It is error to give an instruction which assumes that an employee was the representative of a railroad company as regards the repairing of electric lights used to facilitate the work of loading iron from a car onto a steamer, and that his promise to repair one of them bound competent servant, that he will be rehis promise to repair one of them bound
placed by another (Galveston, H. & S. the company, where another employee is
A. R. Co. v. Eckols [1894] 7 Tex. Civ. shown to have been in control of the
App. 429, 26 S. W. 1117; Wust v. Erie entire work, and no evidence has been
City Iron Works [1892] 149 Pa. 263, 24 offered to prove that the former emAtl. 291; Lyttle v. Chicago & W. M. R. ployee was vested with any other power
Co. [1890] 84 Mich. 289, 47 N. W. 571). than of overseeing the loading of the
On the other hand, the master is not
bound by the promise of an employee
ford (1891) 79 Tex. 619, 15 S. W. 561.

though the promisor was not a vice principal by virtue of his superiority of rank. See chapters xxviii.-xxx., post.4 But no right of action can arise out of a promise made by a fellow servant, whether a superior or not, with regard to the mere details of the work.5

The question whether the employee in question was authorized to make the alterations requisite to secure the servant's safety is for the jury, whenever evidence has been adduced which is reasonably susceptible of the construction that he was so authorized.6

In jurisdictions where the doctrine prevails that every employee, however high his rank, is a mere fellow servant of his subordinates in respect to acts done in carrying on the business (see chapter xxix., post), it is evident that the master is bound only by a promise which he has himself made.7

The master is liable for the nonperformance of a promise made by his representative, although the servant who received the promise may have requested certain of his fellow servants to take steps for his protection similar to those which the master's representative had agreed to take.

\*A promise given by the day foreman management of the machinery, not in a protruding bolts, dangerous to such em- Affirming (1885) 38 Hun, 353. ployee while in the discharge of his duties, has the same effect as a promise 337, 58 N. E. 416, Affirming (1900) 88 given by the employer, and relieves the Ill. App. 162. employee from an assumption of the risk attending such coupling, since it is with- N. S. 130 (complaint to and promise by in the authority of such foreman to foreman not sufficient). In Allen v. cause the shaft to be covered. The position of the court was that such an act 251, 45 L. J. Exch. N. S. 668, 34 L. T. does not require a previous conference N. S. 541, the court seems to have as master mechanic, because it does not in- performed if he gives directions to revolve any alteration of the machinery, pair a defective appliance. The promise or interfere to any extent with its operahere had been given a "considerable tion. Homestake Min. Co. v. Fullerton time" before the accident, but its effect (1895) 16 C. C. A. 545, 36 U. S. App. was not specifically considered. 32, 69 Fed. 923.

<sup>5</sup> A statement by a foreman that he intended to move the machinery slowly was not a promise or assurance of the master that defects would be cured or have destroyed pro tanto the authority dangerous places made safe. Dwyer v. of Clarke v. Holmes (1862) 7 Hurlst. & Nixon (1901) 47 C. C. A. 666, 108 Fed. N. 937, 31 L. J. Exch. N. S. 356, 10 751. A servant who asks to have a Week. Rep. 405, 8 Jur. N. S. 992, in saw reset and is told by the employee which it was expressly held by Byles, J., intrusted with that duty to go on working until noon, when he will see what promise made by a manager of a factory he can do, cannot recover for injuries was equivalent in law to the promise of which he receives before that hour, the employer himself. The neglect, if any, is in a detail of the

of a mine to an employee to cover a duty of the master. Webber v. Piper coupling of a revolving shaft, which has (1888) 109 N. Y. 496, 17 N. E. 216,

<sup>6</sup> Swift & Co. v. O'Neill (1900) 187 Ill.

<sup>7</sup> Smith v. Howard (1870) 22 L. T. with the general superintendent, or the sumed that a manager's whole duty is

These decisions embody the doctrine established in Wilson v. Merry (1868) L. R. 1 H. L. Sc. App. Cas. 326, 19 L. T. N. S. 30, which must be taken to and assumed by the other judges, that a

Where a foreman in a car-repairing

421. Recovery dependent upon proof that the servant was induced by the promise to continue working.— a. Generally.—After the servant has shown that there has been a promise, actual or implied, on the part of the master, and that this promise amounts to an undertaking to remove, not only a danger, but a danger by which he himself is threatened, he still has the onus of proving that the inducing motive of his continuance in the employment was his reliance upon the fulfilment of the promise.<sup>1</sup> Recovery cannot be had where the only reasonable inference from the testimony is that the servant continued work, not because he relied on the master's promise, as given, but merely because of an expectation, based on the defendant's habit, that he would make the repairs in question.<sup>2</sup> But the mere fact that the servant has some suspicion that the master's assurances will not be made good is not enough to deprive him of his right of action.3

When complaining of defective instrumentalities or machinery it is not necessary that the servant shall state in exact words that he apprehends danger to himself by reason of the defects, nor need there be a formal notification that he will leave the service unless the defects be repaired or remedied. It is sufficient if, from the circumstances of

P. R. Co. V. Williams (1889) 15 1ex. 4, machine was reached in the course of repair, assumed the risk of an injury 'Showalter v. Fairbanks, M. & Co. caused by such defect a week after the (1894) 88 Wis. 376, 60 N. W. 257. complaint to the general foreman. Hay-No recovery can be had where the evidence fails to show that the servant went on working in consideration of the promise. Erdman v. Illinois Steel Co. Tex. Civ. App. 68, 21 S. W. 563. An instruction with the table to the course of the repair, assumed the risk of an injury ball v. Detroit, G. H. & M. R. Co. (1897) 114 Mich. 135, 72 N. W. 145.

2 Southern P. Co. v. Leash (1893) 2 promise. Erdman v. Illinois Steel Co. Tex. Civ. App. 68, 21 S. W. 563. An instruction which tall the interest in the course of the risk of an injury to the course of the risk of an injury to caused by such defect a week after the course of the risk of an injury to caused by such defect a week after the course of the risk of an injury to caused by such defect a week after the course of the risk of an injury to caused by such defect a week after the course of the risk of an injury to caused by such defect a week after the course of the risk of an injury to caused by such defect a week after the course of the risk of an injury to caused by such defect a week after the course of the risk of an injury to caused by such defect a week after the course of the risk of an injury to caused by such defect a week after the course of the risk of an injury to caused by such defect a week after the course of the risk of an injury to caused by such defect a week after the course of the risk of an injury to caused by such defect a week after the course of the risk of an injury to caused by such defect a week after the course of the risk of an injury to caused by such defect a week after the caused and caused by such defect a week after the caused and caused by such defect a week after the caused and caused by such defect a week after the caused and caused and caused and caused and caused and caused a the presumption of an acceptance of the risk, where there is no evidence that plaintiff complained of the defect as making his work more dangerous, or that he ever thought of quitting his job unless repairs were made. Bodwell v. A7 Atl. 613. A skilled machinist who on commencing work learned that the machine used by him was defective, and continued to work with it for five months without complaint, and who, 40 Ill. App. 584

shop has promised to protect an em- after making complaint to the foreman, snop has promised to protect an emaking complaint to the foreman, ployee while he is under a car for the purpose of making repairs, it is no excuse for the failure of the foreman to make repairs, continued work for months, when he again made complaint to the general foreman and was told that asked others to keep watch. Missouri it would be fixed after awhile when such P. R. Co. v. Williams (1889) 75 Tex. 4, machine was reached in the course of 12 S. W. 835.

promise. Erdman v. Illinois Steel Co. Tex. Civ. App. 68, 21 S. W. 563. An in-(1897) 95 Wis. 6, 69 N. W. 993. The struction which tells the jury they must testimony of the plaintiff that the defind for the plaintiff, if they believe from fendant had promised to make certain the evidence that the plaintiff, at the repairs is not sufficient to show such time of the injury, "had reasonable reliance upon that promise as will rebut grounds to believe that the defendant the presumption of an acceptance of the would immediately cure the defect," has

the case, it can be fairly inferred that the servant is complaining on his own account, and that he was induced to continue in the service by reason of the promise.4

It is ordinarily for the jury to say whether the servant's reliance on a promise by the master induced him to continue work.5

That the servant's reliance on the master's promise was the efficient cause of the injury cannot be inferred where the evidence shows that the servant apprehended no danger from the particular service in which, pending the fulfilment of the promise, he was engaged when he received the injury.6 Nor does a promise inure to the benefit of the servant unless he was injured at a time and place covered by it.7

b. Promise having no reference to the servant's safety. — Several decisions are based upon the principle that a promise cannot be regarded as the inducing motive of the servant's continuance of work, unless it appears that the immediate purpose of the stipulated alterations was to secure more effectually his personal safety.8

sol. Mill. Co. (1894) 57 Minn. 461, 59 as a protection to the servant. In

N. W. 531.
<sup>6</sup> Union Mfg. Co. v. Morrissey (1883) 40 Ohio St. 148, 48 Am. Rep. 669; Roth-

dry Co. (1896) 133 Mo. 470, 35 S.W. 260, duty to repair the appliances, or supply where a servant engaged in moving a the deficiency, would be performed withderrick across the uncovered girders on in reasonable time." International & G. the first floor of a building, after the N. R. Co. v. Turner (1893) 3 Tex. Civ. master had promised to furnish more App. 487, 23 S. W. 146. planks, fell into the cellar by reason of his foot slipping from the girder, upon the behave it without appropriate the servant does not which he placed it without appropriate to hold that, where the servant does not which he placed it without apprehending complain on his own account, and con-

presently working will not entitle him defective condition was called to his at-to recover for injuries caused by an tention by the servant, gave assurances, earthslide at that part of the trench which did not induce the servant to re-

as showing an express assumption of the ant whose employment required him to risk by the master, or as affording a go upon a pier which had become unreasonable guaranty that the danger will safe because of the decayed condition be removed in time to prevent injury to of the planking, and who continued in the servant, it must be shown that what the service with full knowledge of the passed between the master and servant risk, although he complained of the de-"had in view either a transfer of the fects on the ground that "someone was risk from the servant to the master, or liable to get hurt," and received the mas-

<sup>4</sup> Rothenberger v. Northwestern Con- the removal of the dangerous condition other words, the master should have induced the servant to waive his right to leave the dangerous employment, either enberger v. Northwestern Consol. Mill. by taking upon himself the responsibil-Co. (1894) 57 Minn. 461, 59 N. W. 531. ity for injuries which might result, or See Holloran v. Union Iron & Foun- by leading the servant to believe that the

any danger therefrom.

The promise to shore up a part of a knowledge of the risk, he can recover of trench where the servant expects to be the master, because the latter, when the defective condition was called to his atwhere he was at work when he received main, that the defect should be remethe promise. Showalter v. Fairbanks died." Lewis v. New York & N. E. R. M. & Co. (1894) 88 Wis. 376, 60 N. W. Co. (1891) 153 Mass. 73, 10 L. R. A. 513, 26 N. E. 431, where it was held that 8 Where a promise is relied upon either no action could be maintained by a serv-

422. Reliance upon promise given before work was begun.-In a few cases the courts have sustained the right of a servant to recover in cases where, before he entered the employment or undertook a new work, he had received a promise that certain specific precautions would be taken to secure his safety. In some, at least, of these cases it would seem that the rights of the servant would have been the same, even if the promise had not been given. But it is clear that, whatever may be the implied obligations of the master in a given instance, the actual extent of his duty after the promise has been given is measured by the scope of the express agreement evidenced by that promise.1

promise has no application to a case where neither the master nor the servant contemplated any additional danger to the servant in the use of the defective instrument, but only imperfections in sent, in an emergency, to clear away the work done with it. Tesmer v. snow from the track, and had refused Boehm (1895) 58 Ill. App. 609. Followed in Chicago Bridge & Iron Co. v. Hayes (1900) 91 Ill. App. 269. Nor to a case where the remonstrance of the servant is merely to the effect that, with another appliance, the work would be easier, and he himself admits that, before the accident, he never thought that running of a car over the line while he the work involved any danger. Gowen

ter's assurance that they should be remedefendant would then have to repair it; died. It was considered that the com- that orders were thereupon given to replaint was made entirely in the interest pair it immediately, but that the brake-of the defendant, and referred only to man continued to use it for several the defendant, and referred only to man continued to use it loss several the danger incurred by strangers.

The general rule as to the effect of a son (1900) 22 Tex. Civ. App. 596, 55 promise has no application to a case where neither the master nor the servant

A railway company has been held lia-

the work involved any danger. Gowen was under the track in the performance v. Harley (1893) 6 C. C. A. 190, 12 U. of his duty, where he acted in reliance S. App. 574, 56 Fed. 973. upon the statement of the foreman who An assurance given by the master that was superintending the work that no the number of hands will be increased car would pass until a time considerwill not relieve the servant of his assumption of the risk arising from the Floettl v. Third Ave. R. Co. (1896) 10 insufficiency of the number, where the App. Div. 308, 41 N. Y. Supp. 792. A master's promise was made in his own ship owner is liable for injuries result interest, and with reference to the more ing from his violation of a promise to rapid despatch of his business, and not station a man at the hatch of a ship, rapid despatch of his business, and not station a man at the hatch of a ship, with a view to the protection of the servant, and to induce him to remain in while the loading is going on. Cheeney the service. International & G. N. R. v. Ocean S. S. Co. (1893) 92 Ga. 726, Co. v. Turner (1893) 3 Tex. Civ. App. 19 S. E. 33. A servant who is assured 487, 23 S. W. 146. This decision was that a boiler which he is to repair will lately followed in another, where recovery was denied upon evidence which showed that the plaintiff, a brakeman, trary, rely upon such assurance, and upon an objection being made by the defendant's agent to hauling a car with a defective drawhead, replied that he to keep his promise. Kewanee Boiler hoped the drawhead would break, as the

423. Reliance upon promise given after the work was begun. a. Generally.—Stated in its most general form, the doctrine applied by most of the courts is simply this: If it is a reasonable inference from the testimony that the inducing motive of the servant's continuance in the employment was his reliance upon a promise that the dangerous conditions would be remedied, the mere fact that the servant knew of and appreciated the abnormal risk which caused his injury will not warrant a court in declaring that his continuance in the employment rendered him chargeable, as a matter of law, with an assumption of that risk, or with contributory negligence.1

The doctrine may also be expressed in language which emphasizes the consideration that it is an exception ingrafted upon a general principle.2

1 "If machinery upon which a servant plained of by the servant within a rea-is employed has become dangerous, and sonable time after receiving notice, inthe servant has complained of it, and stead of within a reasonable time after has been promised that it shall be repromising to repair, where the notice paired, but is injured before the defect is and promise were made at the same remedied, and while he is reasonably extime. Consolidated Coal Co. v. Bokamp pecting the promise to be performed, the (1898) 75 Ill. App. 605 (notification promise is a circumstance to be considered that roof was in a dangerous condition ered by the jury in determining whether was given three days before the acciered by the jury in determining whether he has assumed the risk in the meantime, and whether he was using due care in working when he knew there was danger." Counsell v. Hall (1888) that a servant accepts the ordinary risks was danger." Counsell v. Hall (1888) of his employment, and of defects in 145 Mass. 468, 14 S. E. 530. Compare machinery and appliances of which he also Greene v. Minneapolis & St. L. R. knows, does not apply to one who has Co. (1883) 31 Minn. 248, 47 Am. Rep. informed his employer of such defects, 785, 17 N. W. 378; Gulf, C. & S. F. R. and only continues in the employment Co. v. Donnelly (1888) 70 Tex. 371, 8 S. W. 52. Smith v. E. W. Backus Lumber Co. (1896) 64 Minn. 447, 67 N. W. 289, 47 N. W. 571. In another case the court remarked that the general rule 358.

repair a defective appliance, and con- also those superadded by the negligent tinued in the employment a reasonable omissions of the master, where they are time to permit the master to repair the known to the servant, is modified where time to permit the master to repair the known to the servant, is modified where appliance, he was not guilty of negligence in so doing,—is not erroneous, although it might have been better to intomplains to the master and receives form the jury that, under the circumstances, the servant had a right, under it reasonable for him to assume that the the law, to continue in the employ of deficiency will be supplied before he is the master, relying upon his promise. exposed to injury from it. International Englishment (1898) 75 and Englishment (1898) 75 and Englishment (1893) 3 Tex. Civ. App. 487, 23 S. W. 146.

See also the following passage, where the standard it is the same: "Employees the standard in its the same."

reason that it bases a master's liability on entering into a hazardous employ-for an injury sustained by his servant ment take the ordinary risks attending upon his failure to repair a defect com- that service; but when servants com-

court remarked that the general rule An instruction that, if a servant rethat the servant assumes, not only the lied upon the promise of his master to ordinary risks of the employment, but

An instruction is not bad for the the standpoint is the same: "Employees

The rule thus formulated is applicable to cases in which the defective conditions were due to the original construction of the plant, as well as to cases in which those conditions supervened while the plant was being used.3 Nor is its operation confined to latent defects merely.4

In cases where a promise has been given the evidence usually shows that the attention of the master had been called to the existence of the danger by the servant whose safety is menaced by it; and formal statements of the general rule commonly refer to the circumstance that the servant has notified the master of the dangerous conditions which he desires to have remedied.<sup>5</sup> But it is clear, upon principle, that positive action of this kind on the servant's part is by no means necessary to fix his rights. A promise given by the master proprio motu must obviously possess the same virtue and efficacy as one given in response to a complaint by the servant.

Before the master can be held liable as for a failure to perform a promise to remove a specific danger, it is clearly necessary to show that the existing conditions were of such a nature that their maintenance implied culpability.6

lowed to say: 'You were guilty of conthe master's duty to him, and assumed tributory negligence in doing what I directed you to do,' or, 'You assumed that 'See, for example, Woodward Iron Co.

plain of what appears to them to be to repair is confession to a breach of an impending peril in a position to duty, and when a master, to right him which they have been ordered, and they self, requests and induces a postpone-notify the master of the danger, and ment either for convenience or profit, sk to be relieved, the master cannot no principle of justice will lay the burrefuse to relieve them, insist upon their den of delay upon the unoffending servcontinuing the work in that position, ant. The whole question is bottomed and, where they remain at his direction, upon the wrong of the master, and it is waiting for an inspection which he has sophistry to argue that the servant, by promised but neglected to make, relying confiding in his master's promise for a upon his promise and superior judg-reasonable time in which to cure the ment, and fearing the consequences of defects, clearly obvious though they be, disobedience, and are injured, be then alshould be chargeable with having waived

risk when you entered my employment.'

v. Jones (1885) 80 Ala. 123; Union
Under such circumstances, employees
cannot be said to have either heedlessly
or voluntarily assumed the risk."

St. 148, 48 Am. Rep. 669; Missouri
or voluntarily assumed the risk."

St. 148, 48 Am. Rep. 669; Missouri
or voluntarily assumed the risk."

Furnace Co. v. Abend (1883) 107 III.

Schlacker v. Ashland Iron Min. Co.
44, 47 Am. Rep. 425; Greene v. Minne(1891) 89 Mich. 262, 50 N. W. 839.

\*Swift & Co. v. O'Neill (1900) 187

248, 47 Am. Rep. 785, 17 N. W. 378;
III. 337, 58 N. E. 416, Affirming (1900)

Counsell v. Hall (1888) 145 Mass. 468,

14 N. E. 530 note 1 every

\*\*McFarlan Carriage Co. v. Potter (1899) 153 Ind. 107, 53 N. E. 465, Reversing on rehearing (1898; Ind.) 5 on a mangle is not a defect, the employer could not be held liable on the reverses (1898) 21 Ind. App. 692, 51 ground that he had promised to supply N. E. 737, the court said: "A promise a guard. Higgins v. Fanning (1900)

Ordinarily the protection afforded by the promise of a master to repair defective machinery is not postponed until after the arrival of the time at which the promise is to be performed, but commences as soon as it is made.7 But if the master has merely made a qualified promise to remedy a defect after the expiration of a certain period, and not till then, the servant cannot recover for an injury received before the end of that period.8

Under ordinary circumstances a promise to protect a servant from a certain risk is construed as being merely an engagement that the dangerous conditions will be remedied, so far as that result depends upon the performance of the master's personal duties; not that the sporadic and occasional acts of negligence of servants, which he did not directly control, would not occur again.9

b. Sufficiency of complaint.—Any complaint which alleges substantially that the servant remained in the employment for a reasonable

195 Pa. 599, 46 Atl. 102. An employer the pile with water, since the promise is not liable where the elevator, in runtor repair is only important to rebut the ning which the operator was injured, inference that defects are waived by was not out of repair, and was of a kind in ordinary use, though the operator had told the master's superintendent that there should be guards at there should be guards at waived nothing by continuing in the contractor's employment. Branstrator v. perintendent had promised to provide Keckuk & W. R. Co. (1899) 108 Iowa, them. Leonard v. Herrman (1900) 195 377, 79 N. W. 130.

Pa. 222, 45 Atl. 723 (there the court In a New York case it was held that, laid it down that no promise made by even if the evidence had shown that a

to assist in shoveling coal under the to furnish a better one. Sweeney v. Berboilers and to keep their fronts clean, lin & J. Envelope Co. (1886) 101 N. Y. to believe that a new floor would be put 520, 54 Am. Rep. 722, 5 N. E. 358. in, does not affect the employer's liawithout consideration or binding force. Nealand v. Lynn & B. R. Co. (1899) 173 Mass. 42, 53 N. E. 137.

An employee of an independent contractor engaged by a railroad company to load slack on cars cannot recover from the company for personal injuries in which there is a promise to repair caused by the falling of a piece of slack, upon the ground that he relied upon the company's promise, made to the contractor's employees, to cool the top of denied where, after the master had

laid it down that no promise made by even if the evidence had shown that a the master's superintendent "can give promise had been given,—a conclusion rise to a duty not recognized by law"). which was declared to be unwarrantable, Where a floor has always been in the -no obligation was imposed by it, as same condition to the knowledge of a the machine had remained unchanged servant, the fact that an engineer in since the beginning of the servant's encharge of boilers led a person employed gagement and the master was not bound

<sup>7</sup> McFarlan Carriage Co. v. Potter (1899) 153 Ind. 107, 53 N. E. 465, Rebility; for even if the engineer was au- (1899) 153 Ind. 107, 53 N. E. 465, Rethorized to speak for him,—which was versing on rehearing (1898; Ind.) 5 not shown in this case,—his promise under such circumstances would have been reverses (1898) 21 Ind. App. 692, 51 N. E. 737.

<sup>8</sup> As, where the promise was to repair a defect in machinery as soon as the

time in reliance upon a promise by the defendant to remedy the dangerous conditions is good against a demurrer. 10

On the other hand it has been held in one case that a complaint which fails to allege that the plaintiff relied on the promise to repair, or that a reasonable time for repairing had elapsed after the promise was made, will be held bad on special demurrer, but is sufficient after verdict;11 and in another case that a complaint relying on a promise by the master to remedy a defect is demurrable, unless it alleges that, after the promise, a reasonable time had elapsed before the accident, for the master to have remedied the defect.12 But the propriety of thus requiring an averment with respect to the expiration of a reasonable time appears to be quite disputable.18

promised a servant employed on a build- Reverses (1898) 21 Ind. App. 692, 51 N.

ployee against his employer for personal injuries, which sufficiently sets out the defect in the machine relied on, avers that the plaintiff notified the defendant of the defect and received a promise that it should be repaired, and that, relying thereon, he went on with his work, is not obnoxious to a demurrer on the ground that it shows that the plaintiff assumed the risk. Jones v. New American File Co. (1898) 21 R. I. 125, 42 Atl. 509.

The averment of a complaint in an action by a servant against a master for personal injuries due to a defective machine, that defendant had promised plaintiff that it would repair the machine upon the completion of the job upon which the plaintiff was then working, is sufficient to withstand a demurrer upon the ground that the promise is too uncertain and indefinite as to ise is too uncertain and indefinite as to time of performance, although it does in (1899) 181 Ill. 9, 54 N. E. 567, Affirming of performance, although it does in (1898) 75 Ill. App. 605.

12 Burns v. Windfall Mfg. Co. (1896) 146 Ind. 261, 45 N. E. 188 (overlapping edy, if any, is by motion to make more certain. McFarlan Carriage Co. v. Potservant was thrown off).

12 The rationale of the Indiana ruling Reversing on rehearing (1898; Ind.) 5 cited in the last note was that, where Am. Neg. Rep. 132, 52 N. E. 209, Which

promised a servant employed on a building to protect him from falling material, E. 737. In the same case it was held he was injured by a plank which a fellow servant allowed to drop upon him. Vogt v. Honstain (1900) 81 Minn. 174, facie right to recover if he establishes 83 N. W. 533.

\*\*The facts alleged, and shows a prima facie right to recover if he establishes sufficient facts to constitute a cause of action, proof of a promise to repair the Williams (1897) 17 Ind. App. 573, 47 table in which a rip saw was set is sufficient to support a recovery for personal type against his employer for personal such promise although the acceptance on ployee against his employer for personal such promise although the acceptance of the same case it was held that, as a plaintiff need not prove all the same case it was held that, as a plaintiff need not prove all the same case it was held that, as a plaintiff need not prove all that, as a plaintiff need not prove all the same case it was held that, as a plaintiff need not prove all that, as a plaintiff need not plaintiff need tinued in the employment in reliance on such promise, although the complaint alleges a promise to repair both the saw and table, where there was no defect in the saw itself, and plaintiff was injured by reason of a defect in the table operating solely and independently of the saw.

A complaint which, in effect, alleges that the injured servant was induced to remain in the service by the promise of his foreman that a fellow servant of whose incompetence he had complained would be discharged is complete without a further averment that the plaintiff, when he was injured, was ignorant of the fact that the incompetent servant had not been discharged. To go further would be to plead matters of evidence. Galveston, H. & S. A. R. Co. v. Eckols (1894) 7 Tex. Civ. App. 429, 26 S. W. 1117.

<sup>11</sup> Consolidated Coal Co. v. Bokamp

For other cases dealing with the sufficiency of the complaint, see § 429, note 8, infra.

c. Admissibility of evidence.—Evidence that the master or his representative promised to remedy the dangerous conditions in question cannot be introduced unless the promise is specially pleaded.14 But any evidence which fairly tends to show that the servant's action was induced by a promise which is averred in the complaint is relevant and competent. 15

424. Rationale of the relations between the parties after the giving of the promise.— a. Responsibility for conditions temporarily undertaken by employer.—In the opinion of the present writer the most satisfactory theory seems to be that indicated by the following remark, which Byles, J., interjected during the argument of counsel in a leading case where the servant was injured by machinery left unfenced in contravention of the provisions of a statute: "While the machinery was fenced, was not this the contract of the plaintiff, 'I will work with fenced machinery'? After the fencing was broken, was not the contract, 'I will continue to work, if you will restore the fencing'?" 1

admitted, he must specifically aver facts ing which he will be exempt from liaentire absence of allegation as to the Case, cited in note 7, supra.

time appellee had known of the defect

14 Malm v. Thelin (1896) 47 Neb. 686, or had promised to repair it. It may 66 N. W. 650. have been during all the time that the appellant knew of it, or it may have servant is allowed to answer in the negbeen at the moment the car was started ative the question whether he would down the track to the pit, and when have gone to work if the defendant's surepair was impossible before the car perintendent had not promised to rewent upon it." It would seem, there-pair the defect. Taylor v. Star Coal fore, that the conception entertained Co. (1899) 110 Iowa, 40, 81 N. W. 249. was that the responsibility for the defective conditions is not shifted to the & N. 937, 31 L. J. Exch. N. S. 356, 8 master immediately after the promise is Jur. N. S. 992, 10 Week. Rep. 405. A given, but only after the lapse of a similar point of view may possibly be reasonable period. If this is really the ascribed to the supreme court of Maine theory of the court, its correctness may which has stated the situation as fol-well be questioned. No adequate logical lows: If it appears from competent evireason can be suggested for the doctrine dence that an agreement of the servthat the master's immunity is pro- ant, whether made by express words or longed for a more or less considerable by implication, to assume a risk has period after the promise has been given. been canceled or terminated, that risk The writer confesses his inability to for the future falls back upon the masperceive any satisfactory grounds upon ter, and remains upon him until he es-which it can be argued that, in spite tablishes a new agreement or a renewal of the admission of culpability which of the original agreement by the servis implied by a promise, the master ant to assume the risk. Whether there should be allowed a period of grace durhas been such an agreement or renewal

which show that his case falls within bility if an accident occurs. The decithe exception to the doctrine which descion under discussion seems, moreover, clares such knowledge to be a bar to the to be inconsistent with the doctrine laid action. The court said: "There is an down by the same court in the Potter

15 No error is committed where a

In this point of view the effect of the promise is to bring into existence a new stipulation which operates so as to cast upon the master temporarily the responsibility for the particular risk in question. It must be admitted, however, that there is very little, if any, direct authority except that which has just been mentioned for explaining the rationale of the doctrine in this precise form.

All the courts are agreed that the essential effect of a promise is to fasten the responsibility upon the master for a certain period. But in some of the judicial statements of general principles this result is assumed to follow from the continuance or revival of the liability of the employer which is deduced from the implied terms of the contract of hiring; while in others—and these are far the most numerous the language used is so far ambiguous that it is impossible to say with certainty whether the situation contemplated was that which would arise from the substitution of another contract, or that which would arise from the continuance or revival of the original one.3

<sup>2</sup> See Woodward Iron Co. v. Jones (1885) 80 Ala. 123.

<sup>3</sup> By giving a promise to make repairs "the master takes upon himself the re-"the master takes upon himself the responsibility of any accident that may occur during that period," i. e., until the repairs are completed. Pollock, C. B., in Holmes v. Clarke (1862) 6 Hurlst. & N. 349, 30 L. J. Exch. N. S. 135, 7 Jur. N. S. 397, 3 L. T. N. S. 675, 9 Week. Rep. 419. The views of the judges of the Exchequer Chamber were virtually to the same effect, but exvirtually to the same effect, but expressed in somewhat different language. See text at the beginning of this subdivision, and also subd. b, note 5, infra.

condition of the instrumentality, being

is a question for the jury. *Dempsey* fies the rule which charges the servant v. *Sawyer* (1901) 95 Me. 295, 49 Atl. with risks resulting from defects of which he has knowledge is that the objection and promise to repair leave the risk where the duty is, upon the master." Texas & N. O. R. Co. v. Bingle (1895) 9 Tex. Civ. App. 322, 29 S. W. 674.

"The reason for this exception may be stated to be that, when the master has knowledge of the defects, and promises to repair the same, he impliedly requests the servant to continue to work, and that he, the master, will take upon himself the responsibility of any accident that may occur during that period." Chicago Anderson Pressed Brick Co. v. Sobkowiak (1894) 148 Ill. 573, 36 N. E. 572.

vision, and also subd. b, note 5, infra.

"The law charges the master with an assumption of the extraordinary risk pending his promise to repair." McFarlan Carriage Co. v. Potter (1899)
153 Ind. 107, 53 N. E. 465.

"The most logical reason of the rule is "that by the promise of the master a new relation is created between him and the employee, whereby the master impliedly agrees that the servant shall not be held to have assumed the risk for a reasonable is that, under such circumstances, it impliedly agrees that the servant shall not be held to have assumed the risk for a reasonable time following his promise." Swift & Co. v. O'Neill (1900) 187 Ill. 337, 58 N. E. 416.

"The reason of the rule is "that by the promise of the master a new relation is created between him and the employee, whereby the master impliedly agrees that the servant shall not be held to have assumed the risk for a reasonable time following his promise." Swift & Co. v. O'Neill (1900) 187 Ill. 337, 58 N. E. 416.

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"The reason of the rule is "that by the promise of the master a new relation is created between him and the employee, whereby the master impliedly agrees that the servant shall not be held to have assumed the risk for a reasonable is that, under such circumstances, it is a surface of the master and the employee.

"The assurance of the employer that for the convenience and purposes of the the danger shall be removed is an agreemaster, is to be at his risk, and not at ment by him that he will assume the the risk of the servant." Schlitz v. risk incident to the danger for a reason-Pabst Brewing Co. (1894) 57 Minn. 303, able time. It obviates the objection that the continuance of the servant in the "The reason why such a promise modi- service was an implied engagement by

So far as the servant's actual rights of action are concerned, it is obviously immaterial which of these theories is adopted. But in considering the subject from an abstract standpoint it is not amiss to point out that there seems to be one serious objection to the theory which is based upon the supposition that the original contract is kept alive by the promise. If this result be deemed to follow when the promise is given, it is difficult to offer any adequate reason for the distinction which must then be assumed to exist between the effect of an express promise as to the condition of the appliances, and the effect of the implied promise which the original contract conveys as to the same subject-matter. Prima facie it is decidedly illogical to ascribe to a contract, after its revival or renewal, a greater potency than it possessed in its original form. Nor have any of the authorities undertaken to explain away this apparent anomaly.4

him to assume such risks pursuant to (1893) 3 Tex. Civ. App. 487, 23 S. W. the original presumption upon his en- 146; Galveston, H. & S. A. R. Co. v. tering the service." Eureka Co. v. Bass Drew (1883) 59 Tex. 10, 46 Am. Rep. (1886) 81 Ala. 200, 60 Am. Rep. 152, 261. 8 So. 216.

Line R. Co. (1886) 95 N. C. 195.

shall be removed, the duty to remove remedied, the employer, and not the the danger is manifest and imperative, servant, will assume the risks;" and oband the master is not in the exercise of serves that "if the emergencies of a his assurances good. Moreover, the as rarily to use defective machinery, we surances remove all ground for the argu-fail to see what right he has, in law or ment that the servant by continuing the natural justice, to insist that it shall employment engages to assume the be done at the risk of the servant, and risks." Cooley, Torts, p. 559. Quoted not his own, when, notwithstanding the with approval in *Hough* v. *Texas & P.* servant's objection to the condition of *R. Co.* (1879) 100 U. S. 225, 25 L. ed. the machinery, he has requested or in-617.

In a Delaware case the jury were promise thereafter to repair it." charged that, where a master promises to remedy defects in machinery, and the employee, relying on such promise, contemporate, representation of the question is thus to remedy defects in machinery, and the employee, relying on such promise, contemporate to use it for a reasonable time. tinues to use it for a reasonable time, S. W. 561. "It would be difficult to find he does so at the master's risk. Ray v. a principle on which to base a rule re-Diamond State Steel Co. (1900) 2 Penn. lieving a servant from obligation to use (Del.) 525, 47 Atl. 1017.

acceptance of the risk, arising from a ger, and had requested him to remain in continuance in the service, is rebutted. a service known to be dangerous. It International & G. N. R. Co. v. Turner cannot be placed logically on the un-

In Greene v. Minneapolis & St. L. R. The master "assumes the whole risk Co. (1883) 31 Minn. 248, 47 Am. Rep. for a reasonable time" after giving the 785, 17 N. W. 378, the court, after menpromise. Pleasants v. Raleigh & A. Air- tioning the various reasons assigned for the rule, favors the one which would "If the servant, having a right to place it on "the ground of a contract on abandon the service because it is dan-the part of the employer . . . that gerous, refrains from doing so in con-if the servant continues in the service in sequence of assurances that the danger the meantime, and until the defects are ordinary care unless or until he makes master's business require him tempoduced him to continue its use, under a

proper care for his own safety because It has also been laid down that in the master had promised to repair a cases of this type the presumption of an known defect which exposed him to dan-

b. Presumption of waiver by servant rebutted.—Another view is that the deduction which would normally be drawn, that the servant intended to assume the new risk in remaining in a service in which that risk must be constantly incurred, is rebutted by evidence that the promise was relied on. In other words, that waiver of a certain right of action which, apart from the promise, would be imputed to the servant, as a consequence of his continuance of work, will not be inferred where a promise has been given.<sup>5</sup> This theory is essentially

promise or obligation and request, and fect than that of binding him to restore that based upon an express promise to certain conditions which the implied repair, and request to continue in the promise itself requires him to maintain. service in any case in which the employee knows that the defect has not Hurlst. & N. 937, 31 L. J. Exch. N. S.

equal situation of master and servant been repaired, but continues to use the in a country in which all men are free defective thing, or to work without to serve or not to serve any particular something known to him to be necessary employer. If it be placed on the ground to his safety. . . . When the cause that the promise to repair and request of the injury is the direct act of the to continue in the service rebut the or- master or his representative, it cannot dinary presumption that the servant as- be said that the servant remaining in the sumes the known risk incident to the employment is the proximate cause of given employment, it will be difficult to the injury, even though the servant may maintain it in a case in which the serv- have known that the master or his repant continues in the service with a resentative had frequently done the knowledge that the defect has not been same or similar acts which imperiled his repaired, and that he is in constant dan-safety; for the act which in such case ger from the use of the defective thing. causes the injury is the wrongful act If it be placed on the broad, but very of the master or of his representative, indefinite, ground that justice and policy the result of the exercise of the will of require such a rule, it will be difficult the one or the other, and hence the proxrequire such a rule, it will be difficult the one or the other, and hence the proxto give a reason why the same rule should not exist in all cases in which master ought not to be permitted to go injuries result from the use of defective free from liability on the ground that appliances or implements known by employer and employee to be defective, happening of the injury, done acts such and their use dangerous; for the law as that from which the injury resulted, implies an undertaking on the part of but still remained in his service." The the employer to furnish reasonably safe machinery, implements, and appliances, and to repair them when out of order; and to repair them when out of order; out with the assumption that the issue and it implies a request to continue in the service, and to use them untends to exempt the servant from the the service, and to use them untends to exempt the servant from the til notified that this is no longer charge of contributory negligence in exdesired, unless the employment is posing himself to danger, and then profor a definite period. When there ceeds to discuss the rights of the parties is no express promise to repair, with reference to the defense of a conor request to continue in the service, tractual acceptance of risks. But the the employee assumes the risks incident remarks of the court, though open to to a service conducted with machinery, exception in this one respect, are in our implements, or appliances known by judgment perfectly sound in so far as himself as well as the employer to be they emphasize the logical difficulties of defective and dangerous. This being ascribing any greater efficacy to an extrue, it is difficult to perceive that there press, than to an implied, promise, in should be a difference, on grounds of a case where both promises are given policy or justice, between the liability by the same contracting party, and the of the employer based on an implied express promise can have no greater efthe same as that discussed in the preceding subdivision of this section, the only difference being in the standpoint with reference to which it is enunciated.

c. Servant absolved from charge of contributory negligence.—In one case it has been observed that the reason upon which the rule as to the effect of a promise rests is that the promise "relieves the servant from the charge of negligence by continuing in the service after the discovery of the extra perils to which he would be exposed." As an exposition of the juristic situation, however, this form of statement is logically defective, inasmuch as it ignores the fact that the servant's continuance of work with knowledge of an abnormal risk is indicative not only of the conclusion that the servant was negligent, but also of the conclusion that he impliedly agreed to assume the risk. In some cases this defect is avoided by a form of statement in which mention is made both of the responsibility resting on the master and of the servant's exemption from the charge of contributory negli-

356, 8 Jur. N. S. 992, 10 Week. Rep. in the following cases: Gorman v. Des 405, we find Chief Justice Cockburn Moines Brick Mfg. Co. (1896) 99 Iowa, arguing as follows: "It was, indeed, 257, 68 N. W. 674; Pieart v. Chicago, strongly urged upon us, on the part of R. I. & P. R. Co. (1891) 82 Iowa, 148, the defendant, that as the plaintiff, up- 47 N. W. 1017; Union Mfg. Co. v. Moron becoming aware that the machinery rissey (1883) 40 Ohio St. 148, 48 Am. was no longer properly fenced, instead Rep. 669; Louisville & N. R. Co. v. Kenof refusing to go on, as he might have ley (1893) 92 Tenn. 207, 21 S. W. 326; done, continued to perform his service Powers v. Standard Oil Co. (1898) 53 with a knowledge of the increased risk to which he was exposed he must be. to which he was exposed, he must be taken to have voluntarily incurred the a recent Kansas case, the somewhat danger, and is, therefore, in the same singular language is used, that if the position as if he had originally accepted employer instructs the servant to go the service as one to be performed on ahead and use certain defective tools, sponsible for any injury which may from relying on a certain defense. arise to him from the omission of the master to fulfil his obligation." This (1883) 107 III. 44, 47 Am. Rep. 425. conception of a promise, being an evi-Similar language is used in Chicago dential factor which tends to rebut the Bridge & Iron Co. v. Hayes (1900) 91 inference of waiver, is also relied upon Ill. App. 269. Vol. I. M. & S.-76.

unfenced machinery. I am, however, of promising that he will send them in for opinion that there is a sound distinction repair, and the employee continues to between the case of a servant who knowingly enters into a contract to work on is a waiver on the part of the company ingly enters into a contract to work on is a waiver on the part of the company defective machinery, and that of one of the assumption of risk by the emwho, on a temporary defect arising, is ployee. Missouri, K. & T. R. Co. v. induced by the master, after the defect Puckett (1901) 62 Kam. 770, 64 Pac. has been brought to the knowledge of the 631. It is apprehended that the term latter, to continue to perform his service "waiver" is properly, if not exclusively, under a promise that the defect shall applicable only to those cases in which be remedied. In the latter case, it seems a right of action is relinquished, and to me that the servant by no means not to those cases in which a person waives his right to hold the master resued does something which disables him

gence. But it seems to be decidedly preferable, in defining the effect of a promise with relation to the question of the servant's negligence, to say that the contract evidenced by the promise, whether it be regarded as being entirely new, or as being simply a continuance of the original one (see subd. a, supra), differs from the ordinary contract of employment in this respect,—that, even in jurisdictions where the servant's continuance of work with knowledge of an abnormal risk is considered to render him chargeable, as a matter of law, with negligence, the inference of culpability ceases to be a peremptory one as soon as it is shown that the continuance of work was induced by a promise to remove the cause of danger.

425. Assumption of risks as a defense.— a. During the period covered by the promise.—An obvious corollary from the principles explained in § 424, subds. a, b, supra, is that, as long as the period is running which is conceived to be covered by the promise, the defense of an assumption of the given risk cannot be relied upon by the master. This doctrine is affirmed or taken for granted in all the decisions cited at the place referred to.1

It is not disputed that, if no specified time is designated by the promisor for the restoration of safe conditions, the suspension of the master's right to avail himself of this defense continues for a reason-

or law, which may be drawn whenever it is clearly established that a categorical promise to remedy the defect was given, and no evidence has been introduced which can fairly be regarded as indicating that only a qualified responsibility was undertaken by the master, would seem to be the more rational doctrine, in the mere fact that the servant was aware ity was undertaken by the master, would seem to be the more rational doctrine, the jury to say whether such an assumption shall be inferred from evidence that ise. But in one case the court seems to have adopted the broad theory that it ton & W. C. R. Co. (1901) 61 S. C. 468, is for the jury, even when such a promof law, which may be drawn whenever it wards injured thereby.

As, where it is said that the effect ise has been proved, to determine upon \*As, where it is said that the effect ise has been proved, to determine upon of a promise is to continue or revive the which party the risk lies. Dempsey v. liability of the employer, and to absolve Sawyer (1901) 95 Me. 295, 49 Atl. the employee from the imputation of 1035, where the plaintiff, who was work-contributory negligence, springing out of ing at a saw, notified his employer that the continued service. Woodward Iron he would not continue working at it in Co. v. Jones (1885) 80 Ala. 123. Or its defective condition, and the employer that evidence of the giving of a promise promised to remove the defect at a time tends to rebut the inference of contribmore convenient for him, but directed the positive produces and of a waiver of the plaintiff to return and to run the saw utory negligence and of a waiver of the plaintiff to return, and to run the saw servant's right of action. Powers v. as easily and carefully as he could in Standard Oil Co. (1898) 53 S. C. 358, its defective condition; upon which the S. E. 276. plaintiff, making no reply or other pro-That the servant's nonassumption of test, at once went back to work with the given risk is essentially a conclusion the saw, as directed, and was soon after-

able period.<sup>2</sup> See §§ 429, 430, infra. The rationale of the relations created between the parties by the giving of the promise seems to require that, in determining whether this period had expired in the given instance, the mere fact that the servant had observed, some time after the promise was given, that the dangerous conditions had not been remedied, is not to be treated as a controlling element; and that, in spite of his knowledge that the fulfilment of the promise had been delayed, it may still be an open question whether he was not justified in continuing to perform his duties. But there is also some authority for the doctrine that the promise is no protection to a servant who observes, after the lapse of an appreciable interval, that the dangerous conditions still exist.<sup>3</sup> This doctrine the present writer considers to be entirely untenable, for the reason that there is no apparent ground upon which it can be maintained, as a rigid and unvarying proposition of law, that the servant's knowledge which, ex hypothesi, had existed at the time when the promise was given, took on another evidential significance from and after the particular moment when he discovered once more that the risk still existed.4

\* See Eureka Co. v. Bass (1886) 81 use the machinery, though a promise to

guilty of negligence, disregards the er-knowledge of the defect at the time the fect of the promise of the master, as promise was made. The opinion in the taking upon himself the risk incurred Brentford Case (see preceding note) by the servant in doing the work. If deals mainly with the defense of contribthe servant, by the promise, is at first utory negligence, rather than with that justified in remaining in the service, and of assumption of risk, and is not a dedees not in so doing take upon himself cision of the point now under considerates on it be said that he makes it his opinion which seem to controver the expert of the defect at the time the first time the promise was made. The opinion in the defence of the opinion in the defence of contributions of contributions of contributions of the promise was made. The opinion in the promise, is at first utory negligence, rather than with that justified in remaining in the service, and of assumption of risk, and is not a dedoes not in so doing take upon himself cision of the point now under considerate the promise, and the promise was made. The opinion in the service was made. The opinion in the promise was made. The opinion in the promise was made. The opinion in the promise was made. The opinion in the service was made. The opinion in the promise was made. The opinion in t how can it be said that he makes it his opinion which seem to controvert the exown when he continues to work with the defective appliance at the time he receives his hurt? Such a doctrine a promise to repair. A limitation, generally recognized, upon the doctrine that would entirely destroy the force of the promise to repair places the risk promise as an assumption of responsibility by the master, and force the servant in the promise only for a reasonant to stop working with the imperfect appliance, notwithstanding such promise to the master to comply with it; and must not himself be guilty of a ise, until the repair had been made. Of want of due care contributing to his course, in supposable cases the servant injury." may not be warranted in continuing to

Ala. 200, 60 Am. Rep. 152, 8 So. 216; repair be made, for the danger may be Swift & Co. v. O'Neill (1900) 187 Ill. so great and patent that no prudent 333, 58 N. E. 416; both cited in § 424, man would incur it; or the servant may, 333, 58 N. E. 416; both cited in § 424, note 3, supra.

<sup>a</sup> Wharton, Neg. § 221. In Gulf, C. & 5. F. R. Co. v. Brentford (1891) 79 Tex. in either of which cases the promise to 619, 15 S. W. 561, the court strongly intimated its preference for this theory.

<sup>a</sup> The objection to the theory on this score is thus elaborated in Texas & N. ise, knows at the time he receives his O. R. Co. v. Bingle (1895) 9 Tex. Civ. injury from the defective condition that App. 322, 29 S. W. 674: "It seems to us that such a view, unless it be limited pose upon him the risk, any more than to cases in which the servant has been guilty of negligence, disregards the effect of the promise of the master, as promise was made. The opinion in the

In those exceptional cases where the inference of an assumption of the risk is negatived by evidence showing that the servant's continuance of work was not voluntary (see § 302, ante), the fact that a promise was given manifestly does not affect the servant's position in so far as it depends upon the availability of that defense.5

b. After the expiration of the period covered by the promise.—It has been laid down that, if the time for the fulfilment of the promise had gone by before the accident, and the servant knew that it had not been performed, there is a very strong argument that he was no longer relying upon the promise, but had decided to take the risk.6 This qualified form of statement would seem to justify the inference that the inability of the servant to maintain the action is deemed by this court not to be a conclusion of law, even where it appears that the accident occurred after the expiration of the period expressly or impliedly fixed for the fulfilment of the promise. If this is the meaning of the remark, the present writer ventures to express the opinion that such a doctrine is not a sound one. The master's acceptance of the responsibility is, ex hypothesi (§ 424, supra), merely temporary, and there is a manifest logical contradiction involved in a theory which would permit a jury to find that that responsibility still existed after the period during which he had agreed to undertake it had come to an end. The only rational view seems to be that, as soon as the period contemplated for the removal of the dangerous conditions terminated, the servant's position is precisely what it would have been if no promise had been given; that is to say, he reassumes the risk.7

426. Volenti non fit injuria, as a defense.— Under the modern English doctrine that the question whether the action is barred by the operation of the maxim, Volenti non fit injuria, is almost invariably one which is to be determined by the jury (see § 377, ante), it is

time, and was discharging his duties un-ter such contract, then and in that case had worked several days after the time it was immaterial whether the defend-ant, upon being informed of the incom-furnished).

<sup>\*</sup>In a case where the servant was petency of the assistant engineer, promworking, subject to the provisions of a ised to discharge him or refused to do statute which provided that laborers so. Pointer v. Carroll (1883) 35 La. who hired themselves out to serve on Ann. 699. who hired themselves out to serve on plantations had not the right of leaving the person who hired them, and that they could not be sent away by the proprietor until the term of their engagement had expired, unless good and just 417, Reversing (1896) 67 III. App. 66; cause could be assigned, it was held East Tennessee, V. & G. R. Co. v. Dufproper to charge the jury that, if they field (1883) 12 Lea, 67, 47 Am. Rep. found that the plaintiff had been employed under a contract for a specified 101 Tenn. 257, 47 S. W. 425 (demurrer time, and was discharging his duties unto evidence sustained where the severant

clear that a diminished importance attaches to the fact that a promise was given. In the ordinary type of cases it is a merely corroborative circumstance, which tends to sustain the justifiability of a conclusion which the jury usually has a right to draw, even if this element is not present.1

In the United States no decision has, it would seem, been rendered in which the provinces of the court and jury have been delimited with special reference to this defense. Judging from analogy, it may be supposed that, in a case where it was advisedly relied upon, the juridical situation would be regarded as identical with that which would have existed if the defense of assumption of risks had been raised. See § 376, subd. b, ante.

427. Contributory negligence as a defense in cases where a promise was given; generally.—a. During the period covered by the promise.—The question whether a servant was guilty of contributory negligence in view of the testimony which is commonly produced in cases of the kind under review will be found to depend upon two considerations, viz., whether the election to take the risk was prudent, and if so, whether due care was exercised by the servant in view of the fact that the employment involved an unusual amount of danger.1 (See chapters xviii., xix., ante.) But some cases seem to disclose a confusion of thought upon the subject.2

It is manifest that contributory negligence of the latter description merely involves a special application of the general principle that evervone is bound to use that degree of care which the circumstances require, and as the danger covered by the promise is, ex hypothesi, greater than that which the servant would ordinarily be called upon to incur, the inquiry in cases dealing with this aspect of his conduct is merely whether he has exercised the increased degree of care de-

<sup>1</sup> See Wallace v. Culter Paper Mills Holmes (1862) 7 Hurlst. & N. 937, 31 Co. (1892) 19 Sc. Sess. Cas. 4th series, L. J. Exch. N. S. 356, 8 Jur. N. S. 992, 915; Foley v. Webster (1892) 2 B. C. 10 Week. Rep. 405. See § 423, subd. b, 138, in both of which the plaintiff was allowed to recover, although he fully appreciated the risk.

In one Australian case it was held that the maxim, Volenti non fit injuria, was a har to the action where the server of the server

was a bar to the action where the servant had continued to use a defective waukee Gaslight Co. (1892) 81 Wis. 191, event irreconcilable with Clarke v

ant nad continued to use a defective water transpire Co. (1932) 31 Wis. 191, boiler after receiving a promise that it 51 N. W. 328, where the court appears would be repaired. Simat v. Silva to waver between a theory which would (1887) 8 New So. Wales, L. R. (L.) deprive the servant of a right to re415. But this was decided before the cover on the ground of negligence in modern English doctrine was established by the rulings of the court of appeal he did not take appropriate precautions and the House of Lords, and is in any in view of the dangers of the situation

manded by the increased peril. These cases will be reviewed in a later section (432), and our attention will first be given to those which exemplify the more special and characteristic effects of the promise, and illustrate that form of contributory negligence which consists in staying in a position which necessitates exposure to a continuous risk greater than a prudent man would consent to incur.

The general principle underlying the decisions is that the giving of the promise is merely to strengthen the servant's position in respect to the inference that might be drawn as to his want of care in exposing himself to the particular danger to which the promise relates. The promise does not, ipso facto, entitle the servant to recover.3 would seem to follow, therefore, that the correct theory of the effect of a promise in this connection is simply this,—that in many instances in which, if the element of a promise were abstracted, a servant would have been held negligent, as a matter of law, the presence of that element renders it necessary to submit the case to the jury.4 But the

recover inerery by reason of his naving der the circumstances, and as matter of continued to work in reliance on the law, absolutely conclusive of want of promise, and without regard to the question whether he may not have been negdeness. In another case 25 L. ed. 612, 617.

"As the risks to be incurred by the continuous which are the circumstances, and as matter of the circumstances, and as matter of promises. In another of the care on his part." Hough v. Texas to make the premises. In another case 25 L. ed. 612, 617.

"As the risks to be incurred by the

It has never "been held that the promise of a master to repair a defective machine or implement used in his business, and that none but a reckless engineer, utterly careless of his safety, would and known by both [him and the servant] to be dangerous, will relieve the servant from the ordinary result of contributory negligence on his own part, though cases may be found in which stress was laid on the fact that such a the engine, then the company will not be promise was made." Gulf, C. & S. F. excused for the omission to supply properson. S. W. 561. Disapproving an instruction which permitted the plaintiff to recover merely by reason of his having der the circumstances, and as matter of continued to work in reliance on the law, absolutely conclusive of want of

in effect declared, as a conclusion of law, servant, under such circumstances (i. e., that, if the master promised repairs, he after a promise), are not assumed by was liable, without regard to the character of the defects, or the probability of lauper, or to the servant is so great that the policy question whether, all things considered, of the law will forbid persons, even unthe plaintiff was or was not so negligent in continuing to work that he ought not to recover. McKelvey v. Chesapeake less, having taken it, the servant, by his & O. R. Co. (1891) 35 W. Va. 500, 14 own carelessness in performing his work, S. E. 261. Compare Counsell v. Hall (1888) 145 Mass. 468, 14 N. E. 530; to his own injury. Although the prom-International & G. N. R. Co. v. Williams (1891) 82 Tex. 342, 18 S. W. 700, which lave the servant of the duty resting upon men generally of using reasonable in effect declared, as a conclusion of law, servant, under such circumstances (i. e., are to the same effect.

'In a leading case, where the court declared that, apart from the promise, the servant's continuance of work would have been negligence per se, the following language was used: "We may add that was for the jury to say whether or not due care has been observed in a given case, the promise and have been negligence per se, the following language was used: "We may add that it was for the jury to say whether sideration." Texas & N. O. R. Co. v. doctrine upon the subject is usually enunciated in the unqualified form that the case is prima facie for the jury whenever it is proved that a promise was given.<sup>5</sup>

It is not very material, however, to determine which of these logical standpoints is to be regarded as the appropriate one. For practical purposes the adoption of either involves the result that, in order to preclude the servant from recovery, it must be shown that there is some special reason, apart from the mere continuance of work, for imputing to him contributory negligence. Whether there was such

without being conclusively chargeable, as a matter of law, with contributory as a matter of law, with contributory 32 L. ed. 339, 9 Sup. Ct. Rep. 16; New negligence, even though, without such Jersey & N. Y. R. Co. v. Young (1892) promise, he would have been so charge
1 C. C. A. 428, 1 U. S. App. 96, 49 Fed.

cision." Clarke v. Holmes (1862) 7 (1890) 84 Mic. 289, 47 N. W. 571 (in-Hurlst. & N. 937, 31 L. J. Exch. N. S. competent coservant); Carlson v. Wilke-356, 8 Jur. N. S. 992, 10 Week. Rep. 405. son Coal & Coke Co. (1898) 19 Wash. See also Williams v. Whittall (Q. B. D.; 473, 53 Pac. 725 (incompetent coserv-1885) 2 Times L. R. 165, 80 L. T. Journ. ant); Illinois C. R. Co. v. Weiland

Bingle (1895) 9 Tex. Civ. App. 322, 29 101; Lehigh Valley Coal Co. v. Warrek Bingle (1895) 9 Tex. Civ. App. 322, 29
101; Lenigh Valley Uoal Uo. v. Warren
(1898) 28 C. C. A. 540, 55 U. S. App.
In another case the language used is
that a servant who has been promised
by the master that an incompetent and unsafe fellow servant shall be removed
may remain for a time in the service,
without being conclusively chargeable,
Northern O. R. Co. (1898) 128 U. S. 91,

Northern O. R. Co. (1898) 128 U. S. 91,

Northern O. R. Co. (1898) 128 U. S. 91,

Northern O. R. Co. (1898) 128 U. S. 91, negrgence, even though, without such promise, he would have been so charge able. Lyberg v. Northern P. R. Co. (1888) 39 Minn. 15, 38 N. W. 632.

It has been aptly remarked that, relying upon the promises of a master to remove the cause of danger, "the most prudent workmen will often take risks, not more than account of their own necessites, but in consideration of their employers, whose interests require their continued service." Union Mfg. Co. v. E. 261; Gibson v. Minneapolis, St. P. & Morrissey (1883) 40 Ohio St. 148, 48

Am. Rep. 669.

"Wo doubt, a defect thus arising in machinery may be such that no man of working on it. If a jury should find N. W. 1092; Schlitz v. Pabst Brewing that a party complaining had material Co. (1894) 57 Minn. 303, 59 N. W. 188; ly contributed to the injury by his own rashness, the action could not be maintained, inasmuch as it is well established that a plaintiff who has materially consideration of the continued service." Union Mfg. Co. (1894) 57 Minn. 303, 59 N. W. 188; leave the contributed to the injury by his own rashness, the action could not be maintained, inasmuch as it is well established that it is well established the contributed to the injury by his own rashness, the action could not be maintained, inasmuch as it is well established that it is well established that it is well established the contributed to the injury by his own rashness, the action could not be maintained, inasmuch as it is well established that it is well established that it is well established that it is well established the contributed to the injury by his own rashness, the action could not be maintained, inasmuch as it is well established that it is well established the contributed to the injury by his own rashness, the action could not be maintained, inasmuch as it is well established that it is well established the contributed to the injury by his own rashness, the action could not be maintained, inasmuch as it is well established that it is well established the contributed to the injury by his ow that a plaintiff who has materially contributed to his own injury, by his own 295, 49 Atl. 1035; Powers v. Standard negligence, cannot recover, although he oil Co. (1898) 53 S. C. 358, 31 S. E. may show negligence in the opposite 276; Bodie v. Charleston & W. C. R. Co. party. But the question whether the in- (1901) 61 S. C. 468, 39 S. E. 715; Swift jury of which a plaintiff complains is & Co. v. Madden (1897) 165 Ill. 41, 45 to be ascribed wholly to the negligence N. E. 979, Affirming (1896) 63 Ill. App. of the defendant, or whether the plaintiff has had any share in bringing it 331, 45 N. E. 161, Affirming (1895) 63 about, is one wholly for the jury. In Ill. App. 624; Ridges v. Chicago (1897) the present case, the jury have deter 72 III. App. 142; Burlington & C. R. Co. mined this question in favor of the v. Liehe (1892) 17 Colo. 280, 29 Pac. plaintiff, and we are bound by their de- 175; Lyttle v. Chicago & W. M. R. Co.

a reason in any given case is a question which involves a consideration of the two elements which indicate what may be termed the aggregate amount of the danger to which the servant has exposed himself by continuing work, viz., the imminence and greatness of the peril and the length of time during which the exposure to it has continued. On the one hand, the more serious the peril, the more rapidly will the permissible period of continuance run out. On the other hand, the fact that under the doctrine of probabilities some accident will sooner or later occur as a result of exposure to an even moderate peril, when it is constantly incurred, for a considerable period, justifies the argument that, the longer the time that has elapsed without a fulfilment of the promise to remedy a defect, the more certainly has the servant

number of employees); Texas & N. O. of negligence. In both of these cases R. Co. v. Bingle (1897) 91 Tex. 287, 42 Clarke v. Holmes is cited with approval,

Clarke v. Holmes (1862) 7 Hurlst. & infra.

N. 937, 31 L. J. Exch. N. S. 356, 8 Jur.
N. S. 992, 10 Week. Rep. 405, seems to overthrow the authority of a nisi prius of the servant to go to the jury on the ruling made by Martin, B., in the same question of his contributory negligence is to the effect that where week is her is not in any way dependent proper his year, to the effect that where work is being carried on, part of which is unsafe without certain precautions which the employer promises to provide, and he goes away leaving general directions to injury results to a workman engaged on another part of the work, while knowing of the danger, the latter cannot recover against the employer. Smith v. Dowell (1862) 3 Fost. & F. 238. Fut the ef-

after the defect has been brought to the be no recovery. Such a rule, too, would knowledge of the latter, to continue be as bad for the master as it is for the work under a promise that the defect servant. It certainly is not the law." shall be remedied. Laning v. New York Conroy v. Vulcan Iron-Works (1878) 6 C. R. Co. (1872) 49 N. Y. 521, 10 Am. Mo. App. 105. Rep. 417. In Sweeney v. Berlin & J. In Holmes v. Worthington (1861) 2 Envelope Co. (1886) 101 N. Y. 520, 54 Fost. & F. 533, Willes, J., charged the Am. Rep. 722, 5 N. E. 358, the court jury as follows: "If the defendants seems to concede that, if the promise knew of the defect, and undertook to rethere made had related to the removal pair it, and the plaintiff went on work-of a defect in a part of the machine, he ing, relying on their repairing it, then

(1896) 67 III. App. 332 (inadequate would not necessarily have been guilty S. W. 971, Denying Writ of Error in a circumstance which leaves no doubt as (1897) 16 Tex. Civ. App. 653, 41 S. W. to the actual position of the court, and 90, First Appeal (1895) 9 Tex. Civ. App. which is significant in view of the New 322, 29 S. W. 674. York decisions commented upon in § 431,

is not in any way dependent upon his having received a promise from the master that the danger will be removed. Pauck v. St. Louis Dressed Beef & Provision Co. (1901) 159 Mo. 467, 61 S. W. get on with the work, and in his absence 806. But the following statement pos-the dangerous work is carried on before sibly has no special reference to that the precautions have been taken, and an doctrine: "It would be simply inhuman to hold that if an employee, thinking the machinery he is using is to some degree unsafe, reports its condition to his employer and is then told to continue to use it for a short time, and that it will fect of the promise was not discussed. be immediately repaired, and then, in The New York court of appeals in one obedience to instructions, continues his case adopted the theory that there is a work cautiously, believing that he can formal distinction between the case of a by great care avoid an accident until the servant who knowingly enters into a evil is remedied, and is injured in spite contract to work on defective machinery, of all these precautions, his master is and that of one who, on a temporary denote the processor of the servant is, and that therefore there can effort the defect has been brought to the beautiful to the beautiful to the processor.

been guilty of negligence in continuing in the employment.<sup>6</sup> It is obvious that, in most instances, both these elements must be considered to some extent. Ordinarily, therefore, it may be said, in mathematical language, that the rights of the servant are determinable with reference to the sum of two variable quantities, though in the nature of the case it usually happens that the principal stress is laid upon one or other of these.

b. After the expiration of the period covered by the promise.—It is clear that, in all cases where the circumstances were such that, if the promise had not been given, the servant's continuance of work would have rendered him chargeable, as a matter of law, with contributory negligence, this defense furnishes a conclusive bar to the action, if the injury was received after the expiration of the period during which the servant was justified in relying on the performance of the promise.<sup>7</sup> On the other hand, in cases where contributory negligence would not have been viewed as a necessary inference in point of law, the only effect of the expiration of the period covered by the promise is to introduce another evidential item for the consideration of the jury.

428. Contributory negligence, as inferred from the gravity of the risk encountered.— The general rule which is applicable in this connection has been thus laid down: "If the nature of the defects in the machine is such as to create an open, imminent danger such as no prudent man, careful of his life and limb, and none but a reckless man, would risk.

ment."

they may be liable. If the plaintiff the service longer than this [i. e., a reacomplained of the defect, and the described], he does so in the face fendants promised that it should be of the fact that the promise of the remedied, he is not to be deprived of his employer is violated, and that he has remedy, merely because, relying on their no reasonable expectation of its fulfilpromise, he remained in their employ- ment. He can no longer, therefore, rely upon the promise, and must know that "The probability of suffering injury his continuance in service under such is measured in some degree by the circumstances is equally as hazardous length of the period of exposure. One and hopeless of remedy as if no assurmay be especially watchful to avoid dan- ance or promise had ever been made. A may be especially waterill to avoid dan-ger for a time, while the same degree of watchfulness would not be so likely to be exercised continuously." "Reason-ably prudent men may expose them-selves, for a brief period of time, to pos-sible risks, not of the gravest kind, when his conduct, as we have said, although they would refuse to do so continuous not necessarily or per se negligent, may ously." Lyberg v. Northern P. R. Co. or may not become negligent according (1888) 39 Minn. 15, 38 N. W. 632. to the circumstances of the particular ously. Lyvery v. Northern F. L. Co. of may not become negligent according (1888) 39 Minn. 15, 38 N. W. 632. to the circumstances of the particular Woodward Iron Co. v. Jones (1885) case." Eureka Co. v. Bass (1886) 81 80 Ala. 123. In a later case this court Ala. 200, 60 Am. Rep. 152, 8 So. 216. again defined its position as follows: To the same effect, see Bridges v. Ten-"If the employee continues to expose nessee Coal, I. & R. Co. (1895) 109 Ala. himself to the danger by remaining in 287, 19 So. 495. then the injury results from his own negligence. . . . but if the nature of the defect is not such as to impress a prudent man with a feeling or consciousness of imminent danger, then the master is liable." 1

The first half of this statement expresses the rule in the form which it would naturally take in cases in which the servant's right of recovery is denied. It implies that the mere giving of a promise will not of itself suspend the operation of the principle that a servant cannot recover for an injury of which his own negligence was an efficient cause, and that he will, therefore, be unable to maintain an action wherever the danger to which he was exposed after receiving the promise is such that no man of ordinary prudence would have run the hazard of remaining in the employment even for the briefest period.2

The second half of the statement expresses the rule in the language which is appropriate to cases in which the servant's right of recovery is conceded. It affirms the principle, applied or enunciated in numerous cases, that the master's promise will entitle the servant to recover for any injury received within a reasonable time after the prom-

even though he remained in the employ-er's service in reliance upon the latter's & R. Co. (1896) 97 Tenn. 615, 37 S. W. promise to remedy the defects which 549 (employee continued to use for a produced the danger." Indianapolis & walk, upon dismounting from cars, a St. L. R. Co. v. Watson (1887) 114 Ind. piece of timber originally 18 inches wide, 20, 14 N. E. 721, 15 N. E. 824. A promafter it had been worn until it was only 20, 14 N. E. 721, 15 N. E. 824. A promise to an employee by a vice principal, 2 or 3 inches wide on top). In a case where a laborer was injured by the fall of a gravel bank which he had requested his employer to watch, it

Page 1923 20 C. V. 143 1 appointed to watch the balk. Bistruct turas Gold Min. Co. (1893; Idaho) 31 of Columbia v. McElligott (1885) 117 Pac. 819; Smith v. E. W. Backus Lum- U. S. 621, 29 L. ed. 946, 6 Sup. Ct. Rep. ber Co. (1896) 64 Minn. 447, 67 N. W. 884. 358; McAndrews v. Montana Union R.

<sup>1</sup> McKelvey v. Chesapeake & O. R. Co. Co. (1895) 15 Mont. 290, 39 Pac. 85 (1891) 35 W. Va. 500, 14 S. E. 261. (defective hand car likely to jump the <sup>2</sup> "Where an employee knows that the track at any moment); Morbach v. danger is great and immediate, such as a reasonably prudent man would not assume, he cannot recover for an injury, —servant aligned once by fall transfer to the property of receipt a present alignment of receipt a present alignment.

manifestly or immediately dangerous. is error to charge the jury that, in de-Miller v. Bullion-Beck & C. Min. Co. termining the question of contributory (1898) 18 Utah, 358, 55 Pac. 58. 1898) 18 Utah, 358, 55 Pac. 58.

Similar language is used in Clarke v. er the plaintiff continued at his work Holmes (1862) 7 Hurlst. & N. 937, 31 longer than was reasonably sufficient to L. J. Exch. N. S. 356, 8 Jur. N. S. 992, enable the employer to provide someone 10 Week. Rep. 405; District of Columbus to watch the bank. Such an instruction bia v. McElligott (1886) 117 U. S. 621, would leave the jury at liberty to find 29 L. ed. 946, 6 Sup. Ct. Rep. 884; Kane the plaintiff to have been free from negliv. Northern C. R. Co. (1888) 128 U. S. gence, although they may have believed 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; St. from the evidence that no man of ordi-Louis, A. & T. R. Co. v. Kelton (1892) nary prudence would have entered upon 55 Ark. 483, 18 S. W. 933; Texas & N. and continued the work for any time, O. R. Co. v. Bingle (1895) 9 Tex. Civ. however brief, without someone being App. 322, 29 S. W. 674; Harvey v. Al-appointed to watch the bank. District ise was given, unless the danger which the master agreed to remove was such that no prudent man would have exposed himself to it.3

Usually, of course, it is a question of fact for the jury whether the defect was one of such nature that only an imprudent man would have continued to use the defective appliance.4 The mere fact that the servant was aware that the danger to which he would be exposed was serious is not necessarily conclusive against him. The promise, and its natural effect upon a man of ordinary prudence, are to be taken into consideration.5

When the imminence of the danger is relied upon as a circumstance which precludes the servant from recovery, it is necessary to show that the injury was caused by an event which might reasonably have been expected to occur in consequence of the existence of that particular danger to which the master's promise related.6

429. Contributory negligence, as inferred from the length of time the servant worked after the giving of the promise.— The circumstances accompanying the promise are sometimes of such a nature as to show that the servant was placed under a peremptory and immediate obligation to discard the defective instrumentality altogether, or to dis-

\*Brownfield v. Hughes (1889) 128 Pa. \*\*Brownfield v. Hughes (1889) 128 Pa. 194, 18 Atl. 340; Patterson v. Pittsburg (1895) 9 Tex. Civ. App. 322, 29 S. W. & C. R. Co. (1874) 76 Pa. 389, 18 Am. 674. A finding, in answer to a special Rep. 412; Conroy v. Vulcan Iron Works interrogatory, that the danger of using (1876) 62 Mo. 35; Rothenberger v. defective appliance was great, appar-Northwestern Consol. Mill. Co. (1894) ent, and continuous, will not overcome 57 Minn. 461, 59 N. W. 531; Greene v. the effect of a general verdict for the Minneapolis & St. L. R. Co. (1883) 31 plaintiff, where there is no finding that Minn. 249, 47 Am. Rep. 785, 17 N. W. an ordinarily prudent man would not 378; Harris v. Hewitt (1896) 64 Minn. have used it under the circumstances. 54, 65 N. W. 1085; Smith v. E. W. Back-Indianapolis Union R. Co. v. Ott (1894) us Lumber Co. (1896) 64 Minn. 447, 67 11 Ind. App. 564, 38 N. E. 842, 39 N. N. W. 358; Homestake Min. Co. v. Full- E. 529. See also last note. N. W. 358; Homestake Min. Co. v. Full- E. 529. See also last note. App. 32, 69 Fed. 923; Atchison, T. & S. law, negligent in taking out a locomotive F. R. Co. v. Midgett (1895) 1 Kan. App. with the "chafing-irons" in a defective 138, 40 Pac. 995; Sioux City & P. R. Co. condition, where he has reported the dev. Finlayson (1884) 16 Neb. 578, 49 Am. fect, and the foreman of the roundhouse Rep. 724, 20 N. W. 860; Southern Kan. has promised to repair it when the trip sas R. Co. v. Croker (1889) 41 Kan. 747, is finished; the only probable imminent 21 Pac. 785.

(1897) 98 Wis. 73, 73 N. W. 434; Tay-785, 17 N. W. 378. for v. Star Coal Co. (1899) 110 Iowa, 40, 81 N. W. 249.

<sup>6</sup> Texas & N. O. R. Co. v. Bingle

danger in such a case being that the engine may part from the tender, and that is not a personal danger but one danger in such a case being that the 'Hough v. Texas & P. R. Co. (1879) engine may part from the tender, and 100 U. S. 225, 25 L. ed. 617; Clarke v. that is not a personal danger but one Holmes (1862) 7 Hurlst. & N. 937, 31 merely affecting the property of the rail-L. J. Exch. N. S. 356, 8 Jur. N. S. 992, road. A collision which causes the en-10 Week. Rep. 405; Smith v. E. W. gine to override the tender, and thus Backus Lumber Co. (1896) 64 Minn. cuts off the escape of the engineer, is not 447, 67 N. W. 358; Schlitz v. Pabst an event which is expected to be anticibrewing Co. (1894) 57 Minn. 303, 59 N. pated. Greene v. Minneapolis & St. L. W. 188; Jensen v. Hudson Savemill Co. R. Co. (1883) 31 Minn. 248, 47 Am. Rep. (1897) 98 Wis, 73, 73 N. W. 434: Tay-785. 17 N. W. 378. continue its use until it should be restored to a normally safe condition.1 But in the great majority of instances, the mere fact of giving the promise necessarily implies that the servant is expected to go on working. Sometimes the promise is given in words which obligate the master to bring about a restoration of normally safe conditions within a definite time. Under such circumstances it is presumably the duty of the servant to determine, immediately after the giving of the promise, whether he will incur a risk which he may possibly have to endure for the entire specified period.<sup>2</sup> More usually, however, the time at which the promise is to be fulfilled is not expressly mentioned. The legal effect of the promise is then considered to be that normally safe conditions will be restored in a "reasonable time." 3 In most of the cases in which this phrase is discussed with reference to specific facts, it is used to define the length of the period during which the servant may continue in the employment, without being necessarily chargeable with negligence.4 But, as

In one case it was considered that would disable the servant from recover-the promise of the master in response ing if the jury found that the promise to a servant's complaints, to furnish a was indefinite as to the time when the new appliance, amounted to an implied defect should be repaired, and the serv-condemnation of the appliance in use, imputation of negligence in continuing to use the old appliance. Purcell Mill

necessity. Pleasants v. Raleigh & A. Other cases using the same form of ex-Air-Line R. Co. (1886) 95 N. C. 195. pression are cited in the following notes:

<sup>2</sup> Some cases bearing upon one phase

and did not relieve the servant from the with the knowledge that no repairs had been made. S. P. Standard Oil Co. v. Helmick (1897) 148 Ind. 457, 47 N. E.

imputation of negligence in continuing to use the old appliance. Purcell Mill to use the old rope was to be discarded, the servant was negligent in proceeding to use it without giving the master time to supply a new one. The case is merely a decision upon the evidence, and cannot be regarded as having established any definite legal principle. Now the old to the proper agent of the defendant for the purpose of having the cover if he goes on using it without any necessity. Pleasants v. Raleigh & A. Air-Line R. Co. (1886) 95 N. C. 195.

An instruction as to the effect of a

of this situation are cited in § 430, note promise is deemed to be erroneous if it 1, infra.
omits to notice the qualification of the
<sup>2</sup> Swift & Co. v. Madden (1897) 165 doctrine by which the servant is preIll. 41, 45 N. E. 979, holding that it was cluded from recovery if he continues to not error to refuse an instruction which work beyond a reasonable time (Stalzer

we have already seen (§ 425, supra), it is also appropriate as a description of the period within which the defense of assumption of risks is not available to the master. So far as appears, the permissible length of the period is determined with reference to the same considerations, whether the former or the latter defense is relied upon. But this aspect of the question has never been discussed; and it seems to be at least open to argument whether identical standards should always be applied in both of these instances.

It is primarily a question for the jury whether the servant had, at the time of the accident, exceeded the limits of the allowable period of continuance of work.5 A "reasonable time" has been defined by some courts as being the time which would reasonably be allowed for the performance of the promise; by others as the time within which the defect might reasonably have been remedied; and by others as the time which may elapse while the servant is reasonably expecting the promise to be performed.8

In connection with the length of the period which has elapsed since

App. 565); or if it gives the jury to understand that the servant is not justified in relying on it, unless the dangerous conditions are to be remedied immediately (McCormick Harvesting Mach. Co. v. Sendzikowski [1897] 72 Ill. App.

<sup>5</sup> Joliet, A. & N. R. Co. v. Velie (1891; Ill.) 26 N. E. 1086; Union Mfg. Co. v. Morrissey (1883) 40 Ohio St. 148, 48 Am. Rep. 669; Smith v. E. W. Backus Lumber Co. (1896) 64 Minn. 447, 67 N. W. 358; Belair v. Chicago & N. W. R. V. 556; Betair V. Unicago & N. W. R. Co. (1876) 43 Iowa, 662; Ferriss V. Berlin Mach. Works (1895) 90 Wis. 541, 63 N. W. 234; Louisville & N. R. Co. V. Kenley (1892) 92 Tenn. 207, 21 S. W. 326; Morbach V. Home Min. Co. (1894) 53 Kan. 731, 37 Pac. 122; Taylor v. Star Coal Co. (1899) 110 Iowa, 40, 81 N. W. 249; Mann v. Lake Shore & M. S. R. Co. (1900) 124 Mich. 641, 83 N. W. 596.

It is error to charge a jury, without qualification, that a servant who continues to work for six months after ascertaining the existence of a defect is absolved from the charge of contributory that the servant can recover for an innegligence, if he notified the master of the existence of the defect which he discovered, and the master promised that would be reasonable to allow for its perthe defect would be repaired. Interna- formance, and, as we think, for an in-

v. Jacob Dold Packing Co. [1900] 84 Mo. N. W. 531; Porody v. Chicago, M. & St. App. 565); or if it gives the jury to un- P. R. Co. (1882) 5 McCrary, 38, 15 Fed. 205.

<sup>7</sup> Harris v. Hewitt (1896) 64 Minn. 54, 65 N. W. 1085. In Illinois Steel Co. N. W. 1038. In Itember Steet Co. v. Mann (1897) 170 III. 200, 40 L. R. A. 781, 48 N. E. 417, it was held error (three judges dissenting) to refuse an instruction to the effect that the servant may, while relying on the promise, remain in the service only for such time as would be reasonably sufficient to enable the master to remedy the defect.

\*Counsell v. Hall (1888) 145 Mass. 468, 14 N. E. 530. The better opinion is that a "reasonable time" means the "time which would elapse while the servant is reasonably expecting the promise to be performed." Mann v. Lake Shore & M. S. R. Co. (1900) 124 Mich. 641, 83 N. W. 596. It is "for the jury to say whether or not such time had elapsed as would preclude all reasonable expectation that the defect would be remedied." Taylor v. Star Coal Co. (1899) 110 Iowa, 40, 81 N. W. 249.

jury caused by the defect "within such a period of time after the promise as it tional & G. N. R. Co. v. Williams (1891) jury suffered within any period which would not preclude all reasonable expectation that the promise might be sol. Mill. Co. (1894) 57 Minn. 461, 59 kept." Shearm. & Redf. Neg. § 96, quotthe giving of the promise with regard to an inorganic agency of the business, it is proper to consider the frequency with which the servant was called upon to handle the defective appliance after the promis was received, the opportunities he may have had to examine it, and the necessity for making that examination, in view of his complaint as to its condition, and the right he had to suppose it had been repaired in pursuance of the promise.9 In determining whether the danger incident to a continuance of work with an incompetent subordinate, for a certain period, was such that a prudent man would not have exposed himself to it, even on the faith of the master's promise to remove him, the circumstances to be considered are "the general nature of the employment, the nature and extent of the danger necessarily and generally incident to it when carried on in company with an incompetent subordinate, as well as the particular nature of the work being done during the period, . . . [covered by the promise] and the opportunities which the plaintiff's position presented for self-protection during a brief period by watchfulness, or by so ordering the employment . . . as to lessen the risk from his want of skill."10

The permissible duration of the period of continuance of work is necessarily abbreviated where the master has indicated by his course of action that he has done all that he intends to do for the present by

ed with approval in Hough v. Texas & time within which he might reasonably P. R. Co. (1879) 100 U. S. 213, 25 L. expect the defendant would keep his ed. 612.

In Illinois Steel Co. v. Mann (1897) On the ground that the question 170 Ill. 200, 40 L. R. A. 781, 48 N. E. whether a reasonable time to execute the 417, three of the judges considered the repairs had elapsed when the accident 42 S. W. 971.

In Stephenson v. Duncan (1889) 73
Wis. 404, 41 N. W. 337, the declaration was held fatally defective for the reason that it averred that the defendant had ample time to put the appliance in safe condition between the time when the plaintiff informed him of the defect and the time of the injury. This allegation was held to imply that the plaintiff continued in his employment beyond the

promise and remedy the defect.

On the ground that the question true doctrine to be that the responsibil- occurred was not logically identical with ity of the master continues until he ful-the question whether the servant had ity of the master continues until he fulfils his promise, or notifies the servant continued work for more than a reasof his inability or unwillingness to do so, or until such a length of time has elapsed as would, under all the attending circumstances, make it unreasonable denies contributory negligence and for the servant to rely upon the promise. (The views of the majority of the court are stated in note 7, supra.) This doctrine was also adopted in Texas & N. or medy them, and that defendant promised to doctrine was also adopted in Texas & N. or remedy them, and that plaintiff was injured within six days after the promise, does not show contributory negligence on does not show contributory negligence on

way of remedying the dangerous conditions, and what has been done is insufficient to afford protection. 11

430. Illustrative cases.— In the preceding sections the two main elements involved in cases where a promise has been given have been discussed under their general aspects. In the present section it will be shown how the courts have dealt with evidence presenting various combinations of those elements,—that is to say, longer or shorter periods of continuance in the employment, and dangers of a more or less serious description.

In any case where a prudent man would be justified in remaining in the service at all after the discovery of the danger covered by the promise, the servant cannot be regarded as negligent where he continues to work under a well-founded belief that steps to secure his safety will be taken almost immediately.1

<sup>11</sup> In a case where the master had fact that the platform upon which he promised to guard a defective appliance, was working was obviously too narrow, it was held error to refuse to instruct where the accident happened within the jury that if the defendant, pursuant twenty minutes after the father had to his promise, erected a guard for the been induced by the boss in charge of defective appliance a certain time before the work to allow the deceased to rethe accident, but the guard so erectmain temporarily at his employment by ed was insufficient, which fact the plain-the promise that he should be taken right down.

A servant is not, as a matter of law.

the appliance so adjusted without complaint, then he voluntarily assumed the risk of operating the appliance. Lally he works in the neighborhood of dangerous machinery from which the covering has been torn away, by continuing has been torn away, by continuing in the employment after discovery of the master's work until noon of the same day, at dangerous employment within a reasonable time on discovery of the master's work until noon of the same day, at method of doing business, when he finds that the master will not remedy the danger or fulfil his promise in that respect."

1 Fairbank v. Haentzsche (1874) 73

111. 236 (danger from moving machinery,—no specific time mentioned in promise); Sendzikowski v. McCormick Harvesting Mach. Co. (1895) 58 Ill. App. 418 (defective machine,—no specific time mentioned in promise); Sendzikowski v. McCormick Harvesting Mach. Co. (1895) 58 Ill. Sured that it would be repaired in a short time, he is entitled to recover for conscience of the death of a Chalkley (1900) 98 Va. 62, 34 S. E. miner who was directed him to continue at able time day, at which time he promises to remedy the defect. Roux v. Blodgett & D. Lumber Co. (1891) 85 Mich. 519, 13 L. R. A. 728, 48 N. W. 1092. Where a servant who had asked defendant, his employer, to repair a defect in a circular saw with which plaintiff was working, was asshort time, he is entitled to recover for curring about twenty minutes there (1891) 89 Mich. 253, 50 N. W. 839 (minater v. Virginia & N. C. Wheel Co. v. ing company liable for the death of a Chalkley (1900) 98 Va. 62, 34 S. E. miner who was directed to remain at which time he promises to remedy the defect. Roux v. Blodgett & D. Lumber Co. (1891) 85 Mich. 519, 13 L. R. A. 728, 48 N. W. 1092. Where a servant who had asked defendant, his employer, to repair a defect in a circular saw with which plaintiff was working, was asshort time, he is entitled to recover for curring about twenty minutes there is a question for the jury, where, after plaining of expected danger, and, being notifying the master that a saw was so coarse as to be dangerous, he returned to work, upon receiving a promise that the defect, and the defect was a defect in a circular saw with which time he promises to remedy the defect. Roux v. Blodgett & D. Lumber Co. (1891) 85 Mich. 519, 13 L. R. A. 728, 48 N. W. 1092. consequence of so remaining).

In Madara v. Pottsville Iron & Steel
the defect would be remedied the same
Co. (1894) 160 Pa. 109, 28 Atl. 639, a
day. Dempsey v. Sawyer (1901) 95
father was held entitled to recover for Me. 295, 49 Atl. 1035. A hole in a road
the death of his son, occasioned by the 1½ ft. x 3 ft. in area and 1½ ft. deep does

Courts are particularly inclined to put a lenient construction upon the servant's continuance of work, where his immediate desertion of his post would cause extreme inconvenience to his employer and the public, and he may therefore be regarded as having exposed himself to danger from motives of duty. Such cases present themselves where the servant is in control of some machinery used in the business of transportation, which, as is well known, is not infrequently found to be out of order at a time when it will greatly incommode the traffic to withdraw it temporarily from use.2

The servant has also been allowed to recover in many other cases in which there was no special reason for anticipating that the defects would be speedily repaired, and in which there was nothing to indicate that either the master or the community at large would have been

he returned with another load the fol-lowing morning. Nelson v. Show (1899) officer having promise 102 Wis. 274, 78 N. W. 417.

A miner is justified in continuing his repair it on his return.

work, where his foreman has promised that a pile of débris, which would obstruct his escape in case of accident, would be removed on the following morning, where there is no indication that any such accident is likely to happen before the promise can be kept. Kelley v. Fourth of July Min. Co. (1895) 16 Mont. 484, 41 Pac. 273.

from the roof of the room where he the conductor that the defective car worked is not necessarily chargeable would be thrown out of the train when with negligence for failing to saw props it reached a station a few miles distant of the right length for use and put them from the place where he noticed the deup, when the straw boss promised to fect. send someone to do so right away, but a failed to keep his promise prior to the accident. Sugar Creek Coal Min. Co. gineer to take to the end of the trip, v. Peterson (1897) 75 Ill. App. 631, at the request of his superior officer Reversed in (1898) 177 Ill. 324, 52 N. (master mechanic), an engine the only the feet of which is a disabled air broken.

low servant will be removed, the plain- In Hawley v. Northern C. R. Co. tiff may reasonably infer that he will be (1880) 82 N. Y. 370, some stress was 632.

not constitute a defect so imminently dangerous that a teamster employed in hauling bark over the road was not justified in relying on his employer's express promise to repair the defect before he returned with another load the following morning. Nelson v. Shaw (1899) 102 Wis. 274, 78 N. W. 417.

In Kane v. Northern C. R. Co. (1888) 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16, where it was held that an employee on a train owes it to the public, as well as to his master, not to abandon his post, and that the absence of a step on one of the cars did not create a danger so imminent as to subject him to a charge of recklessness in continuing A miner injured by the fall of coal work, upon receiving an assurance from from the roof of the room where he the conductor that the defective car

E. 475.

Where a promise does not designate Flynn v. Kansas City, St. J. & C. B. R. any time at which an incompetent fel
Co. (1883) 78 Mo. 195, 47 Am. Rep. 99.

the may reasonably infer that he will be (1880) 82 N. Y. 370, some stress was removed at once, or as soon as possible, laid on the fact that a promise to speed-and the jury, in determining whether he ily repair the track which caused the was guilty of negligence in continuing injury had been given; but the actual to work, may justifiably consider that grounds of the decision in the servant's such an inference will naturally influence his conduct. Northern addressing the secondary of the decision in the servant's such an inference will naturally influence his conduct. ence his conduct. Lyberg v. Northern edge was imperfect, and that the dan-P. R. Co. (1888) 39 Minn. 15, 38 N. W. ger was not so imminent that he was necessarily negligent in obeying orders.

prejudiced to an unusual extent, if the servant had consulted his personal interests by quitting the employment immediately after he discovered the danger in question. A number of decisions of this type are collected in the note below.3

<sup>3</sup> In Clarke v. Holmes (1862) 7 injured by the defective car running Hurlst. & N. 937, 31 L. J. Exch. N. S. into it. International & G. N. R. Co. 356, 8 Jur. N. S. 992, 10 Week. Rep. v. Williams (1896; Tex. Civ. App.) 34 405, where the machinery which caused S. W. 161. the injury had remained unfenced for A servant is not, as matter of law, about a year, and the servant had made guilty of contributory negligence in confrequent complaints, the court of extinuing to work for two or three days chequer chamber upheld a verdict ab- on an inclined tramway, some boards of solving the plaintiff of the charge of con- which have become loose, where the sutributory negligence in continuing to perintendent has promised to secure work during that period. But the questhem. Conroy v. Vulcan Iron Works tion whether the time of continuance (1876) 62 Mo. 35. Remaining at work was unreasonable was not specifically about fifteen days after a promise to

liable for an injury to a motorman a servant with knowledge that there caused by a defective piece of track, was no intention to change the same. where the company promised the day be-Weber Wagon Co. v. Kehl (1891) 40 fore the accident to have the defect rem- Ill. App. 585, Affirmed in (1892) 139 edied, but neglected to do so. Harris v. Ill. 644, 29 N. E. 714. Hewitt (1896) 64 Minn. 54, 65 N. W.

(1876) 43 Iowa, 662, the court refused where the tendency of the fuses supto say, as a matter of law, that a brake-plied, to hang fire, had become known man waived his objection to a defective to him six days before he was injured, drawbar by continuing in the service through his returning to the mine in about three months, during which he the belief that the fire communicated to had occasional opportunities for ascer- the fuse had been extinguished; and the taining whether the master's promise court set aside a verdict for a miner had been kept.

be held negligent for continuing to use reasonable time. This case was followed a defective block for shipping cars, where in Davis v. Graham (1892) 2 Colo. App. he called attention to its condition three 210, 29 Pac. 1007, where a judgment for days before the accident and had been the plaintiff was reversed because the promised that safer ones would be fur- trial judge had not given an instruction nished promptly. Lehigh Valley Coal indicating to the jury the law as to Co. v. Warrek (1898) 28 C. C. A. 540, reasonable time. 55 U. S. App. 437, 84 Fed. 866.

law, negligent in continuing to use a de- ing from the constant fall of pieces of fective lantern six days after the con- coal from the roof of a gangway which ductor has promised to furnish a new was being cleared without being timone. Atchison, T. & S. F. R. Co. v. Lan- bered, it is for the jury to say whether

law, guilty of contributory negligence the assurance of the superintendent that in remaining in the employ of a rail- there was no danger, and that the deroad company for three or four days af- fective conditions would be removed. ter learning of a defect in the brake of Rcddon v. Utah P. R. Co. (1887) 5 a hand car on which he has been em- Utah, 344, 15 Pac. 262. A nonsuit ployed, where the road master states should not be granted in an action for that he will have the defect remedied, injuries sustained in a mine, where and the section hand has himself trans-plaintiff has shown that the place was ferred to another car, on which he is dangerous, that he reported such con-

raised either by the court or by counsel. repair a slippery floor is not such an An electric railway company was held unreasonable length of time as to charge

In Eureka Co. v. Bass (1886) 81 Ala. 200, 60 Am. Rep 152, 8 So. 216, the In Belair v. Chicago & N. W. R. Co. court set aside a verdict for a miner the effect that the plaintiff could not A servant is not, as matter of law, to recover if he continued work beyond a

Where a miner drew the attention of A brakeman is not, as a matter of his superintendent to the danger arisnigan (1895) 56 Kan. 109, 42 Pac. 343. he was negligent in continuing to work A section hand is not, as matter of for three or four days in reliance upon

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With respect to dangers created by the incompetency or unfitness of a coservant, it has been laid down that contributory negligence will not be inferred in any case where the injured servant was justified in supposing that by the use of additional care he might safely perform

dition to the agents of the employer the day before the accident, who promised the servant was injured two days after to watch the same and timber it when the giving of a promise of repairs, by necessary, and assured him of its safety, reason of the fact that the bearings of and directed him to continue work; and, a saw became worn, the result being in reliance on such promises and as- that a portion of the batten was broken surances, he did so and received the injuries complained of. Miller v. BullionBeck & C. Min. Co. (1898) 18 Utah, 62 S. W. 1124. 358, 55 Pac. 58. Where a servant in a working in reliance upon the superin-tendent's promise to have the place of remedy defects therein. East Chicago work made secure, and was injured Iron & Steel Co. v. Williams (1897) 17 within twenty-four hours afterward by Ind. App. 573, 47 N. E. 26. the fall of some apparently solid rock

W. 434.

Where the collar of a wood-working machine, called a "shaper," was out of order, in such a way that the hands of the operator were liable to be jerked against the knives, the court refused to the machine, although the latter had relaw, to have waited so long as to lose peatedly made the same promise before the benefit of such promise, where he and failed to keep it. Meyer v. Gund-was injured within six days after the and failed to keep it. Meyer v. Gund-lach Yelson Mfg. Co. (1896) 67 Mo. App. 389.

In Rothenberger v. Northwestern Consol. Min. Co. (1894) 57 Minn. 461, 59 N. W. 531, the court refused to set aside a verdict to the effect that a period of ten days was not an unreasonable period during which to continue work in a mill, although the defects in the ma-chinery might have been remedied in moving the danger complained of.

The case was left to the jury where

It is not negligence, as a matter of mine, who was exposed to the risk of law, for a servant who is operating rolls injury, owing to the loose condition of used for converting pig iron into "merthe rock in the roof of a mine, went on chant iron," to continue work for one

It is a question for the jury whether which was carried down with a portion an employee in charge of a steam pump of the loose rock, he was held not to was so reckless that he could not rehave remained at work for an unreasonable time. Taylor v. Star Coal Co. ceived a promise that, as soon as cer(1899) 110 Iowa, 40, 81 N. W. 249.

A common laborer injured owing to the want of a guard on an endless pipe which permitted an escape of steam chain, and the want of sufficient light, into the cylinder, sufficient to start the two days after a promise was given to pump; that a new pump was erected, remedy the dangerous conditions, was but the valve was not repaired; that the allowed to recover in Jensen v. Hudson escaping steam, while sufficient to start Saumill Co. (1897) 98 Wis. 73, 73 N. the old pump, had not started the new pump until the occasion of the injury to the employee, which occurred about thirty days after the promise to repair. Mann v. Lake Shore & M. S. R. Co. (1900) 124 Mich. 641, 83 N. W. 596.

A servant who has received a promise hold, as a matter of law, that a servant that the valves of a hydraulic crane, could not reasonably wait two weeks for which were so much out of order that the fulfilment of the promise of the su- the crane was not under control, will be perintendent to remedy the defects in repaired, cannot be held, as matter of promise was made. Daugherty v. Midland Steel Co. (1899) 23 Ind. App. 78, 53 N. E. 844.

A servant injured a few hours after receiving a promise that better light would be provided is entitled to recover. \*\*Swift & Co. v. O'Neill (1900) 187 III. 337, 58 N. E. 416, Affirming (1900) 88 III. App. 162.

A servant injured by the upsetting of about two days if all the other repairs a truck loaded with hot iron, owing to had been postponed to the task of re- the fact that the truck and track were out of repair, may recover, where it aphis duties; 4 nor where he might reasonably have thought that he could supervise the other servant's conduct, so as temporarily to avoid any danger from his presence.5

The comparative rarity of the instances in which the courts have undertaken to declare, as a matter of law, that even the giving of a promise would not excuse the servant for remaining in the employment, is indicative of the extreme reluctance with which they interfere with the verdicts of juries on this class of cases. Some illustrative decisions are cited in the note below.6

## 431. Decisions restricting or ignoring the doctrine as to the effect of

or three days after a promise had been R. Co. (1888) 39 Minn. 15, 38 N. W. given to remedy the defect. Ray v. 632. Diamond State Steel Co. (1900) 2 Penn.

(Del.) 525, 47 Atl. 1017.

Ill.) 26 N. E. 1086.

was injured a few hours afterward).

court should charge, as a matter of law, business to have such defects remedied that the workman injured was guilty at the end of each trip. of culpable negligence in remaining at

the accident occurred).

A verdict for a blacksmith injured through the incompetence of a helper will not be set aside where the injury was received four days after the master promised to furnish another assistant, and the testimony leaves it doubtful whether he ought, as a reasonable man, Steel Co. (1897) 95 Wis. 6, 69 N. W. to have apprehended the occurrence of 993.

pears that the accident happened two some accident. Lyberg v. Northern P.

<sup>в</sup> А locomotive fireman who, after complaining of the absence of a shield Evidence that the master's representa- on the glass indicating the oil supply tive had promised to increase the num- for the cylinder, and receiving the enber of servants in a few days is suffi- gineer's promise to see that a shield is cient to take the case to the jury, who furnished, leaves the terminal station have then to decide whether the plain where the shield can be procured; and tiff continued to work for more than a proceeds on a trip, knowing that the reasonable time after such promise. promise has not been and cannot be ful-Joliet. A. & N. R. Co. v. Velie (1891; filled until the return, has been held unable to recover for an injury caused by \*Curran v. A. H. Stange Co. (1898) the bursting of the glass. Albrecht v. 98 Wis. 598, 74 N. W. 377 (servant in Chicago & N. W. R. Co. (1901) 108 sawmill resumed work in reliance on a Wis. 530, 53 L. R. A. 653, 84 N. W. 882. promise to furnish another sawyer, and In this case the essential ground of the as injured a few hours afterward). decision seems to have been the immi-The work of directing the movement nence of the danger; but stress was also of logs as they are rolled down an in- laid upon the facts that the fireman cline is not so extremely dangerous, in never expected to use the engine after view of the incompetency of a fellow the trip on which he was about to start, workman who starts such logs, that the and that it was the regular course of the

A vicious horse with an old and rotwork, notwithstanding the employer's ten harness upon it constitutes a compromise to put a competent man in the bination of conditions so likely to cause place of the negligent employee. Cross an accident that, if the servant is in-Lake Loyging Co. v. Joyce (1897) 28 jured in driving the animal, he cannot C. C. A. 250, 55 U. S. App. 221, 83 Fed. recover on the ground that he had re-989 (time of continuance not stated). ceived, three days previously, a promise <sup>5</sup> Maitland v. Gilbert Paper Co. that the harness would be repaired or a (1897) 97 Wis. 476, 72 N. W. 1124 (en- new one furnished. Levesque v. Janson gineer in charge of stationary engine in- (1895) 165 Mass. 16, 42 N. E. 335. An jured by incompetency of a fireman,— independent reason for denying recovery not stated how long after the promise in this case was that a new harness had been furnished, in accordance with the A verdict for a blacksmith injured promise, and might have been used.

a promise.—In Scotland the scope of the doctrine with regard to the effect of a promise has been considerably restricted by two cases. But owing to the fact that both cases were decided with relation to the sufficiency of the complaint, it is difficult to say what the precise theory is which prevails in that country.2

In Massachusetts a decision has recently been rendered in which the court shows some inclination to limit the application of the doctrine respecting a promise, to cases in which the servant was operat-

plaintiff knew of the danger of working a breach was involved. with the horse and had no claim against is submitted that there is nothing in the series 955. opinions which can fairly be construed as a declaration that the doctrine pro- Sc. Sess. Cas. 2d series 975, and Somerpounded was applicable only in cases ville v. Gray (1863) 1 Sc. Sess, Cas. 3d where a statute had been violated. Nor series 768, the evidence showed that the does such a theory receive any support injured workmen knew of the danger to from the subsequent English cases in which they were exposed, and that they which a promise was involved. In Smith received a promise from the masters' v. Harvard (1870) 22 L. T. N. S. 130, foremen that the cause of the danger the case went off on the point that the would shortly be removed. The quesservant by whom the promise was made tion of the servants' acceptance of the was a mere fellow servant, and the scope risk or contributory negligence was not of the doctrine as to the effect of a discussed, the cases being made to turn promise was not discussed under its genupon whether the foremen were vice eral aspects. In Williams v. Whittall principals or not. (Q. B. D. 1885) 80 L. T. Journ. 101, 2

According to one of these the doc- Times L. R. 165, the action in which the trine inures to the advantage of the servant was allowed to recover was servant only in cases where the negli- brought under the employers' liability gence of the master consists in the vio- act of 1880. But it cannot reasonably lation of a statutory duty. *Crichton* v. be inferred from the language of the lation of a statutory duty. Crichton v. be inferred from the language of the Keir (1863) 1 Sc. Sess. Cas. 3d series, court that it was intended to confine the 407, Distinguishing on this ground scope of the decision to such actions. Clarke v. Holmes (1862) 7 Hurlst. & The statement of Bowen and Fry, L. JJ., N. 937, 31 L. J. Exch. N. S. 356, 8 Jur. in Thomas v. Quartermaine (1887) L. R. N. S. 992, 10 Week. Rep. 405 (see §§418, 18 Q. B. Div. 685, 56 L. J. Q. B. Div. 420, supra). The precise ruling was that the cover for an injury caused by the unfitness of a horse, allegations that the master was aware of the animal's unfitness, had promised to provide another, and had induced the plaintiff to go on working by a promise of giving him an assistant to lessen the dangers, which promise the trine thus declared to have been establessen the dangers, which promise the trine thus declared to have been estab-master had not fulfilled, show that the lished was never applicable, unless such

In the second of the Scotch cases rethe master. The position taken was ferred to in the text, it was held that simply that the servant had been work- a complaint was demurrable which ing all along with the same horse. He averred in effect that the plaintiff was was accordingly neither in a better nor well acquainted with the work to be a worse position in consequence of his done, that he knew there were no proper resumption of work at the request of materials furnished for making the imthe defendant, while the implied con- plements the defects of which caused his tract remained the same as before. The injury, and that he had complained of theory thus adopted as to the effect of this to the foreman, and had received a the English decision cited is based upon promise that the necessary materials what the present writer conceives to be would be supplied. M'Gee v. Eglinton a misunderstanding of its rationale. It Iron Co. (1883) 10 Sc. Sess. Cas. 4th

ing the defective appliance, and to deny its benefits to an employee whose functions are to keep certain parts of the appliance in order.<sup>3</sup> No reasons are suggested for drawing this distinction, and, so far as the decision is based upon the existence of such a distinction, it seems to be of very questionable correctness. But on the facts it is doubtless sustainable for the reason that the promise was not given by any employee who was authorized to make it in the employer's behalf.

In one Wisconsin case it was said to be quite doubtful whether the rule that a servant is entitled to go on working for a reasonable time after a promise to remove a danger, without his being charged with an assumption of the risk, is applicable to any other cases except those in which machinery or tools are found to be defective. But it will be apparent, on referring to § 421, note 8, supra, and note 5 to the present section, that the Federal decision cited by the court<sup>5</sup> does not warrant this expression of doubt,—at all events with relation to the circumstances involved.

In a New York case in which recovery was denied on the ground that the injury was caused by a simple appliance, the defects of which were understood as fully by the servant as by the employer, and that, for this reason, no negligence was imputable to the master, the court declined to attribute any differentiating significance to the fact that the employer had promised to furnish a safer instrumentality.

\* Silvia v. Wampanoag Mills (1900) sented) shows the position of the court hand of a picker boss was caught, while questions involved: "As a general rule he was repairing the machine, in the it is to be supposed that the master who beater of a picker which started owing employs a servant has a better and more to the fact that a shipper was defective comprehensive knowledge as to the mand allowed the belt to shift. Recovchinery and materials to be used than cry was denied upon evidence which the employee, who has claims upon his showed that he had made no complaint protection against the use of defective to the overseer, but that two or three or improper materials or appliances days before the accident he had observed while engaged in the performance of the the shipper to be defective, and had service required of him. The rule stated, taken it to the boss machinist, who had however, is not applicable in all cases, no authority over him, to get a new one, and where the servant has equal knowland, as there were none on hand, had edge with the master as to the machinput it back, by the orders of the machin- ery used or the means employed in the ist, who promised to procure another performance of the work devolving upon in a few days.

177 Mass. 194, 58 N. E. 590. There the with regard to the main and subsidiary him, and a full knowledge of existing de-<sup>4</sup>Showalter v. Fairbanks (1894) 88 feets, it does not necessarily follow that Wis. 376, 60 N. W. 257 (trench caved the master is liable for injuries sustained by reason of the use thereof. In Gowen v. Harley (1893) 6 C. C. A. considering the application of the rule \*\*Gowen v. Harvey (1893) & C. C. A. considering the application of the rule 190, 12 U. S. App. 574, 56 Fed. 973.

\*\* \*Harsh v. Chickering (1886) 101 N. the limited knowledge of the employee, Y. 396, 5 N. E. 56 (ladder not being provided with spokes slipped under a servant who had mounted it to light a lamp). The following extract from the servant has a right to rely upon the majority opinion (Ruger, Ch. J., dismaster to protect him from danger and

injury, and in selecting the agent from been followed in other states, as shown which it may arise. . In cases, by the subjoined rulings: however, where persons are employed in would entitle him to the protection of ing the work would be furnished. the principle referred to."

In a short per curiam judgment

One employed to make general repairs the performance of ordinary labor, in about a building is guilty of negligence which no machinery is used, and no ma- in attempting to ascend a ladder placed terials furnished, the use of which re- on a slippery floor, without himself arquires the exercise of great skill and ranging, under his duty of general recare, it can scarcely be claimed that a pairing, some appliance, fixture, or defective instrument or tool furnished guard to make the foot of the ladder seby the master of which the employee cure, although the employer had previhas full knowledge and comprehension, ously promised to procure a safe ladder. can be regarded as making out a case of Corcoran v. Milwaukee Gaslight Co. liability within the rule laid down. A (1892) 81 Wis, 191, 51 N. W. 328. An common laborer who uses agricultural employer is not liable for personal inimplements while at work upon a farm juries sustained by his employee because or in a garden, or one who is employed of an obvious defect in a ladder, consistin any service not requiring great skill ing of the nails being partially withand judgment, and who uses the ordin- drawn from the steps, and which could ary tools employed in such work, to have been easily remedied with a stone which he is accustomed and in regard to or brick if a hatchet or hanner was not which he has perfect knowledge, can obtainable, although he had informed the hardly be said to have a claim against employer thereof and the latter had told his employer for negligence, if in using him it was safe for the present, but his employer for negligence, if in using him it was safe for the present, but a utensil which he knows to be defective, promised to remedy it. Meador v. Lake he is accidentally injured. It does not Shore & M. S. R. Co. (1894) 138 Ind. rest with the servant to say that the 290, 37 N. E. 721. The rule that the master has superior knowledge, and has master is responsible for damages rethereby imposed upon him. He fully sulting to a servant from defects in macomprehends that the instrument which chinery and appliances of which the he employs is not perfect, and if he is servant has notified him and which he thereby injured it is by reason of his has promised to repair governs cases in own fault and negligence. The fact that which machinery or tools that are used he notified the master of the defect and in the work are discovered to be danger. he notified the master of the defect and in the work are discovered to be dangerasked for another instrument, and the ously defective while in use, and to cases master promised to furnish the same, in in which tools or machinery are necessuch a case, does not render the master sary for the safe performance of the responsible if an accident occurs. We work. It has no application to a case have been referred to no adjudicated where the service required is simple case which upholds the liability of a manual labor without tools or machinparty under circumstances of the same ery, and where no such tools or applicharacter as those presented by the evi- ances are necessary to the performance dence here. A rule imposing such a lia- of the work with a reasonable degree of bility in the case considered would be safety. Gowen v. Harley (1893) 6 C. far reaching, and would extend the prin- C. A. 190, 12 U. S. App. 574, 56 Fed. ciple stated to many of the vocations of 973, where it was held that a servant life for which it was never intended. It could not recover damages for the breach is one of a just and salutary character, of his employer's promise to furnish designed for the benefit of employees enskids for the purpose of transferring a gaged in work where machinery and mabox weighing about 250 pounds from one but little knowledge, and not for those feet away. The general principle laid engaged in ordinary labor which only down in *Marsh* v. *Chickering* (1886) requires the use of implements with 101 N. Y. 396, 5 N. E. 56, was approved, which they are entirely familiar. The plaintiff was of the latter class of la-consideration that the promise was not borers, and the work in which he was that a danger would be removed, but engaged was not of a character which merely that additional facilities for do-

In a short per curiam judgment it has Later New York cases in which the been held that a painter who uses a dedoctrine of this case has been approved fective ladder, knowing its defective conare cited in note 8, infra. It has also dition, assumes the risk of its use, and effect of this decision, when taken in connection with two other rulings of the same court is to establish in this state the doctrine that, notwithstanding a promise of the master to render the conditions safer, the risks arising from the character or condition of simple appliances, are assumed by the servant, in so far as they are known to him, while, in the case of appliances not coming under that description, the effect of such a promise is to shift the responsibility to the master for a certain period.8

promised to supply him with a better inability to see how any other concluive one in the meantime. The decision and the facts discussed in the cases cited was put on the broad ground that the in the last note, and in Marsh v. Chick-

supra.

(1896) 162 Ill. 461, 44 N. E. 876, the acter of the appliance. court seems to consider that this qualification of the general rule is referable, pressed the opinion that the distinction not only to the fact that the danger in suggested by counsel did not rest on any such case is obvious, but that the con- logical foundation. In this opinion the tinued use of the tool after knowledge present writer fully agrees, for reasons of the defect, and after the lapse of more stated in the text. But he is unable to than a reasonable time since the prom- concur in the inference which seems to ise to remedy it was made, indicates be drawn by the court from this absence recklessness. This introduction of the of any logical foundation for the distincfactor of reasonable time is not justition, viz., that the doctrine of Marsh v. fied by anything said by the New York Chickering is applicable to all kinds of court, and it must therefore remain appliances, since it was held that no resomewhat doubtful whether the New covery could be had by a servant who York ruling would be followed in II- was injured, while oiling machinery linois without reservation, if the con- with a can which had a short spout, sideration here emphasized were elim- after the employer had promised to furinated from the case.

Mo. App. 192.

49 N. Y. 521, 10 Am. Rep. 417; Sweeney an employee engaged in moving sand v. Berlin & J. Envelope Co. (1886) 101 from a sand bank, and familiar with N. Y. 520, 54 Am. Rep. 722, 5 N. E. 358. that kind of labor, was denied recovery See § 426, note 6, supra. The actual for an injury caused by the caving in date of the latter of these cases is sub- of overhanging gravel and sod, notwithsequent to that of Marsh v. Chickering, standing the prior promise of his emsupra, though it was decided in the ployer to make the bank secure in a day same year.

court rejected the contention of counsel be maintainable for an injury resulting

cannot recover the injuries sustained by that this doctrine had been adopted in falling therefrom, although his employer New York. But the writer confesses his ladder, directing him to use the defect- sion is possible, when the language used servant had wantonly and recklessly en- ering, are collated. In the earlier cases countered a risk of an obvious charthe doctrine of Clarke v. Holmes (1861) acter. St. Louis, A. & T. R. Co. v. Kel- 7 Hurlst. & N. 937, 31 L. J. Exch. N. S. ton (1892) 55 Ark. 483, 18 S. W. 933. 356, 8 Jur. N. S. 992, 10 Week. Rep. 405, No cases are cited, but the decision was was expressly approved. In Marsh v. probably based on Marsh v. Chickering, Chickering that doctrine is not followed. pra. and the differentiating element relied In Illinois Steel Co. v. Schymanowski upon is unquestionably the simple char-

In the Spencer Case the court exnish one with a long spout. Such, also, In Missouri it is held that to continue seems to be the effect of two other deciusing even a simple appliance in reliance sions, in both of which contributory negupon the master's promise is not negli-ligence was held to be a bar to the acgence, as a matter of law. Warner v. tion, and the legal consequences of an Chicago, R. I. & P. R. Co. (1895) 62 assurance that there is no present danger was distinguished from those of a Laning v. New York C. R. Co. (1872) promise of future protection. In one, or two. McCarthy v. Washburn (1899) <sup>8</sup> In Spencer v. Worthington (1899) 44 42 App. Div. 252, 58 N. Y. Supp. 1125. App. Div. 496, 60 N. Y. Supp. 873, the In the other, an action was held not to

It is difficult to see any rational ground upon which the distinction thus indicated can be sustained. Its adoption can, it would seem, be justified only upon the hypothesis that one or other of the following propositions is a correct statement of the juristic situation: (1) That, in the case of simple appliances, the promise of the master does not, in any way, alter or shift his responsibility, even temporarily. (2) That the quantitative value of the constructive knowledge imputed to the servant with regard to the defects in such appliance is different from the quantitative value of such actual knowledge as he may asquire in regard to more elaborate instrumentalities. (3) That the danger of handling simple appliances like ladders, spades, axes, etc., is, as a matter of law, so serious as to require the application of the rule that the master's promise will not warrant a continuance of the service where the hazards to which the servant will be exposed are so imminent that no prudent man would encounter them. All these propositions are manifestly untenable; the first because it entails the anomaly of gauging the effect of an express stipulation by the nature of the subject-matter to which it relates; the second, because it involves a logical absurdity; the third, because it ignores the most obvious facts. The conclusion arrived at by the New York court of appeals is possibly to be explained by the fact that its attention was not properly directed to the rationale of the effect ascribed to a promise, as being essentially a stipulation by the master to accept temporarily the responsibility for any accident that may occur. See § 424, subd. a, ante. It seems not reasonable to suppose that, if due prominence had been given to this aspect of the relations of the parties, the learned judges who concurred in the decision in Marsh v. Chickering would have been more fully alive to the anomaly of the position to which that decision commits them. It is evident that, so far as other jurisdictions are concerned, the authority of Marsh v. Chickering and the cases in which it has been followed is, to say the least; greatly impaired by the omission of the courts to discuss adequately the numerous decisions which, as the preceding sections of this chapter indicate, embody a doctrine essentially inconsistent with that adopted in New York.

In a Maine case the doctrine as to the effect of a promise has, for some reason which is not apparent, been altogether ignored.9

from the fall of a brick through the unplanked floor beams of a building under supra, represent the sound doctrine, and construction, although the employer had that the exception to that doctrine previously promised to safeguard him. which is embodied in Marsh v. Chicker-Hanniyan v. Smith (1898) 28 App. Div. ing is untenable. See text. 176, 50 N. Y. Supp. 845. But the correct theory, it is submitted, is rather (1895) 87 Me. 352, 32 Atl. 965, it was

432. Duty of servant to exercise care with respect to the defective instrumentality.— The fact that the master has promised to repair a defect does not relieve the servant of the duty of using reasonable care for his safety.1 If the servant, by his own negligence in the manner of using the defective appliance, brings injury on himself, the master will not be liable.2

It has been laid down that, in view of the servant's knowledge of the existence of an abnormal danger, a greater degree of care will be required of him than if he had not known of the defect; and that it is always an essential question, whether the servant's own care and precautions were proportionately increased in view of his knowledge of the danger.4 On the other hand the position has been taken that where an employer directs a servant to continue using a defective tool, and at the same time promises to have it repaired, the employee is not bound to use extra care is using the tool. All that is required of him, it is said, is that, for the purpose of protecting himself against injury, he shall exercise that degree of care which a man of ordinary prudence would exercise when employed in a dangerous service of a similar description.<sup>5</sup> For practical purposes, however, it may be presumed that the apparent conflict between the standards of duty thus defined is merely superficial. It will hardly be contended that a servant was in the exercise of ordinary care, if his conduct, while he was using a defective appliance, was merely as cautious as that of a prudent person using the same appliance in a sound condition. However this may be it is clear that the employer cannot hold the servant to the exercise of an unerring choice of the best method of obviating difficulties and lessening danger. If the servant uses reasonable and ordinary judgment, he does all that can be required; and the fact that

with the condition of the apparatus, the 57 Minn. 303, 59 N. W. 188. A servant received from a fall while he was trying machinery by continuing to use the mato push to a sliding door, although he chinery, where he relies upon the prom-had already received a promise that it ise of the master to remedy the defect;

examining it, cannot recover from the master, although the latter failed to keep his promise to discharge the interval of the latter failed to keep his promise to discharge the interval of the latter failed to keep his promise to discharge the interval of the latter failed to keep his promise to discharge the interval of the latter failed to keep his promise to discharge the interval of the latter, without the latter failed to latt petent employee. Bolton v. Georgia P. R. Co. (1889) 83 Ga. 659, 10 S. E. 352.

held that, as he was thoroughly familiar 2 Schlitz v. Pabst Brewing Co. (1894) plaintiff could not recover for injuries does not assume the risk from defective should be repaired.

Texas & N. O. R. Co. v. Bingle (1895)

9 Tex. Civ. App. 322, 29 S. W. 674. An employee having the supervision of an other employee, and knowing that the latter is an incompetent and careless workman, who trusts himself upon a latter is an incompetent and careless workman, who trusts himself upon a latter is an incompetent and careless workman, who trusts himself upon a latter is an incompetent and careless workman, who trusts himself upon a latter is an incompetent and careless workman, who trusts himself upon a latter is an incompetent and careless workman, who trusts himself upon a latter is an incompetent and careless workman, who trusts himself upon a latter is an incompetent and careless workman, who trusts himself upon a latter is an incompetent and careless workman, who trusts himself upon a latter is an incompetent and careless workman, who trusts himself upon a latter is an incompetent and careless workman, who trusts himself upon a latter is an incompetent and careless workman, who trusts himself upon a latter is an incompetent and careless workman, who trusts himself upon a latter is an incompetent and careless workman, who trusts himself upon a latter is an incompetent and careless workman, who trusts himself upon a latter is an incompetent and careless workman are a latter is an incompetent and careless workman are a latter is an incompetent and careless workman are a latter is an incompetent and careless workman are a latter is an incompetent and careless workman are a latter is an incompetent and careless workman are a latter is an incompetent and careless workman are a latter is an incompetent and careless workman are a latter is an incompetent and careless workman are a latter is an incompetent and careless workman are a latter is an incompetent and careless workman are a latter is an incompetent and careless workman are a latter is an incompetent and careless workman are a latter is a latter in the latter is a latter in the latter is a latter in the latter in the latter is

his judgment may not prove to be absolutely the best does not relieve the employer from liability.6

The doctrine deducible from several decisions is that a servant who, after intermitting the use of the defective instrumentality to which the promise relates, is beginning once more to work with it after the lapse of a period reasonably sufficient, if proper diligence has been exercised, to have effected the restoration of normally safe conditions, is entitled to act upon the presumption that the defect no longer exists, and is not bound to institute an examination for the purpose of ascertaining whether the promise had been performed, unless there is some indication of danger which would put a prudent man on inquiry.<sup>7</sup> The rule thus laid down is merely a special application of the general principle discussed in §§ 354, 355, 409, subd. c, ante. In New York, on the other hand, it would seem that the servant is deemed not to be in the exercise of ordinary care if, under such circumstances, he takes it for granted that the dangerous conditions have been remedied; and he is bound to make an examination,8 unless

and is absent on sick leave for several drive down the nill without first ascerdays afterwards, is not, as a matter of taining whether his employer had relaw, negligent in taking out the engine deemed his promise to repair such defect in machinery which is not and defect in machinery which is not and who knew that a machine was defective, and had made complaint as to its condition, was justified in operating it withon the supposition that it had been repaired by the employer as promised, is a question for the jury. Keevan v. Walker (1898) 172 Mass. 56, 51 N. E. 449. That an employee, on Monday morning, went to work upon a platform which, the Saturday night before, he knew to be insecure, but which the per-

<sup>6</sup> Illinois C. R. Co. v. Creighton (1895) 105 feet, is not so imminently dangerous as to make it contributory negligence, as
'An engineer who has received a matter of law, for a teamster in the empromise that his engine will be repaired, ploy of the owner of such roadway to and is absent on sick leave for several drive down the hill without first ascertaining whether his employer had re-

a defect in machinery which is not apparent upon a casual inspection, and he is not required to inspect the machinery out making an examination, after re-before using it in order to ascertain turning to his work several days later, whether or not the repairs have in fact been made, unless there is something in the condition of the machinery which would cause an ordinarily prudent person to make an examination thereof. Missouri, K. & T. R. Co. v. Nordell (1899) 20 Tex. Civ. App. 362, 50 S. W.

<sup>8</sup> It has been held that an employee son charged with the duty of making re- who knows that the machine at which pairs promised to repair, without mak- he works is out of repair, and that a felpairs promised to repair, without making any examination to see if such repairs had been made, is not conclusive it on a specified day, is guilty of such of want of due care precluding recovery contributory negligence as will prevent a for injuries received from the insecurity recovery for an injury resulting from of the platform. Chapman v. Southern such defect, in subsequently going to P. Co. (1895) 12 Utah, 30, 41 Pac. 551. work upon the machine of his own accordance of the contraction of the sound and the subsequently going to the platform. A hole in a private roadway 18 inches cord, without ascertaining whether or deep, 1½ feet one way, and about 3 feet not it had been repaired. Schulz v. the other way, near the foot of a de-Rohe (1896) 149 N. Y. 132, 43 N. E. scent of about 11 feet in a distance of 420, Reviewing (1893) 4 Misc. 384, 24

he has some positive, tangible ground for supposing that the repairs have been undertaken and completed.9 In none of the decisions cited is it explained why the general principle just referred to, that a servant is prima facie entitled to rely upon the master's performance of his obligations, should be deemed subject to an exception in this class of cases.

Under any view of the servant's obligations it is clear that he is chargeable with knowledge of the conditions, where the defect was one of such an obvious kind that, if he had been making ordinary use of his eyesight at the time he was injured, he could not have failed to observe that it had not been repaired. 10

The obligation of the servant to use due care after he has received a promise of repairs does not go to the extent of a requirement that he shall himself take active steps to lessen the danger covered by the promise.11

chine had a defective valve, which conclusion arrived at was that it was caused it to start suddenly and push the broad daylight when the servant repiston head into the meat cylinder, so sumed working, and he could have seen that the fingers of the operator were lia- the defect if he had looked. ble to be caught). In Carlson v. Walsh (1900) 56 App. Div. 551, 67 N. Y. Supp. could repair a defective footboard him-516, recovery was denied to a servant self, or run the locomotive with it enwho, upon resuming work, was injured tirely removed, does not render him by the sudden starting of machinery which the master had promised to repair several weeks previously.

a freight elevator several weeks after he received a promise that the automatically closing gates guarding the shaft of the elevator would be repaired, it was repaired. Gibson v. Minneapolis, St. P. held that he was justified in assuming & S. S. M. R. Co. (1893) 55 Minn. 177, that they were operating properly, the 56 N. W. 686. Nor is an employee evidence being that during the period whose duties require him to pass under that had elapsed since the promise was a coupling of a revolving shaft having given, he had seen lumber on the prem- protruding bolts under any obligation ises, and had been told that carpenters to turn aside from his ordinary duties were at work. Larkin v. Washington and construct a box to cover such coup-Mills Co. (1899) 45 App. Div. 6, 61 N. ling, after the foreman's attention has

Flint & P. M. R. Co. (1885) 56 Mich. Homestake Min. Co. v. Fullerton (1895) 620, 23 N. W. 440. In the second of the 16 C. C. A. 545, 36 U. S. App. 32, 69 New York cases just cited a second and Fed. 923.

N. Y. Supp. 118 (sausage-filling ma- apparently independent ground for the

11 The fact that a railroad engineer guilty of contributory negligence in continuing to use it in its defective condition, where the rule of the company pro-Where a servant resumed the use of vides that employees shall report defects or repair them themselves, and he has reported the defect to the proper person, and been twice assured that it will be Y. Supp. 93.

been called to the defect and ne has

10 This was the position in Brewer v. promised to send corpenters to cover it.

When the Man Co. v. Fullerton (1895)

## CHAPTER XXIII.

## RIGHT OF ACTION FOR INJURIES RECEIVED IN OBEYING DIRECT ORDERS.

- 433. Introductory.
- 434. Necessity of showing that an order was given.
- 435. and was given by some employee who represented the master.
- 436. and was the inducing motive of the servant's act.
- 437. and was negligent under the circumstances.
- 438. Assumption of the risk, as a defense.
- 439. Contributory negligence usually negatived by evidence that servant acted under direct order.
- 440. Considerations upon which this doctrine is based.
  - a. Master and servant not upon the same footing.
  - b. Servant entitled to rely on the master's performance of his duties.
    - c. Order considered to be an implied assurance that there is no abnormal danger.
    - d. Necessity for prompt obedience.
    - e. Direct order considered as tending to negative voluntary action.
    - Direct order considered as tending to produce confusion of mind.
- 441. Direct order not a justification where it was given without authority.
- 442. nor where a prudent man would have refused to comply with it.
- 443 nor where the servant fully appreciated the danger.
- 444. nor where the servant executed it in a negligent manner.

The cases in which the duty to which the order related was outside the scope of the servant's original contract are collected in chapter xxv., post.

As to the extent to which the order of a superior employee is an excuse for doing an act violative of a rule, see § 366, note 10, ante.

433. Introductory.— The fact that the servant, at the time he was injured, was complying with a direct, specific, personal order of his master, or his master's representative, has, it is well settled, a material bearing upon the question whether he can hold the master responsi-

ble.¹ Broadly speaking, the evidential significance of this fact will be found to be simply this,—that, as it goes to show that the servant's ignorance of the risk to which his injury was due was excusable, or that his action was not entirely voluntary, it tends to negative the availability of the various defenses which, as has been shown at length in chapters xvii.—xx., ante, are essentially dependent upon proof that the servant voluntarily encountered a danger which was, or ought to have been, comprehended by him.

As a condition precedent to establishing his right to recover for an injury, on the ground that it resulted from his compliance with a specific and direct order, the servant must establish the following propositions:

- (1) That an order was given.
- (2) That the order, if not given by the master himself, was given by his representative, within the scope of the authority conferred on him.
- (3) That the act which led to the injury was done in obedience to the order.
  - (4) That the order was a negligent one under the circumstances.

The defenses open to the master are the same as those which are available in cases where a specific and direct order is not an evidential element,—viz., that, having a full comprehension of the risks which an obedience to the order involved, the servant was chargeable either with an assumption of those risks, or with contributory negligence in complying with the order, or with contributory negligence in respect to the manner in which he executed the order.

As regards the essential element on which all these defenses are based,—viz., the servant's knowledge of the danger,—it is not amiss to draw attention to the fact that this element is also involved in the investigation of the question as to whether the order was negligent. It will be seen, by referring to § 437, infra, that one form of negligence in giving an order is that which consists in not accompanying it by proper instruction and warning, where the person giving it ought to have seen that there was a probability that the servant did not appreciate the danger to which he was being exposed, or had not sufficient intelligence or technical skill to enable him to protect himself.

434. Necessity of showing that an order was given.—It is very sel-

<sup>&</sup>lt;sup>1</sup> Halcy v. Case (1886) 142 Mass. 316, enunciated the doctrine as to the effect 7 N. E. 877, holding, in regard to a case of the plaintiff's knowledge of the conwhere the act in question was done in obedience to an order, that an instruction requested by the defendant, which of the jury to the aspect of the evidence.

dom that the significance of the words or gestures which were the inducing cause of the act which resulted in the injury complained of can be a matter of doubt. But it is clear, both on principle and authority, that, in order that the servant may receive the benefit of such inferences as may be drawn from the fact that he was complying with an order, it is not necessary to show that the directions given were of a formally imperative character.1

435. — and was given by some employee who represented the master. -On general principles it is manifest that, where the order in question was not given by the employer himself, he cannot be made responsible for an injury caused by obedience to it, unless it proceeded from an agent who had authority to give such a direction with regard to the subject-matter. See chapter xxxIII., post. But whether it is also requisite, in order that the master may be charged with responsibility, that the directing employee should be a vice principal in the sense in which that term is understood in cases where the defense of common employment is relied upon, is a question which, under the authorities as they stand, can scarcely be said to have been definitely settled.

In most of the cases cited in the present chapter the servant giving the orders was one who, under the recognized exceptions to the doctrine of common employment, was a vice principal, either because he was a general representative of the master as respects the management of the whole business, or a particular department thereof, 1 or because he was a superior servant in a state where such superiority constitutes vice principalship at common law.<sup>2</sup> In some cases the directing em-

when told to clear the track as a train

<sup>1</sup> Kean v. Detroit Copper & Brass Rolling Mills (1887) 66 Mich. 277, 33 N. W. 395 (superintendent); Illinois Steel Co. v. Schymanowski (1895) 59 III. App. 32

<sup>1</sup> A workman who said to the foreman perintendent of construction train); hen told to clear the track as a train Norfolk & W. R. Co. v. Ward (1894) 90 as coming, "There are two stones on Va. 687, 24 L. R. A. 717, 19 S. E. 849 was coming, "There are two stones on Va. 687, 24 L. R. A. 717, 19 S. E. 849 the track;" and was told, "It is time (foreman in charge of work of excavayou were getting them off," is justified tion); Coyne v. Union P. R. Co. (1889) in considering this an order to take them 133 U. S. 370, 33 L. ed. 651, 10 Sup. Ct. off. Stephens v. Hannibal & St. J. R. Rep. 382 (foreman of railway construc-Co. (1885) 86 Mo. 221, (1888) 96 Mo. tion); Indiana Car Co. v. Parker (1884) 207, 9 S. W. 589. 100 Ind. 181 (master mechanic); Rogers v. Overton (1882) 87 Ind. 410 (orders of road master to trackman).

2 In one case the order was given by a second mate. Jones v. St. Louis, N. & P. Packet Co. (1890) 43 Mo. App. 398. v. Schymanowski (1895) 59 III. App. 32 second mate. Jones v. St. Louis, N. & (superintendent); Affirmed in (1896) P. Packet Co. (1890) 43 Mo. App. 398. 162 III. 447, 44 N. E. 876; Hawkins v. In others the order was given by a sec-Johnson (1885) 105 Ind. 29, 55 Am. Rep. tion master to a laborer. Patton v. 169, 4 N. E. 172 (foreman of factory); Western North Carolina R. Co. (1887) Shortel v. St. Joseph (1891) 104 Mo. 96 N. C. 455, 1 S. E. 863; East Tennes-114, 16 S. W. 397 (engineer in charge see, V. & G. R. Co. v. Duffield (1883) of construction); Colorado Midland R. 12 Lea, 63, 47 Am. Rep. 319; Bradshaw Co. v. O'Brien (1891) 16 Colo. 219, 27 v. Louisville & N. R. Co. (1893) 14 Ky. Pac. 701 (foreman in charge of construction); Novock v. Michigan C. R. Co. Hannibal & St. J. R. Co. (1885) 86 Mo. (1886) 63 Mich. 121, 29 N. W. 525 (su ployee was one for whose negligence the master had been declared liable by a statute in force in the jurisdiction where the injury was received.3

But there are also some decisions which, when collated with others rendered by the same court, would seem to indicate that a master may be bound by an order given by an employee who is not a vice principal.4 Whether such a doctrine, if it is really embodied in the cases cited, can be justified on strictly logical grounds, is very doubtful. A mere coservant who takes upon himself to give an unauthorized order is clearly guilty of negligence, and there is no apparent reason why this fact should not be deemed to let in the defense of common employment.<sup>5</sup>

Different considerations are, of course, controlling where the servant is seeking to exonerate himself from the charge of contributory negligence. See § 441, infra. Under such circumstances the essential question is merely whether the injured servant was justified in obeying the order; and in determining that question it is not material to inquire whether the directing party was a vice principal. This aspect of the subject is obviously in need of elucidation by the courts. As the decisions stand, there would seem to be some grounds for saying that a servant may, upon the same facts, fail or succeed in his action, ac-

(1891) 108 Mo. 322, 18 L. R. A. 827, fense of coservice: Central R. Co. v. 698; Shadd v. Georgia, C. & N. R. Co. (1895) 116 N. C. 968, 21 S. E. 554; Richmond & D. R. Co. v. Rudd (1892) 88 Va. 648, 14 S. E. 361; Norfolk & W. R. Co. v. Ampey (1896) 93 Va. 108, 25

reference to statutes which preclude rail- tion foreman was treated as being the way companies from relying on the de-negligence of a fellow servant.

(1891) 108 Md. 522, 18 L. R. A. 521, lease of esservice: Central R. Co. V. 18 S. W. 1094. In others the order was De Bray (1883) 71 Ga. 406; Fox v. Chigiven by a conductor to a brakeman. cago, St. P. & K. C. R. Co. (1892) 86 Mason v. Richmond & D. R. Co. (1892) Iowa, 368, 17 L. R. A. 289, 53 N. W. 111 N. C. 482, 18 L. R. A. 845, 16 S. E. 259; Strong v. Iowa C. R. Co. (1895) 698; Shadd v. Georgia, C. & N. R. Co. 94 Iowa, 380, 62 N. W. 799; Frandsen (1895) 116 N. C. 968, 21 S. E. 554; v. Chicago, R. I. & P. R. Co. (1873) 36 Iowa, 372; Smith v. St. Paul & D. R. Co. (1892) 51 Minn. 86, 52 N. W. 1068.

<sup>4</sup> This remark is applicable to cases in 8. E. 226; Turner v. Norfolk & W. R. which the order was given by the capCo. (1895) 40 W. Va. 675, 22 S. E. tain of a ship to a seaman (Williams
83; Greer v. Louisville & N. R. Co. v. Churchill [1884] 137 Mass. 243, 50
(1893) 94 Ky. 169, 21 S. W. 649.

Am. Rep. 304); by the foreman of a 

The following cases were decided with 80 Fed. 260, an improper order of a sec-

cording as the defense interposed is common employment or contribu-

tory negligence.

436. — and was the inducing motive of the servant's act.—Upon general principles it is clear that a servant cannot recover on the ground that, when the accident occurred, he was complying with an order, unless it is shown that the order was the operative influence which led to his doing the act which was the immediate cause of the injury.1

437. — and was negligent under the circumstances.—Whether a given order was a negligent one is ordinarily determined by the application of principles which have been discussed under their more general aspects in earlier chapters of this treatise. Negligence cannot be attributed to the master where he has no knowledge, either actual or constructive, of the peril which the servant's compliance with the order would involve. This principle obviously prevents recovery, irrespective of the question whether the peril was or was not known, actually or constructively, to the servant. See chapters x., x1., ante.

If there is evidence tending to show that the master was, and the servant was not, chargeable with knowledge of the peril which a compliance with the order would involve, and that the master was, or ought to have been, aware of the servant's ignorance in this respect, the master may properly be found guilty of negligence if it appears that he gave the order without instructing the servant as to the exist-

<sup>1</sup>The fact that an order was given simply followed their example in doing gent to order a servant to assist in what he did. Novock v. Michigan C. R. manipulating a churn drill therein. Co. (1886) 63 Mich. 121, 29 N. W. 525. O'Neil v. O'Leary (1895) 164 Mass. 387, A direction to a servant to "hurry up" 41 N. E. 662. her work is not a fact which can be supwards forgetting that condition, the (1897) 82 Fed. 111. consequence being that he suffers injury. In a case where t consequence being that he suffers injury. In a case where the master directed Brennan v. Front Street Cable R. Co. his servant to drive a loaded team (1894) 8 Wash. 363, 36 Pac. 272 (serv-through a passageway over which a ant was late on the morning when the board sign was hung, the result being accident occurred, and was so hurried that he was injured, it was held that when he was called that he left open a the question of negligence was properly manhole containing machinery, and left to the jury, upon a charge that if stepped into it a short time afterwards, the ignorance of the plaintiff and of the while performing his duties in great defendant were equal so that both were haste).

1 Where the employer had no knowland acted upon by the plaintiff's coserv- edge which should have led him to supants is wholly immaterial as an element, pose that the charge in a certain hole where he did not hear it himself, but had not been exploded, it is not negli-

A tug is not liable for injury to a fireposed to distract her attention or to af-feet her power of observation two hours falling into the water and being crushed afterwards. Herold v. Pfister (1896) 92 between the boat and wharf while Wis. 417, 66 N. W. 355. An angry sumjunping ashore to attach a line in obemons from the master's representative, dience to the orders of the master, where which the servant complies with so hurthe distance from the wharf (5 feet) was riedly that he inadvertently leaves the not so great as to render the service place of work in a dangerous condition, necessarily dangerous to a man of ordiwill not excuse him for shortly after nary strength and activity. The Pilot

while performing his duties in great defendant were equal, so that both were either without fault or in equal fault,

ence of the peril.<sup>2</sup> See chapters vii., x., xvi., ante. A fortiori is negligence a proper inference where the servant was not only not chargeable with knowledge of the peril, but was also physically and mentally incapable of performing, with reasonable safety, the work to which that peril was incident.<sup>3</sup> But the question whether negligence shall be predicated on account of the servant's ignorance or unfitness is determined with due reference to the consideration that the employer or his representative is entitled to assume that the servant will exercise ordinary care in carrying out the order.4 Compare § 302, ante.

As a servant is presumed to have accepted the responsibility for any injury which is caused by one of the ordinary risks of the employment (§§ 259–269, ante), negligence is not predicable of an order which merely exposes him to such a risk.<sup>5</sup>

In several cases it has been held that, if the facts are otherwise such as to negative culpability, the master cannot be found guilty of negligence merely because the testimony also shows that he or his rep-

the plaintiff could not recover. Haley cent Min. Co. (1893) 9 Utah, 163, 33 v. Case (1886) 142 Mass. 316, 7 N. E. Pac. 692.

the servant to drill a hole in a rock at in exposing him to peril which he was a place where the drill will come in incapable of appreciating without proper contact with an unexploded charge.

Stearns v. Reidy (1889) 33 Ill. App.

3 Kehler v. Schwenk (1892) 151 Pa.

246, Affirmed in (1890) 135 Ill. 119, 25

N. E. 762. An action is maintainable enced boy ordered to leave his ordinary work of elect nighting and inexperiments. where a foreman, being aware that the work of slate-picking and drive a dump side bearings designed to keep a car car).

from tilting were missing, ordered an employee employed to handle damaged inexperienced railway employee who was cars to go on top of the car, without working in a roundhouse and railway working in a roundhouse and railway warning him of the danger, the result yard, to clean an engine which at the being that the car tilted over when the employee went to one side of it. Southern R. Co. v. Hart (1901) 23 Ky. L. Rep. 1054, 64 S. W. 650. A presumption of negligence is raised against a mine owner by showing that the plaintiff employee was injured while assisting, at the order of the foreman, in a dan-gerous occupation which was no part of gasus (1899) 96 Fed. 623 (seaman sent his work, by the fall of a mass of male aloft to take the turn out of the topterial, which the foreman knew to be in gallant sail without its being clued up). an unsafe condition. Linderberg v. Cres-

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In Sullivan v. India Mfg. Co. (1873) <sup>2</sup> Diezi v. G. H. Hammond Co. (1900) 113 Mass. 396, where the defendant had 156 Ind. 583, 60 N. E. 353 (inexperial verdict, the court remarked, in disenced servant ordered to perform work cussing the correctness of the charge which it was dangerous for him to undertake without assistance). The owner boy fourteen years old is injured by of a quarry is liable for the act of his moving cogwheels, it is competent for foreman in giving an order certain to him, although he obeys the order, to result in injury, as, one which requires show that the employer was negligent the servant to drill a hole in a rock at in exposing him to real which he

time was standing still, and who was injured by its being moved while he was under it, where he was not told to go under the engine and there was no reason to suppose that he would do so. Spencer v. Ohio & M. R. Co. (1891) 130 Ind. 181, 29 N. E. 915.

Davis v. Detroit & M. R. Co. (1870)

resentative gave directions by which the injured person was required to use special haste in performing the work in hand.6

The omission to give proper orders may, under certain circumstances, be no less culpable than the giving of an improper order. But negligence cannot be inferred on this ground where the master or his representative simply failed to give an order to do something which would have the effect of securing them against some danger which the servant could appreciate as well as his superiors, and from which he could protect himself no less effectually than if he had received an order.7

438. Assumption of the risk, as a defense.— The principle that a servant, when he is directed either by his master, or by a fellow employee under whose control he is placed, to perform a certain piece of work, or to perform it in a certain place, will ordinarily be justified in obeying the orders so given, without being necessarily chargeable with an assumption of the risks incident to the work, has been recognized in several cases.1 For practical purposes, however, this

superior in the performance of a certain work in hand, does not show negligence. piece of work which it was desired to Wanner v. Kindel (1893) 4 Colo. App. complete before the arrival of a regular 168, 34 Pac. 1014. complete before the arrival of a regular train, and consequently became confused, and failed to act in concert as they should have done. The servant's v. Merchants' Woolen Co. (1885) 146 rights are not enlarged, under such circumstances, by the fact that the order was accompanied by an oath. Coyne v. dered to hurry with his work; but the Union P. R. Co. (1889) 133 U. S. 373, effect of this element was not discussed. 33 L. ed. 655, 10 Sup. Ct. Rep. 382. A A railroad company is not liable for jury would not be warranted in finding that an oath addressed to a sailor who knew what to do was sufficient to shift the responsibility for a misstep, on the to desert the car and get out of the way. words accompanying the oath carried no to save the car before the train reached specific or wrong direction as to the them. Texas & P. R. Co. v. Eason manner in which the plaintiff should (1899) 34 C. C. A. 530, 92 Fed. 553. act. Williams v. Churchill (1884) 137

"Cook v. St. Paul, M. & M. R. Co. Mass. 243, 50 Am. Rep. 304 (plaintiff (1885) 34 Minn. 45, 24 N. W. 311; became entangled in the loose end of a Strong v. Iova C. R. Co. (1895) 94 tow rope while acting in obedience to Iowa, 380, 62 N. W. 799. The directions of the master, after he in some cases there is traceable a conhad just cried out with an oath, "You ception that an order has an effect anwon't get that rope fast"). Merely disappears to a promise by the master to to trender a master liable for injuries remove a certain cause of danger (chap-

The necessity of keeping a constructorized by him in operating a machine, tion train out of the way of regular the dangers from which were open and trains being one of the risks incident to obvious. Ruchinsky v. French (1897) the employment of a laborer working 168 Mass. 68, 46 N. E. 417 (verdict for on the construction train, he is not en- plaintiff rightly directed). An order to titled to recover on the ground that he "proceed quickly, and not waste so much and his coservants were hurried by their time" in doing a certain part of the

the responsibility for a misstep, on the to desert the car and get out of the way, ground that it confused him and drove if they knew of the approach of the him forward into the danger, where the train and of the danger of attempting words accompanying the oath carried no to save the car before the train reached

not render a master liable for injuries remove a certain cause of danger (chap-

principle is not of much importance, as the ultimate question to be determined in this as in all other classes of cases when the defense of an assumption of the risk is put forward is simply whether the servant had knowledge, actual or constructive, of that risk, and encountered it without being subjected to what the law regards as coercion. "There is no doubt of the general rule that one who, knowing and appreciating the danger, enters upon a perilous work, even though he does so unwillingly and by order of his superior officer, must bear the risk."2 No differentiating significance, therefore, can be ascribed to the fact that the injury was received as the result of obeying an order, where it appears that the servant was merely directed to do something which was a part of the regular work of the establishment in which he was employed, and that the risk to be encountered was fully comprehended by him.<sup>3</sup> Similarly, in cases where the only possible inference from the testimony is that the responsibility for any injury that might result from the risk in question had, in consequence of his having remained in the employment with a full knowledge of that risk, been shifted to the servant before the date of the accident, the mutual obligations of the parties are in nowise modified by the fact that the immediate occasion of his being in the position in which he was when the injury was received was his compliance with an order.4

take a position which would ordinarily be taken under the normal conditions of 143 Mass. 206, 9 N. E. 728 (servant inthe work); Fitzgerald v. Honkomp jured by explosion of steam pipe caused (1892) 44 Ill. App. 365. One ordered by his letting steam into it while it was by his foreman to clean rolls in a mill, full of water, the danger of doing this and who has equal knowledge with the being known to him. No recovery, foreman of the danger in attempting to though he was acting under orders, and clean them on the front side, assumes unwillingly); Hoth v. Peters (1882) 55 the risk of attempting to clean them Wis. 405, 13 N. W. 219 (servant injured from that side, whether he ought to have by fall of lumber from a car which was obeyed the order of the foreman or not. Kean v. Detroit Copper & Brass Rolling Mills (1887) 66 Mich. 277, 33 N. W. danger by the direction of the foreman). 395.

ter xxII., post); that is to say, it operates as an implied stipulation on the master's part that he will take upon himself the responsibility for any injuries resulting from obedience to the order. See Indianapolis & C. R. Co. v. a dryer, over spikes driven in a beam Love (1858) 10 Ind. 554, where the master became subject fact that the defendant told him to take to all the risk of an accident" is used in phrase that the master became subject last that the defendant told him to take to all the risk of an accident" is used in the cotton from the dryer did not make Kehler v. Schwenk (1892) 151 Pa. 505, a concealed danger of that which was 25 Atl. 130.

2 Ferren v. Old Colony R. Co. (1887) his assumption of a risk which was in-143 Mass. 197, 9 N. E. 608. cident to and part of his regular work, <sup>3</sup> Demers v. Deering (1899) 93 Me. and which he knew to be such and un-272, 44 Atl. 922 (servant required to derstood."

<sup>4</sup> Linch v. Sagamore Mfg. Co. (1887) slippery from frost and ice cannot re-cover, though he assumed the place of

A carpenter sent to do some work in

The effect of the decisions, as a whole, may be said to be this,—that the doctrine which declares that a servant acting under the direct orders of the master or a superior coservant does not assume the risk incident to the work is not applicable except where the service is a special one, and not even then where the danger is obvious to a person of ordinary prudence and intelligence.<sup>5</sup> In other words, the master does not make himself an insurer of the servant's safety because the latter is requested to incur a danger, provided that danger is one manifestly incident to the employment.6

439. Contributory negligence usually negatived by evidence that servant acted under direct order.— For reasons explained in §§ 295, 319, ante, it is plain that negligence cannot be predicated of a servant's obedience to an order, where he had no knowledge, actual or constructive, of the dangerous conditions to which such obedience would expose him. Under such circumstances the fact that a direct order was given obviously becomes wholly immaterial. But there is also a large class of cases in which that fact is treated as a differentiating

a brewery, and there directed to place a silage 10 feet deep, resulting from the stringer in a certain room, from which latter's undermining the same, although intendent of the brewery to try again, from the top. saying that the work must be done, 'As, where the appearance of a rope makes another attempt, in which he is which a servant was ordered to use to seriously injured, assumes all the risk, support himself while washing down a and cannot recover. Beittenmiller v. mast did not indicate its weakness, and Bergner & E. Brewing Co. (1888) 22 he had no knowledge of the length of W. N. C. 33, 12 Atl. 599. An employee time it had been in use. The Ethelred of ordinary intelligence, who knows that (1899) 96 Fed. 446. trenches are liable to cave in, and that M. & Co. (1894) 88 Wis. 376, 60 N. W.

he is driven out by the fumes of am-monia, who when ordered by the super- by undermining, instead of by taking

A street-railway conductor who, in an the one in which he is working has just emergency and by order of the compartially caved in at a distance of a few pany's foreman, goes to work to repair feet, assumes the risk of returning to the brake of a car standing on the track his work therein upon an order of the over the pit in the station, and is insuperintendent. Showalter v. Fairbanks, jured by another car which ran in upon the track, because a switch was negli-77. gently left open, is not chargeable with Where a section hand got on a hand fault or neglect in accepting the emcar, which he had for three months ployment, where he had never worked in known to be defective, in obedience to the pit previously, nor been advised of an order of his foreman to go home to the risks and dangers of the situation. dinner, an instruction regarding the lia- Stucke v. Orleans R. Co. (1898) 50 La. bility of an employer who orders a serv- Ann. 188, 23 So. 342. On the ground ant into a position of extra hazard is that it was for the jury to say whether inapplicable and misleading. Burling-ton & C. R. Co. v. Liehe (1892) 17 Colo. of the danger, it was held that negli-280, 29 Pac. 175. <sup>8</sup>Stuart v. New Albany Mfg. Co. law, where he obeyed an order to go and (1896) 15 Ind. App. 184, 43 N. E. 961. help to extricate another miner upon <sup>9</sup> In Welch v. Brainard (1895) 108 whom earth had fallen, and was injured Mich. 38, 65 N. W. 667, it was held that by a second earthslide. Frank v. Bullion an employer is not liable for an injury Beck & C. Min. Co. (1899) 19 Utah, 35, to a servant caused by the fall of en- 56 Pac. 419. element, and in which the courts apply a doctrine which, in so far as it is susceptible of formal enunciation, may be stated as follows: Although the circumstances, when abstracted from the fact of the giving of the order, may be such as to justify a court in holding that the servant appreciated the danger to which his injury was due, and was negligent in subjecting himself to that danger, such a conclusion is, in a large number of instances, not warrantable, if the testimony goes to show that the immediate occasion of his being subjected to that danger was his compliance with the order.<sup>2</sup> The effect of this doctrine is that, where the servant, in obedience to an order, performs a duty which, though dangerous, is not so dangerous as to threaten immediate injury, or where it is reasonably probable that the work may be safely done by using more than ordinary caution or skill, he may recover, if injured.3 It will be seen that this rule, when analysed,

cover, if injured.<sup>3</sup> It will be seen that this rule, when analysed,

""Questions arise whether the action of a servant is his voluntary act, or done fective switch, the court said: "Let it in obedience to the commands of the master or one in authority over him. When an act is performed by a servant was dangerous, yet, doubtless, many trains had passed over it safely, and in obedience to a command from one having authority to give it, and the performance of the act is attendant with a degree of danger, yet in such case it is not requisite that such servant shall ball ance the degree of danger, and decide with absolute certainty whether he must do the act, or refrain from it; and his periors who requested him to continue knowledge of attendant danger will not defeat his right of recovery, if, in obeying the command, he acted with that degree of prudence that an ordinarily prudent man would have done under the circumstances." Chicago Anderson (1884) 148 Ill. 583, 36 N. E. 572. If the master, knowing of the existence of abnormal dangers, commands and urges the servant to do something which involves used of the utmost skill and care, the Pressed Brick Co. v. Sobkowiak (1894) 148 Ill. 583, 36 N. E. 572. If the master, knowing of the existence of abnormal dangers, commands and urges the servant to do something which involves use of the utmost skill and care, the Pressed Brick Co. v. Sobkowiak (1894) and care, the Pressed Brick Co. v. Sobkowiak (1894).

In a case where an engineer was inservant in to a certain station at a greater at e of speed than the customary rate recovering damages. Moline Plow Co. v. Anderson (1885) 19 Ill. App. 417. whether he was guilty of contributory negligence in so running, when he knew, have used ordinary care for his personal is ageneral way, of the defective considered that the switch in question where the injury was dangerous, yet dangerous, yet many dangerous, yet is afely. Under such as the considered that the switch in considered that the switch in density dangerous, yet is safely.

would be deemed clear evidence of negliar master to shield himself from respongence, was recently laid down in Butler sibility for the consequence of his own Bullast Co. v. Hoshaw (1901) 94 Ill. negligence by alleging those acts, not inevitably or immediately dangerous, to \*In Patterson v. Pittsburg & C. R. have been negligent, which his servant Co. (1874) 76 Pa. 389, 18 Am. Rep. 412, performed by his express order." Hawamounts to nothing more than a statement that, in determining what is ordinary care on the part of a given individual, all the circumstances of his position should be regarded, including, in cases like the present, the servant's orders, the demands of his duty, the apparent risk to be met, and the purpose of his action, no less than his physical sur-

ley v. Northern C. R. Co. (1880) 82 N. form, in broad daylight, in obedience to Y. 370, Affirming (1879) 17 Hun, 115, the command of the conductor, who was and following the Pennsylvania case su- his direct superior, and after fellow lapra, which has also been approved in borers had jumped and landed safely, is Chicago & N. W. R. Co. v. Bayfield not so obvious as to be a necessary legal (1877) 37 Mich. 205, and Richmond & conclusion, but is a question for the D. R. Co. v. Rudd (1892) 88 Va. 648, jury. Northern P. R. Co. v. Egeland 14 S. E. 361 (following the Pennsyl- (1896) 163 U. S. 93, 41 L. ed. 82, 16 vania case, where a brakeman who was Sup. Ct. Rep. 975, Affirming (1893) 5 engaged in uncoupling a car without a C. C. A. 471, 12 U. S. App. 271, 56 Fed.

ployee to obey an order of his superior a train moving at the rate of from 4 depends upon whether it would be rash to 6 miles an hour, used his lantern, and dangerous to do so; and where and got off carefully. Central R. Co. v. there was no apparent danger so to do, De Bray (1883) 71 Ga. 406. it would not be fault on his part." Evidence of an order from a conductor Central R. Co. v. De Bray (1883) 71 to a brakeman to cut off some cars from

Ga. 406.

guilty of contributory negligence in ating, as a matter of law, that he was tempting, in pursuance of the direction negligent in attempting to disconnect of the track foreman, a vice principal, the cars by going in between them. Unto board an electric car moving at the der such circumstances he may well rate of three or four miles an hour, pre- have understood that, even if the order cluding recovery for his death, caused was not a specific direction to go in beby falling from the car and being run tween the cars, he was authorized to cut over by it, is for the jury. Chattanooga them apart by going in between them in Electric R. Co. v. Lawson (1898) 101 such a mode as appeared to him, in the Tenn. 406, 47 S. W. 489.

from evidence showing that plaintiff's Co. (1891) 154 Mass. 529, 28 N. E. 682. intestate, while in the employ of de- A brakeman cannot be held negligent fendant as a carpenter, was helping to because, on a dark, cold, and stormy take down an iron pipe used in the erec-night, when he had to act promptly, he tion of a steel grain elevator; that he complied with an order of his conductor was ordered by the general foreman of to take up and use a coupling link which construction to take a pair of tongs and was lying on the ground near the track, go up on the scaffold, 18 feet above the although it turns out that the link was floor, and stand on a board 1 foot wide, not suitable for the purpose for which and assist in holding the upper sections it was required. Denver, T. & G. R. Co. of the pipe from turning, while the lower v. Simpson (1891) 16 Colo. 55, 26 Pac. section was being unscrewed by the comsection was being unscrewed by the combined strength of three men, of whom A servant may recover on evidence the foreman was one; and that, while which shows that he obeyed the orders engaged in doing this, he fell off and was of his superintendent to hold the outer

stick, in contravention of rules, but by 200. Negligence is not inferable, as a order of the conductor, was thrown off matter of law, where the evidence shows the flat car where he was standing and that a brakeman who was injured by run over). "Whether it be the fault of an em- with an order to dismount at night from

a slowly moving train introduces an ele-Whether or not a section hand was ment which prevents a court from sayexercise of ordinary care, to be neces-Negligence is not a necessary inference sary. Hannah v. Connecticut River R.

339.

was of his superimentation of hold the base william Graver Tank Works v. end of a plank, which rested at its inner O'Donnell (1901) 191 Ill. 236, 60 N. E. end on the edge of a wagon bed; that his duty was to lower it slowly to the ground after a heavy barrel which was tion crew in jumping from a train going to be unloaded had been rolled on to about 4 miles per hour, to a station plat-

roundings. Having weighed all these considerations, unless the case then discloses that the risk was such as would not be taken by a man of common prudence, so situated, the court cannot justly declare that the taking of that risk by the servant, in obedience to orders, was neg-

barrel, being forcibly run against the work, not applicable where a servant plank, thrust it off of the wagon bed and drove a wagon by express orders along fell upon it; and that the servant's arm a particular way, and was caught by a was broken by the shock thus caused. shaft which he was stepping over, hav-Beard v. American Car Co. (1897) 72 ing found that it was too low to admit

Mo. App. 583.

from the front plate, and inclined back jured); Harrison v. Denver & R. G. W. against another furnace, 4 inches dis-R. Co. (1891) 7 Utah, 523, 27 Pactant; that after it had so stood for a 728 (ordered to take down a shafting fendant said that plaintiff should do as fact); Britton v. Northern P. R. Co. he told him; that another person also (1891) 47 Minn. 340, 50 N. W. 231 suggested to defendant that the plate (section man not necessarily negligent in was dangerous, and should be fastened; attempting, at the command of his fore-that the defendant, nevertheless, did man, to remove a hand car out of the nothing, and the plate fell because of way of a slowly approaching engine); the rear foundation giving way, plain- Colson v. Craver (1899) 80 Ill. App. tiff's work not affecting it. Reese v. 99 (employee operated circular saw Clark (1901) 198 Pa. 312, 47 Atl. 994. without a helper, knowing that it was

that appliances for coupling were defective, but believed that the coupling to go under an overhanging bank of ordered could be safely made by hand); earth to assist in placing stone on a Louisville, E. & St. L. Consol. R. Co. v. wall, not obliged to balance the degree Utz (1892) 133 Ind. 265, 32 N. E. 881 of danger); Wierzbicky v. Illinois Steel (fact that brakeman walked along the Co. (1901) 94 Ill. App. 400 (servant top of a train moving at a high rate of knew that the rope on a spool was in speed not necessarily a bar to his an untwisted, loose, and raveled condiaction, where he was acting under tion); and decisions referred to in this orders); Indiana Car Co. v. Parker and the next sections.

(1885) 100 Ind. 181 (workman not In an action by a trackman for in-

necessarily negligent in changing from juries sustained while attempting to one part of his work to another); draw a spike in a dangerous manner Hawkins v. Johnson (1886) 105 Ind. with a sledge, an instruction that, if the 29, 55 Am. Rep. 169, 4 N. E. 172 (rule jury believed that defendant's foreman that servant must at his peril choose instructed plaintiff to draw spikes in a

form a skidway for the barrel; that the the safer of two methods of doing his of his passing underneath it while On the ground that the danger was seated in the wagon); Central R. Co. not inevitable nor imminent, the con- v. De Bray (1883) 71 Ga. 406 (braketributory negligence of the servant was man not necessarily negligent in getting held to be for the jury to determine, off a moving train by the orders of the where the evidence was that, in taking conductor); Pagels v. Meyer (1899) 88 down a furnace, the rear plate, weigh- Ill. App. 169 (servant adopted dangering about a ton, and resting on an old ous method of arranging planks to be brick foundation wall, was disconnected cut by a rip-saw, and had his hand inday to plaintiff's knowledge, he was diat night): Thompson v. Chicago, R. I. rected by his employer, under whose & P. R. Co. (1900) 86 Mo. App. 141 immediate orders the work was being (engine-hostler's helper obeyed orders of done, to take out the front wall bricks, hostler to couple two tenders so conand, on plaintiff saying the best way structed as to come dangerously close was to take the plate down first, de-together, he not being aware of this To the same effect, see Stuart v. ordinarily operated by two men); Nor-Evans (1883) 49 L. T. N. S. 138, 31 folk & W. R. Co. v. Ward (1894) 90 Week. Rep. 706, per Williams, J.; Va. 687, 24 L. R. A. 717, 19 S. E. 849 Illinois Steel Co. v. Schymanowski (servant entered an unusually narrow (1896) 162 Ill. 447, 44 N. E. 876; Nor-ditch under peremptory orders to dig folk & W. R. Co. v. Ampey (1896) 93 it deeper, and it caved in upon him); Va. 108, 25 S. E. 226 (servant knew McFadden v. Sollitt (1901) 94 Ill. App.

ligence.<sup>4</sup> The practical result of such a doctrine, when stated in terms of the servant's knowledge, is that the servant may maintain an action, unless he not only knows what is the risk to be encountered, but also that it will probably be attended with injury which he cannot avoid by the exercise of care and caution.<sup>5</sup>

In other cases the extent of the servant's right of action is indicated by a restrictive form of statement, and he is said to be entitled to obey a specific command of his superior without incurring thereby the imputation of contributory negligence, unless the execution of that command involves a hazard to which no ordinarily prudent person would have subjected himself; or unless a reasonably prudent person in his situation and with his knowledge of the danger would not have obeyed the command; or unless the danger was so "apparent," or "obvious,"9 or "clear,"10 or "manifest,"11 or "glaring,"12 or "imminent"13

if plaintiff, from his experience, knew that by obeying the order he was undergoing more danger, and obeyed without protest or objection, and was thereby injured, he would not be entitled to recover, is properly refused, since it could not be said, as a matter of law, that the danger that the head of the spike hand not negligent because he obeys would fly off and strike plaintiff, as it did, by attempting to pull the spike in a train is close at hand). Compare such manner, was imminent. Illinois Schroeder v. Chicago & A. R. Co. (1891) C. R. Co. v. Sporleder (1900) 90 III. 108 Mo. 322, 18 L. R. A. 827, 18 S. W. App. 590. App. 590.

The rule that an employer who furnishes a proper machine is not liable to a servant injured while using it for an improper purpose (see § 342, ante) does not apply in the case of an injury to an inexperienced employee who was using the machine in obedience to the direction of a superior whom it was his duty to obey. Newbury v. Getchel & M. Lumber & Mfg. Co. (1896) 100 Iowa,

441, 69 N. W. 743.

\*Schroeder v. Chicago & A. R. Co. (1891) 108 Mo. 322, 18 L. R. A. 827, 18 S. W. 1094 (where a section man tried to get a hand car off the track when a train was approaching).

<sup>5</sup> This form of expression is found in Halliburton v. Wabash R. Co. (1894)

58 Mo. App. 27.

° Newbury v. Getchel & M. Lumber & Mfg. Co. (1896) 100 Iowa, 441, 69 N.

Stephens v. Hannibal & St. J. R. Co.

(1888) 96 Mo. 207, 9 S. W. 589. \* Nall v. Louisrille, N. A. & C. R. Co. (1891) 129 Ind. 268, 28 N. E. 183, 611; Thompson v. Chicago, M. & St. P. R. Co.

more dangerous mønner than plaintiff (1883) 4 McCrary, 629, 14 Fed. 564; had been accustomed to draw them, yet *Chicago Anderson Pressed Brick Co.* v. if plaintiff, from his experience, knew *Sobkowiak* (1892) 45 Ill. App. 317, Af-

1094.

In a case where a servant was ordered to assist in the adjustment of a shaft close to a moving circular saw which was not guarded, and who, after having suggested that the work was not safe unless the saw was stopped, complied with a second and peremptory direction to proceed with the work, and was injured owing to his clothes catching in the saw, the jury were held to have been properly instructed that the plaintiff would not be barred from recovery by the fact that the work was dangerous, unless the danger was so obvious, and the injury thereby was so inevitable, that a man of ordinary prudence would have refused to obey, if ordered by his employer to do it. Van Duzen Gas & Gasoline Engine Co. v. Schelies (1899) 61 Ohio St. 298, 55 N. E. 998.

<sup>10</sup> Higgins v. Missouri P. R. Co. (1891) 43 Mo. App. 550.

<sup>11</sup> Larson v. Center Creek Min. Co. (1897) 71 Mo. App. 512; Last Chance Min. & Mill. Co. v. Ames (1896) 23 Colo. 167, 47 Pac. 382.

<sup>12</sup> Jenney Electric Light & P. Co.

that a person of that average prudence and intelligence whose hypothetical conduct is the test of the existence or absence of negligence would have declined, under the given circumstances, to have complied with the order. In other words, if a danger is not so absolute or imminent that injury must almost necessarily result from obedience to an order, and the servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order.14

It does not follow that, because disobedience to the order would have been justifiable, the servant was guilty of negligence in obeying it.15 Still less will the employer be permitted to escape liability on the ground that by disobeying the order the servant would have avoided injury, where it is a reasonable inference from the testimony that it was the servant's duty, under the given circumstances, to encounter the danger in question.16 Nor does it follow that, because it may

v. Murphy (1888) 115 Ind. 566, 570, 18
N. E. 30; Lebanon v. McCoy (1895) 12
Ind. App. 500, 40 N. E. 700 (laborer obeyed order to remove timber lying near a negligently erected bridge); given. Harncy v. Missouri P. R. Co. Norfolk & W. R. Co. v. Ward (1894)
90 Va. 687, 24 L. R. A. 717, 19 S. E. 849 (day laborer injured by the caving in of the sides of a narrow excavation which the foreman ordered him to dig to a greater depth than was prudent); East Tennessee, V. & G. R. Co. v. Duffield (1883) 12 Lea, 69, 47 Am. Rep. 17. 319; Huhn v. Missouri P. R. Co. (1887) 192 Mo. 440, 4 S. W. 937; Shortel v. St. Joseph (1891) 104 Mo. 114, 16 S. W. 537 (case for jury where a laborer was injured by the fall of an arch while he Chicago, St. P. & K. C. R. Co. (1892) was taking down the supports); Stephens 86 Iowa, 368, 17 L. R. A. 289, 53 N. W. V. Hannibal & St. J. R. Co. (1888) 96 Mo. 207, 9 S. W. 589; Fox v. injured by the fall of a large wheel which he was that the following instruction was propapproaching); Ballard v. Chicago, R. I. et P. R. Co. (1892) 51 Mo. App. 452 (servant jumped from moving train); Fogus v. Chicago & A. R. Co. (1892) the fall of a large wheel which he was the fall of a large wheel which he was better judgment); Halliburton v. Wabash R. Co. (1894) 58 Mo. App. 27 (plaintiff injured by theels under a locomotive).

In a case where an injury caused by the cause in the proposal propaching is a toward of packet wheels under a locomotive).

In a case where an injury caused by the exercise of ordinary care and prudence wheels under a locomotive). wheels under a locomotive).

In a case where an injury caused by judgment, have been avoided, then the a defective car was shown, an instruction that the servant was justified in going in to uncouple the car, under the conductor's order, even though he knew would not say that it might not prop-

by the exercise of ordinary care and

be negligence for a superior servant to order his subordinates into a dangerous position into which he himself is to accompany them, they are therefore negligent in complying with the order.<sup>17</sup>

The rule as to the qualifying effect of an order is deemed to be especially applicable where the servant is an immature boy, who objected to doing the work, but ultimately did it with reluctance. 18

- 440. Considerations upon which this doctrine is based.—The trine stated in the last section depends upon several different consid-Some of these, it will be observed, are more or less operative in every case, whether directly relied on or not. Others are applicable only under special circumstances.
- a. Master and servant not upon the same footing.—A fundamental principle which has already been discussed under other aspects (§§ 408 et seq., ante), and which is frequently adverted to in cases of the type reviewed in this chapter, has been thus stated in a leading decision already cited: "The servant does not stand on the same footing with the master. His primary duty is obedience, and if, when in the discharge of that duty, he is damaged through the neglect of the master, it is but meet that he should be recompensed." This essential inequality in the positions of the parties is deemed to warrant the deduction that "a prudent man has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the common master has placed him, and is not bound, at his peril, to set his own judgment above that of his superior."2 In other words, when a

part, rendering the employer liable to repairing force, then, should move on, others injured thereby. To assume a both prudently and obediently, to the position of danger is not necessarily discharge of its full duty."

18 Kehler v. Schwenk (1892) 151 Pa. and an employee in such case, even if 505, 25 Atl. 130. injured, would have no right of action, Patterson v. since he was employed for such position (1874) 76 Pa. 389, 18 Am. Rep. 412.

erly be given in some possible case, but accidents. Although the train was bethe bare fact that a position to which hind time, this would not justify the the bare fact that a position to which and time, this would not justify the an employee is ordered for the discharge boss and men, who constitute the reof his duty is a dangerous one will not pairing force, in setting off their hand justify his disobedience, since he was car and awaiting the train. It might employed for that duty, and its disnot arrive for hours, or possibly might charge may be necessary to save the lives of others; and a failure to do hand car with men, tools, and materials his duty, or disobedience under such cirto repair a breach or remove obstruc-cumstances, might be negligence on his tions which stayed its progress. The

'Patterson v. Pittsburgh & C. R. Co.

since he was employed for such position of danger and paid for assuming it."

In Frandsen v. Chicago, R. I. & P.

Co. (1873) 36 Iowa, 372, it was on this ground that a section hand should when they have equal knowledge of the have refused to go with a hand car into a railway cutting, when a train might arilway cutting, when a train might one of subordination and obedience to arrive at any moment. But the court the master, and he has the right to rely said: "A judicial sanction to such insubordination would breed an infinity of the master. The servant is not entirely

servant did not assert his judgment in opposition to the supposed better judgment or stronger will of his master, the law usually allows a jury to determine whether he was negligent, or acted in reliance upon the judgment of his master, or out of a constrained acquiescence in the rule of obedience which his relation as servant imposed.3

anyone." Jenney Electric Light & P. Co. the circumstances, and upon all the eviv. Murphy (1888) 115 Ind. 566, 18 N. E. 30.

In a case where the servant was injured by falling from a scaffold while he was engaged in taking down a shafting in an insufficiently lighted room, it was held proper to instruct the jury a scaffold, due to his changing, under the that if the work ordered to be done was orders of the foreman representing the not obviously dangerous, or of such a common master, the manner in which it nature that the servant could see that it could not be performed with safety, or about which there could be a difference there was evidence that scaffolds were of opinion in the minds of reasonable sometimes suspended in that way by and prudent persons, then the servant those engaged in similar work, although was not, at the peril of being discharged, he objected to fastening it in that way, bound to set up his judgment against as rendering it "liable to come down." that of his master. Harrison v. Denver Offutt v. World's Columbian Exposition

4 N. Y. Supp. 774 (servant set to work guilty of negligence, where the method underneath an unexploded blast, which pursued by him in loading wheels on a went off). This decision was reversed car was adopted by him in reliance in (1891) 126 N. Y. 1, 26 N. E. 905, upon the judgment and experience of but merely on the ground that the de- his foreman, and there is nothing to fense of common employment was a bar show that such reliance was not justito recovery.

plaintiff's position. His business was manner of setting a certain kind of that of an engineer, and unless he obeyed terra cotta with which he is not faorders and ran his engine he would have miliar. Gibson v. Sullivan (1895) 164 been obliged to abandon the defendant's Mass. 557, 42 N. E. 110. A laborer in service; of one thus situated the law a quarry, who has stood aside while a should not be too exacting. We must "boat" loaded with rock is being hoisted assume that the officers of defendant, to a ledge directly above where he is assume that the olders of detendant, to a ledge directly above where he is who had charge of the road, and must working, is not necessarily negligent in have known its condition, deemed it returning to the place of work in comsafe; and the plaintiff had the right to pliance with a signal from his foreman rely somewhat upon their judgment. which he supposes to be an intimation Other employees of the road, and hunthat the "boat" has been swung past the

free to act upon his own suspicions of dreds of passengers, were daily trusting danger." Shortel v. St. Joseph (1891) their lives upon the road, and on the 104 Mo. 114, 16 S. W. 397. "Where an day of the accident he was ordered to, employer commands his employee, whom and did, precede a passenger train. Unhe assumes to direct, to use a defective der such circumstances, was the plainimplement in a particular way, leaving tiff bound to set up his judgment against the latter no discretion as to the time or that of all others, and determine for manner of its use, the employee may rely himself that the road was absolutely unupon the superior knowledge and experi- safe for the passage of his engine, and ence of the employer, unless the defect is abandon his position as engineer, or take so glaring and extreme as to make the upon himself the risk caused by defenddanger of using the utensil apparent to ant's negligence? We think, under all dence given on both sides, that it was a question for the jury to determine, whether the plaintiff acted with reasonable prudence and discretion in venturing to run his engine over the road."

An employee injured by the falling of was suspended, is not chargeable with the knowledge that it was unsafe, where & R. G. W. R. Co. (1891) 7 Utah, 523, Co. (1898) 175 Ill. 472, 51 N. E. 651, 27 Pac. 728.

Reversing (1897) 73 Ill. App. 231. A 27 Pac. 728. Reversing (1897) 73 Ill. App. 231. A \*\* Cullen v. Norton (1889) 52 Hun, 9, railway servant is not, as matter of law, fiable. Kain v. Smith (1880) 89 N. Y. In Hawley v. Northern C. R. Co. 375. A mason is not negligent, as mat-(1880) 82 N. Y. 370, the court argued ter of law, in following the instructions "We must take into account the of his foreman with regard to the proper

The inequality of the positions occupied by a servant and by the master or employee who controls him is usually emphasized as a circumstance indicative of the conclusion that his knowledge was relatively inferior. But under some states of facts this consideration might be material, even though both parties have the same knowledge of the danger.4

b. Servant entitled to rely on the master's performance of his duties.—(Compare §§ 354, 355, ante.)—A second principle which is especially important in cases where the servant was injured as a result of his compliance with a direct order, and which naturally suggests itself as a material element under such circumstances, is that a servant is not necessarily negligent where he acts upon the presumption that his employer and his employer's agents have done, are doing, and will do, their duty.<sup>5</sup> The servant is

as a matter of fact, the danger is not about the construction of scaffolding, or yet over, and the laborer is ultimately injured by the falling of the boat consequent upon its striking against the by his employer, and ordered to remove ledge. Cox v. Sycnite Granite Co. the chips and rubbish from beneath a caffold, he is entitled to assume that Compare also Illinois Steel Co. v. Schymanowski (1896) 162 Ill. 459, 44 that the scaffolding is of sufficient N. E. 876; McKee v. Tourtellotte (1896) 167 Mass. 69, 48 L. R. A. 542, 44 N. E. 167 Mass. 69, 48 L. R. A. 542, 44 N. E. 167 Mass. 69, 48 L. R. A. 542, 44 N. E. 1671: Larson v. Center Creek Min. Co. A section hand engaged, under the dicenter of the construction of a foreman of the gang, in at W. R. Co. v. Ward (1894) 90 Va. 687, tempting to remove a hand car from the 24 L. R. A. 717, 19 S. E. 849; Colorado Midland R. Co. v. O'Brien (1891) 16 Colo. 219, 27 Pac. 701 (laborer, not appreciating the risk, went on overloaded construction train); Turner v. Norfolk ing train and the efforts of his men to while riding on a hand car through a cut Louis, I. M. & S. R. Co. v. Rickman in a curve, which his foreman had en- (1898) 65 Ark. 138, 45 S. W. 56. heating them).

margin of the ledge and is no longer ship-carpenter, or a joiner, or a medangerous to a person below, although, chanic of any kind, and knows nothing as a matter of fact, the danger is not about the construction of scaffolding, or

construction train); Turner v. Norfolk ing train and the efforts of his men to & W. R. Co. (1895) 40 W. Va. 675, 22 get the hand car off the track, will give S. E. 83 (boy of sixteen years killed such directions as will protect him. St.

tered without sending a man ahead with See also Crowley v. Cutting (1896) a flag,—not negligent in obeying order 165 Mass. 436, 43 N. E. 197 (servant orto get on the car); Regers v. Overton dered to steady a stone which is being (1882) 87 Ind. 410 (trackman not neghoisted by a derrick has a right to rely ligent in obeying an order of a road on the presumption that it is properly master to assist in bending rails without fastened): McMillan Marble Co. v. Black (1890) 89 Tenn. 118, 14 S. W. heating them).

\*It cannot be said that the master 470 (boy set to work under a dangerous and servant are on an equal footing, projecting rock entitled to assume that even where they have equal knowledge it has been tested): \*Cook v. St. Paul\*, of the danger. To so say is against M. & M. R. Co. (1885) 34 Minn. 45, 24 common experience, and in disregard of N. W. 311 (floor of depot which had been the fact that the servant occupies a position subordinate to the master. gave way): \*McGorern v. Central Ver-Stephens v. Hannibal & St. J. R. Co. (1890) 123 N. Y. 280, 25 (1888) 96 Mo. 207, 9 S. W. 589.

\*Where an employee, who is not a who is sent for by the superintendent deemed to be warranted in shaping his conduct with reference to this presumption, unless he has, or ought to have, acquired knowledge of circumstances which indicate that it is not justifiable.6 The juridical theory is that the order, having a natural tendency to throw the servant off his guard, may properly be considered to excuse him from the exercise of the same degree of care as would have been incumbent on him if the case had not involved this factor.7

and ordered to enter one of the bins 400, 59 S. W. 1125 (see subd. d, note 13, through a trap door at the bottom to de- infra). tach from the sides any grain that may be sticking to the sides, has a right to as- tcr (1892) 56 Ark. 206, 19 S. W. 575. had been falling in uncommonly large casions told the elevator man that the numbers on the day of the accident); employee was in the shaft, and the latSteinhauser v. Spraul (1893) 114 Mo. ter may have relied upon his doing so 551, 21 S. W. 515, Affirmed on Rehearing on the occasion in question.

An employee in a mine has a right to (domestic servant, ordered to ascend ladder, entitled to assume that it is not defective); Southern R. Co. v. Hart the duty of inspecting the same, and (1901) 23 Ky. L. Rep. 1054, 64 S. W. may proceed with his work relying on 650 (servant ordered to mount on top of such presumption, unless a reasonably a stationary car under repair is not prudent and intelligent man under like a stationary car under repair is not prudent and intelligent man under like negligent in acting on the assumption circumstances would be able to discern that the side bearings, designed to keep risks which defects in the mine indicate. it from tilting, were in their place); Ashland Coal & I. R. Co. v. Wallace Sprague v. New York & N. E. R. Co. (1897) 101 Ky. 626, 42 S. W. 744, Re- (1896) 68 Conn. 345, 37 L. R. A. 638, hearing Denied in (1897) 101 Ky. 644, 36 Atl. 791 (engineer not negligent in 43 S. W. 207. A servert who is sent to testing his training of the asymptotic closer ways deliver after a block has been to starting his train on the assumption clear away débris after a blast has been that the conductor's statement as to the set off in a rock cutting is entitled to time at which another train was leaving assume that an inspection has been made a certain station was correct); Gulf, C. for the purpose of seeing if there are & S. F. R. Co. v. Duvall (1896) 12 Tex. any overhanging or loose fragments Civ. App. 349, 35 S. W. 699 (inexperienced laborer ordered to remove danger-which may injure him. Capasso v. enced laborer ordered to remove danger-which with may injure him. Capasso v. enced laborer ordered to remove danger-which with the conduction from the track as a N. Y. Supp. 409. Train was approaching): Texas C. R. Thankins v. Johnson (1886) 105 Ind.

6 Southwestern Tcleph. Co. v. Wough-

sume that the superintendent has previ- An employee directed to perform a ously ascertained that no grain has acparticular task has a right to assume cumulated in such a position as to be that his employer will furnish him a dangerous to men working in the lower reasonably safe place, or will see that part of the bin); Eldridge v. Atlas S. S. the place is reasonably safe while the Co. (1890) 58 Hun, 96, 11 N. Y. Supp. task is being performed, unless he is 468 (seaman entitled to assume that warned, or has reasonable cause to bewinch can be safely operated,—fact was lieve, or by the exercise of care and diliwinch can be safely operated,—fact was lieve, or by the exercise of care and dilispecially emphasized that he was bound gence should know, that it is not safe, or by his articles to obey orders); Lebanon unless the danger is within the obvious v. McCoy (1895) 12 Ind. App. 500, 40 scope of his employment as the business N. E. 700 (demurrer case): Devrese v. is carried on. Kirk v. Senzig (1898) Meramee Iron Min. Co. (1893) 54 Mo. 79 Ill. App. 251, where it was held that App. 476 (miner injured by tall of stone an employee directed by a foreman to from a slope above a pit where he was go into the bottom of an elevator shaft sent to work, the evidence being that it and pick up soap therein was not, as was impossible by any reasonable care a matter of law, debarred from recovery to prevent such occurrences altogether. for an injury caused by the elevator deto prevent such occurrences altogether, for an injury caused by the elevator de-but that the defendant's vice principal scending upon him, where the elevator had failed to use proper precautions, in was at the fourth or fifth floor when he view of the fact that he knew that stones entered, the foreman had on other ochad been falling in uncommonly large casions told the elevator man that the

Co. v. Hicks (1900) 24 Tex. Civ. App. 29, 55 Am. Rep. 169, 4 N. E. 172. "When

In a logical point of view the principle now under review is more properly treated as one which is distinct from, and independent of, the one noticed in the preceding subdivision, since it is essentially a particular instance of the operation of a general principle which is applicable, irrespective of whether the obligations in question are imposed upon a servant of superior, equal, or inferior, grade. (See §§ 354-356, 409, subd. c, ante.) But it is sometimes enunciated in a form which shows that it may also be deduced from the conception that the positions of a servant and his superiors are unequal. it is laid down that the servant has a right to assume that the master, or the master's representative, with their superior knowledge of the conditions, will not expose him to unnecessary perils.8 From the principle, considered under this aspect, are deduced the two subsidiary rules, that obedience to an order is not contributory negligence in any case in which the servant has a right to assume that the master will warn him as to any danger which the service may involve;9 and that, although a servant is usually deemed to be guilty of negligence, as matter of law, if he unnecessarily put himself in a dangerous position, his culpability, under such circumstances, will be for the jury, where he was entitled to assume that he was ordered to take that position, because his duty required it.10

the master undertakes to direct specifiexposed. He has a right to presume cally the performance of work in a parthat the master will do his duty in this cally the performance of work in a partath the master will do his duty in this ticular manner, we cannot say, as matrespect, and, therefore, when directed by ter of law, that the servant is not justified in relying to some extent upon the knowledge and carefulness of his employer, and in relaxing somewhat the vigilance which otherwise would be incumbent upon him. The servant's attention must be principally directed to the performance of the work in the manner in which he is ordered to perform it, and he may be in a less favorable position to see and judge of the surrounding dangers." Haley v. Case (1886) 142

Mass. 316, 7 N. E. 877.

\*\*Illinois Steel Co. v. Schymanowski\*\* (1896) 162 Ill. 459, 44 N. E. 876. See (1896) 162 Ill. 459, 44 N. E. 876. See (2. C. & St. L. R. Co. v. Brown (1893) also Powers v. Fall River (1897) 168-6 C. C. A. 142, 18 U. S. App. 10, 56 Fed. Mass. 60, 46 N. E. 408 (triped, used instant) in the manner in that the master will do his duty in this trester will do his duty in this treatment that the master will do his duty in this treatment that the master will do his duty in this treatment that the master will do his duty in this treatment that the master will do his duty in this treatment that the master will do his duty in this treatment that the master will do his duty in this treatment that the master will do his duty in this treatment that the master will do his duty in this treatment that the master will do his duty in this treatment that the master will do his duty in this treatment that the master will do his duty in this treatment that the master will do his duty in this treatment that the master will do his duty in this treatment that the master will do his duty in this treatment that the master will do his duty in this treatment to perform them in a certain place, without performent experies, and, therefore, when directed by respect, and, therefore, when directed by respect, and, therefore, when directed to be perform them in a certain place, without performent the proper authority

ging; servant's right to rely on superintendent's experience emphasized); Halliburton v. Wabash R. Co. (1894) 58 Mo.

same footing as his master, as respects a matter of law, guilty of contributory the matter of care in inspecting and in-negligence in attempting to mount a vestigating the risks to which he may be coal car in obedience to the orders of his

stead of derrick for hoisting water pipes, of the supporting posts of a shed, and fell into ditch which servant was digignorant that the shed would fall if the posts were cut, should have warned).

10 Light v. Chicago, M. & St. P. R. Co. (1894) 93 Iowa, 83, 61 N. W. 380, hold-A servant "does not stand upon the ing that a railroad employee is not, as

c. Order considered to be an implied assurance that there is no abnormal danger.—It has frequently been declared that a specific order to do a certain act carries with it an implied assurance that the act may be done with reasonable safety.11 It is manifest, however, that under the principles explained in chapters x., xI., ante, an employer who would prima facie be held liable for injuries caused by a defective appliance when, without making any inspection, he urged his men forward with words which showed that in his opinion there was no danger, cannot be held liable if such an inspection, made with reasonable care, would not have disclosed the fact that there was a defect in the chain.12

As to the effect of an express assurance of safety, see next chapter.

d. Necessity for prompt obedience.—(Compare §§ 358-361, ante.) -Another circumstance which is frequently emphasized is the fact that when a servant is suddenly called upon to execute a piece of work in a particular manner, under the eye of his employer, or his employer's representative, a careful observation of the conditions is generally quite impracticable, if the direction is to be carried out with that

upon the assurance that there is no dan-expected manner, appeals for advice to ger which is implied by such an order." the employee whose duty it is to instruct Illinois Steel Co. v. Schymanowski him, and receives an answer which he (1896) 162 Ill. 459, 44 N. E. 876. See supposes to amount to an instruction to also Keegan v. Kavanaugh (1876) 62 go on as before, is not negligent in fol-Mo. 232; Leland v. Hearn (1900) 49 lowing that direction. Bjbjian v. Woon-App. Div. 111, 63 N. Y. Supp. 204; Dunn socket Rubber Co. (1895) 164 Mass. 214, v. Connell (1897) 20 Miss. 727, 46 N. E. 265. Y. Supp. 684, Affirmed in (1897) 21 Misc. 295, 47 N. Y. Supp. 185.

fact, a trainman knew, or had an oppororder by the general superintendent to tinue to run over it, exercising care, and

the defect. Flynn v. Kansas City, St. J.

superior, although he might have ridden & C. B. R. Co. (1883; Mo.) 10 Westsafely to the place to which he was di-418, Former Appeal 78 Mo. 195, 47 Am. rected to go on the footboard of the en- Rep. 99. An inexperienced foreigner, imperfectly acquainted with English, 11 "The servant has a right to rest who, after a machine has acted in an un-

A servant who drives a wagon along a isc. 295, 47 N. Y. Supp. 185. particular way by the express direction The question whether, as a matter of of his master's representative, and is injured by the projecting bolts of a retunity of knowing, the methods em- volving shaft which, when it is too late, ployed by the company in running its he finds himself unable to clear, while train by telegraphic orders, becomes im- seated in the wagon, is not debarred material where the superintendent gave a from recovery by the rule that a servant peremptory order that his train should must, at his peril, choose the safer of proceed regardless of the movements of two alternative methods of doing his another train traveling in the opposite work. Such a direction is an implied direction. Sheehan v. New York C. & statement that the way indicated is reader. R. R. Co. (1883) 91 N. Y. 332. An sonably safe, and an instruction withdrawing the consideration of the direcengineers, "not to run faster than card tion from the jury is erroneous, when time until the track can be got into bet- the question of the servant's exercise of ter condition," was in effect a declaradue care is submitted to them. Hawk-tion that the road was not necessarily ins v. Johnson (1886) 105 Ind. 29, 55 hazardous, and the engineer could con-Am. Rep. 169, 4 N. E. 172.

12 Hoffman v. Dickinson (1888) 31 W

that the superintendent would remedy Va. 148, 6 S. E. 53.

promptitude which is expected from subordinates.<sup>13</sup> The qualifying import of this circumstance is obviously not diminished by the fact

thereon, see § 281, notes 4, 5, ante); mount a moving car, because he had ob-Mason v. Richmond & D. R. Co. (1892) served that it was traveling at the rate 111 N. C. 482, 18 L. R. A. 845, 16 S. E. of about 10 miles an hour, or because his a dark night not bound to examine discovered that the ground near the coupling); Dillingham v. Harden (1894) track sloped in such a manner that he 6 Tex. Civ. App. 474, 26 S. W. 914 (serv-could not readily seize the ladder and he is directed by his foreman to use in may properly find him to have been free

it is not, as a matter of law, guilty of tributory negligence such as will defeat contributory negligence in failing to his recovery. Stephens v. Hannibal & look ahead and observe an obstruction St. J. R. Co. (1888) 96 Mo. 207, 9 S. near the track. The want of time for W. 589. deliberation, and the position he would In Patton v. Western N. C. R. Co. 

<sup>13</sup> Halvy v. Case (1886) 142 Mass. Boston & M. R. Co. (1891) 153 Mass. 316, 7 N. E. 877; Strong v. Iowa C. R. 297, 10 L. R. A. 769, 26 N. E. 864. Al-Co. (1895) 94 Iowa, 380, 62 N. W. 799 though a brakeman would have been (for the facts of this case and comments justified in refusing to obey an order to 698 (brakeman ordered to couple cars on lantern had gone out, or because he had ant not bound to examine a skid which place his foot in the stirrup, yet a jury lowering rocks into a pit).

A carpenter employed by a railroad an emergency which gave him no time company, who obeys a hasty order to for reflection. Fox v. Chicago, St. P. & pick up his tools, bedding, etc., and put K. C. R. Co. (1892) 86 Iowa, 368, 17 L. them on a push car and to get on, does R. A. 289, 53 N. W. 259. A brakeman not assume the risks arising from the on a freight train is not guilty of neglifact that the car, which then starts gence in attempting to make a coupling down a heavy grade, is not provided with between two cars of unequal height with proper appliances to control its velocity, a misshapen link which he had been di-Miller v. Union P. R. Co. (1882) 4 Mc- rected by the conductor to take from the Crary, 115, 12 Fed. 600. It is for the ground and use, when, owing to darkness jury to determine whether a boy of and storm, he did not discover the defect seventeen, who was working in a foun- in the link in time to avoid an accident. dry, was negligent, where he was ordered Denver, T. & G. R. Co. v. Simpson (1891) to stop an engine and to hurry, this not 16 Colo. 55, 26 Pac. 339. Where one of being a part of his regular duties, and a gang of men engaged in raising a in executing the order his trousers were track by putting stone under it on the caught by an uncovered set screw and sudden approach of a train is ordered to collar on a revolving shaft over which take off some stone remaining on the he stepped. Dowling v. Allen (1881) 74 track, and immediately attempts to do Mo. 13, 41 Am. Rep. 298. A servant so, without opportunity to observe and who obeys a hurried order of his calculate the distance to the train or its foreman to take hold of a car and push speed, he is not necessarily guilty of con-

cago & N. W. R. Co. (1891) 80 Wis. 428, clined to apply the general rule that 50 N. W. 404. Where a brakeman, when mounting a seems that this command was given and moving car, put his foot under it in a promptly obeyed without hesitation. It place where he expected to have the sup- was rash, negligent, unreasonable, and port of a jaw strap, and was injured unwarranted, but the danger to be enowing to the fact that it was missing, it countered in obeying it was not so manwas held that, in view of the fact that ifest and so great as, under the circumhe was acting under orders, and of the stances, to render a prompt obedience to haste necessary under the circumstances, it contributory negligence on the part of it was for the jury to say whether he the appellant. An ordinary laborer on was negligent in omitting to look and railroads-one of ordinary experiencesee whether there was a jaw strap, be- might make a leap without injury; he fore he undertook to use it. Coates v. might not unreasonably believe that he

could, taking proper care, and especially act with promptness and despatch, it so when commanded to do so by a rail-would be most unreasonable to demand road employee of long experience who of him the thought, care, and scrutiny had the right to command him in the which might be exacted where there is course of his duty. While to jump from a rapidly moving train of cars is tion. Thus, if a ladder is usually found very hazardous, and, ordinarily, to do upon such cars, in the haste necessarily so is negligence, it is not contributory attendant upon uncoupling cars and negligence where the plaintiff—a laborer stopping the train he was not bound to on the railroad—is suddenly commanded deliberate and settle in his mind that a lab or the car was on the ca by his employer or its agent to do so, in like means of ascending the car was on the course of his employment, and the this one, though he knew by prior obsercommand is at once obeyed from a sense vation that it was wanting. of duty and without waiting to think of and consider the hazard. Such a case is Carty (1896) 49 Neb. 475, 68 N. W. 633, exceptional. The agent of the employer the court said: "Our conclusion, after suddenly commands the laborer to do an a consideration of the subject, is that it extra hazardous act in the course of his is a harsh and unreasonable rule which duty,—one that may, though not prob-charges a servant, when commanded to ably, be safely done by observing due perform an act by his master, with the care; one that must be done at once if duty of at once determining whether or done at all. 'The laborer obeys the com- not the act can be safely performed, and mand promptly, nerved only by a faith- then performing it at his peril, or reful sense of duty, and as a consequence fusing to perform it at the expense of suffers serious bodily injury. In that losing his employment. The risk incase the injured party does not, in legal curred by obeying a negligent command contemplation, contribute to his own in- of the master is not one ordinarily incisuch as that he might, when suddenly is not an assumed risk, because neglicalled on, not unreasonably believe that gence on the part of the master is not the command was a proper one, and that presumed to be a feature of the employhe ought to obey. Although the act was ment. It is true that where ample hazardous, it was not essentially danger- time exists for examination and reflecous.'

right to assume that the directing em- ing dangerous acts, except at his own ployee knew the extent of the danger, risk; and it is this consideration which and would not order him to do an act governs the cases holding that the conwhich he could not safely do, it has been tinued use of defective appliances withheld that in an action for injuries sus- out protest and a promise by the master tained by an inexperienced section hand to remedy them discharges the master in alighting from a moving train in from liability. With the case, however, obedience to an order of the section fore- of a command given suddenly, which man, while the train was running at the must be obeyed immediately or not at rate of from 7 to 12 miles an hour, it all, a different question is presented. was not error to submit the issue of ob- The servant is confronted with a new vious danger to the jury, where plain- danger, one not contemplated when he tiff's evidence showed that it was no part entered the employment, and one not of his duty to get on and off moving made a part of it by continued use. trains, and that the order was impera- The servant has certainly, in the first tive, requiring immediate action, thus place, a right to presume that the masgiving him no time for deliberation. Ler gave the command advisedly and in Texas C. R. Co. v. Hicks (1900) 24 Tex. the exercise of due care. If the servant Civ. App. 400, 59 S. W. 1125.

(1870) 29 Iowa, 14, 4 Am. Rep. 181, whether or not it is negligence for him where a brakeman was killed owing to to obey depends upon circumstances. the want of a ladder on a car, the court The act may be so foolbardy, so clearly argued thus: "Though decedent knew entailing disaster, that the only reason of the defective car, if he acted under in- able course is to disobey. The test of structions and directions of a superior negligence is, in such cases, as in others, the action would by no means thereby whether or not a man of ordinary prube defeated. Under such circumstances, dence so situated would obey or refuse.

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In Chicago, R. I. & P. R. Co. v. Mc-The facts and circumstances were dent to the servant's employment, and tion a servant may not, beyond a certain On the ground that the servant had a limit, continue in the service, performdisobey, he forfeits his employment; and In Greenleaf v. Illinois C. R. Co. even though he be aware of the danger, compelled, as he necessarily would be, to In many cases a man of ordinary pruthat the servant had previously protested against being exposed to the risk in question.14

In cases where the defense of contributory negligence is raised, the consideration thus relied on will sometimes serve to excuse a servant's temporary forgetfulness of a danger the existence of which he had previously ascertained. See § 350, ante. But it would seem that, according to the more logical view of the situation, the fact that his forgetfulness of a previously known danger was excusable under the circumstances will not enable him to recover, where the master relies specifically upon the defense of an assumption of the risk. See § 281, ante.

e. Direct order considered as tending to negative voluntary action. —(Compare §§ 288, 289, 381, 382, ante.)—The fact that the master urged or coerced the servant into danger is conceded to be an evidential element which tends to negative the inference which is ordinarily drawn, where it appears that the servant undertook or remained in an employment with a knowledge of the abnormal risk from which his injury resulted.<sup>16</sup> The cases illustrating this exception from a positive standpoint are not numerous. Where the servant is of mature years, the compulsion which it contemplates will only be inferred in circumstances of a very unusual description.<sup>17</sup> The case of a young child is different. He cannot be expected to have the

an expected train); Chicago Anderson See also Greenleaf v. Illinois C. R. Co. Pressed Brick Co. v. Sobkowiak (1890) (1870) 29 Iowa, 14, 4 Am. Rep. 181 38 Ill. App. 531 (servant ordered to pro- (brakeman not necessarily negligent in ceed after he had objected to work on failing to remember that a car which he account of its danger).

<sup>15</sup> In Lee v. Woolsey (1885) 109 Pa. 124, end ladder). where the master was personally directwhere the master was personally directing the work, and giving emphatic orders (1874) 76 Pa. 389, 18 Am. Rep. 412; to move quickly, the court said: "If Pennsylvania Co. v. Lynch (1878) 90 an employee is, in haste, called upon to execute an order requiring prompt attention, he is not to be presumed necessarily to recollect a defect in machinery, (1893) 50 III. App. 104.

"In Wells & F. Co. v. Gortorski (1893) 50 III. App. 445, a laborer, unor a particular danger connected with derstanding only a foreign language, his employment, so as to avoid it. A prompt and faithful employee, suddenly foreman, and coerced to remain there called upon by a superior to do a par-

dence, compelled to decide instantly, ticular act, cannot be supposed to re-even though aware of the existence of member at the moment a particular danger, would prefer obedience, and danger incident to its performance, of would take the risk." Contrast cases cited in § 442, note 5, it would be most unreasonable to deinfra.

mand of nim the thought and care which might be exacted when there is more time for chegreation and deliberation. able in East Tennessee, V. & G. R. Co. v. time for observation and deliberation" Duffield (1883) 12 Lea, 63, 47 Am. Rep. (servant here had failed to observe that 319 (laborer, after protest, used defect- planks had been removed over a space ive hammer, where there was need of through which he was engaged with quick action to get the track ready for tackle and horse in hoisting timbers). was about to uncouple had not the usual

<sup>16</sup> Patterson v. Pittsburg & C. R. Co.

will power of a grown man in resisting his master's orders; and where the evidence tends to show coercive influence the opinion of the jury should be taken upon the question whether his compliance with the order was negligent.18

f. Direct order considered as tending to produce confusion of mind. -In § 437, supra, it has been shown that negligence may sometimes be imputed to the master on the ground that he or his representative had, at a dangerous conjuncture, issued an order which was calculated to create a confused condition of the servant's reasoning faculties, and thus diminish his capacity for making an intelligent choice between a safe and an unsafe course of action. From another standpoint it is clear that the existence of the condition thus induced, supposing it to be excusable, is a circumstance which tends to negative culpability on the servant's part. The situation is essentially identical with that which, as already stated, may result from obedience to an imperative

he was directed by the foreman to drive of the plaintiff's youth and weakness is out the truck was not sufficient to show one of the elements that go to make up that he was coerced into taking the risk, the charge of negligence on the part of since he acted voluntarily, and with full the defendant in putting such a person konwledge of the situation. Miller v. upon such a service. It seems to us the Grieme (1900) 53 App. Div. 276, 65 N. master, in such circumstances, and not Y. Supp. 813.

to Patterson v. Pittsburg & C. R. Co. a foreman ordered a boy thirteen years (1871) 76 Pa. 389. 18 Am. Rep. 412. old to hurry in his work of cleaning a supra, and said: "The principle of this dangerous machine in order that he decision would exoncrate the plaintiff in might clean another machine which was the present case from a charge of con- ordinarily attended by another boy who

his language, actions, and position, tributory negligence in engaging in a which was greater than his fear of the palpably dangerous service, even if he danger of the place, and overcame his were a full-grown adult, because there own judgment, was held entitled to recover for injuries sustained.

A problem of the place, and overcame his were a full-grown adult, because there was other testimony to the effect that the appliance might be used with safety cover for injuries sustained.

A railroad company is liable for injuries received by an inexperienced brakeman in making a dangerous coupling in the nighttime, where the conductor refused to allow anyone else to dent kept persistently urging him to expedite the task, with full knowledge of the danger to which he was exposed. The But where plaintiff, after a year's service in driving a coal truck, which was barely low enough to pass under a brack was injured by attempting to re-voluntarily engages in a dangerous; but although apparently dangerous; but when his youth and physical weakness are considered, and the fact that he was ordered to do this work, and that he objected to doing it, and went reluctantly to the service, it cannot be doubted that he is entirely free from any charge of contributory negligence, and also that the master became subject to all the more than a child, either in years or in trength, and could not be expected to service in driving a coal truck, which was barely low enough to pass under a in resisting his master's orders. He beam in the coal bin when he was on the cannot be held, therefore, as one who seat, was injured by attempting to reseat, was injured by attempting to revoluntarily engages in a dangerous sermain on the seat while driving out vice, especially by a master who specificander it with a new truck two feet cally directed him to do the hazardous higher than the old one, the fact that work. On the contrary, the very fact the servant, must be held to have as-18 In Kehler v. Schwenk (1892) 151 sumed the risks of the service." In Pa. 505, 25 Atl. 130, where a boy of Tagg v. Medicorge (1893) 155 Pa. 368, fourteen was injured, the court referred 26 Atl. 671, it was held that, where

order which it is necessary to execute with great rapidity.19 subd. d, supra.

441. Direct order not a justification where it was given without authority.—In § 435, supra, it has been stated that a master is not affected with liability for the consequences of an order proceeding from a coemployee of an injured person, unless that coemployee was authorized to issue it, and in so doing acted as the master's agent. authority of the coemployee is also material in another point of view, since it is clear that, if he had no authority to give the order, and this fact was or ought to have been known to the injured servant, the latter must, in obeying the order, have been guilty of contributory negligence. The cases cited in the two preceding sections will furnish ample illustrations of the circumstances under which the authority of the directing employee has been taken for granted.

As the nature of the relations between superior and subordinate employees in different descriptions of business is usually a matter of common knowledge, the question whether the directing employee was invested with the necessary authority to issue the order is seldom a material element in the case. In the exceptional instances in which there may be a doubt as to those relations, the injured servant, if he undertakes to show that an act which, if done proprio motu, would have betokened carelessness, was excusable, for the reason that it was done in compliance with an order given by a party whom he was bound to obey, must prove that he had just reason for believing that his failure or refusal to obey the commands of the superior would or might be followed by a discharge from the employment. But it is

for the plaintiff.

2d series, 1082.

and of less than ordinary intelligence, 50 Fed. 325. who is injured while obeying peremptory orders to assist in operating a macron with revolving cylinders at which Mason v. Richmond & D. R. Co. (1892)

was absent, and the boy was injured in he was not employed to work, the danthe work, it is not improper for the ger being partially concealed from his court to charge that, if the boy was not view, cannot be said, as a matter of law, aware of the danger, and his will was to have failed to exercise due care. Patsubjected to that of the foreman, and node v. Wurren Cotton Mills (1892) 157 he obeyed him because he thought the Mass. 283, 32 N. E. 161 (distinguishing foreman knew better, or because he was earlier cases in which the danger was afraid to disobey, the jury might find obvious and known to plaintiff). A seaman has been held entitled to recover Whether a young apprentice was jus- his actual damages for injuries from tified in obeying an order accompanied falling into the hold because of the givby threats is not a question which ing way, through imperfect fitting of should be decided on demurrer. M'Mil- which, as he was new to the ship, he lan v. M'Millan (1861) 23 Sc. Sess. Cas. was excusably ignorant, of a section of the hatch upon which he was standing Similar views seem to prevail in Quewhile adjusting another section, under bec. St. Arnaud v. Gibson (1898) Rap. the direction of the boatswain, who was Jud. Quebec, 13 C. S. 22. hurrying him in his work. Erquit v. hurrying him in his work. Erquit v. <sup>19</sup> An employee fourteen years of age New York & C. Mail S. S. Co. (1892)

not necessary that he should show that the superior was himself invested with the power of discharge. Any other doctrine, it has been pointed out, would enable the master to evade responsibility by providing that this power should be lodged in some person other than the immediate superior of the workman, while at the same time the power would, for practical purposes, be exercised by the superior himself, as a result of the fact that his recommendations in this regard would in practice always be followed.2

It is clear that an order given by one superior servant to do a manifestly culpable act—in the case cited, the violation of a rule—will not excuse the servant for doing that act after he has passed under the control of another superior servant, who has never given him a similar direction.3

The fact that the person from whom the order directly emanated was only a fellow servant of the injured person will not prevent recovery, if it appears that such fellow servant was simply the channel through whom the order was transmitted from an employee who had authority to give it.4

698. See note 3, infra. <sup>2</sup>Turner v. Goldsboro (1896) 119 N. C. 387, 26 S. E. 23. still adhere to the doctrine that a brake- ductor Dick, who had previously been man is not culpable for exposing him- his superior." self, in obedience to the orders of the 'In a case where it was contended conductor in charge of the train, to that there was no evidence that an in-

111 N. C. 482, 18 L. R. A. 845, 16 S. E. several months without receiving any order modifying the written rule, would Lumber Co. discharge him for failure to couple with his hands when a stick would not an-<sup>3</sup> Mason v. Richmond & D. R. Co. swer the purpose. And we do not think (1894) 114 N. C. 718, 19 S. E. 362 that the command of Guthrie to "hurry (brakeman injured while coupling cars up," coupled with the testimony of the with his hands instead of a stick). Re-plaintiff that he thought Guthrie had ferring to its former judgment in the seen him couple with his hands before case (1892) 111 N. C. 482, 18 L. R. A. that time, is tantamount to an express 845, 16 S. E. 698, the court said: "We command, such as was given by Con-

peril to which his voluntary exposure of jured brakeman was acting under the himself would constitute contributory orders of the conductor, when he atnegligence. Our ruling was founded both tempted to uncouple cars in motion, it upon the principle that the conductor, was held that a brakeman, though in-as middleman, had on behalf of the com-pany waived its express regulation, and with such matters pertaining to his duupon the idea that the known relation ties as are of common knowledge, and between a conductor and a brakeman, is therefore presumed to be aware that running on the same train as his subor- brakemen are subject to the orders of running on the same train as his subordinate, was such as to subject him to a the conductor with reference to their well-grounded fear of dismissal should duties, and that such orders are often the hesitate to obey such an order, and thereby relieve him of legal culpability for conduct which, but for the fact of pury to say, in the light of this common his acting under the fear of the consequences of disobedience, would constitute negligence. But we did not intimate that a brakeman would be warranted in assuming that another conductor, under whom he had served for (1889) 78 Iowa, 569, 43 N. W. 303.

A master cannot relieve himself of responsibility for an order which is apparently within the scope of the authority of the superior servant, by showing that no such authority was conferred by the rules framed for the regulation of the business.<sup>5</sup>

442. — nor where a prudent man would have refused to comply with it.—Upon general principles it is manifest that, although the servant may have been directly commanded or urged to undertake the work from which the injury resulted, he cannot claim an indemnity where the danger to be encountered was at once so obvious and so serious that no prudent man would have incurred it.1 That is to say, the order must, if it is to serve as a justification, be in a matter with regard to which the servant has a right to rely on the superior judgment of the master.2

The courts decline to lay down a rule of law purporting to define accurately how dangerous a proposed action would have to be before a servant receiving an order from his master to perform it would be required to disober under pain of being chargeable with negligence.3 But where there is no dispute as to the facts, and the dangers of obedience to an order are as apparent to the servant as to the employer's representative, there is no occasion to go to the jury to determine whether the servant should have obeyed the order.4

The mere fact that the conductor of in obedience to orders is not negligent).

forget that the servant is required to exercise ordinary prudence. If the instrumentality by which he is required Duffield (1883) 12 Lea, 69, 47 Am. Rep. to perform his service is so obviously 319. and immediately dangerous that a man

a train had, under the company's rules, A charge is erroneous which assumes no right to order a man off a moving that an engineer cannot be negligent in no right to order a man off a moving that an engineer cannot be negligent in train, is no defense to an action by a operating his engine where he does so brakeman who is injured in obeying such an order. Central R. Co. v. De Bray the signals of the conductor. Nonculpability cannot be predicated where the act commanded, however performed, Co. (1874) 76 Pa. 389, 18 Am. Rep. 412, would be a negligent one. Alabama G. the court remarked: "We are not to S. R. Co. v. Richie (1892) 99 Ala. 346, former that the convent is required to 12 So. 612 12 So. 612.

<sup>3</sup> Chicago Anderson Pressed Brick Co. of common prudence would refuse to v. Sobkowiak (1890) 38 Ill. App. 531. of common prudence would refuse to v. Sookowiak (1890) 38 111. App. 301. use it, the master cannot be held liable 'Arean v. Detroit Copper & Brass for the resulting damage. In such case Rolling Mills (1887) 66 Mich. 277, 33 the law adjudges the servant guilty of N. W. 395. An employee who was inconcurrent negligence, and will refuse price while it was required to get upon an entire that the refuse price while it was required to the rote. concurrent negligence, and will refuse jured in attempting to get upon an enhim that aid to which he otherwise would be entitled." Compare Moline of from 6 to 12 miles an hour should be Plow Co. v. Anderson (1885) 19 III. nonsuited, although he was acting un App. 417; Shortel v. St. Joseph (1891) der orders. Roul v. East Tennessee, V. 104 Mo. 114, 16 S. W. 397; Southwest- & G. R. Co. (1890) 85 Ga. 197, 11 S. E. ern Teleph. Co. v. Woughter (1892) 56 558. Where a train is moving at the Ark. 206, 19 S. W. 575; McDermott v. rate of from 4 to 6 miles an hour, an Hannibal & St. J. R. Co. (1885) 87 Mo. experienced trainman is not justified in 285 (disapproving of an unqualified in- obeying an order to jump from it. Mcstruction to the effect that an act done

In cases where the essence of the servant's justification is that the order given was so urgent and peremptory as to leave him no time for reflection or for examination into the conditions to which he was required to expose himself (see § 440, subd. d, supra), he will necessa-

III. App. 638. See, however, Northern Bradshaw v. Louisville & N. R. Co. l'. R. Co. v. Egeland (1895) 163 U. S. (1893) 14 Ky. L. Rep. 688, 21 S. W. 93, 41 L. ed. 82, 16 Sup. Ct. Rep. 975, 346. A car repairer, although he took Cited in § 439, note 3, supra. A brake-the position by the direction of his foreto the starting of his train in violation position for seven weeks, and knew that of the rules of the road, without a word that end of the track had not been of formal protest, although he had, at guarded, and was aware that engines the time, every reason to expect that he were likely to enter from that end. would meet another train traveling in Chicago, B. & Q. R. Co. v. McGraw the opposite direction on the same track. (1896) 22 Colo. 363, 45 Pac. 383. On the one hand, if it was ordinarily The orders of a superior will not jushis duty to obey the orders of the despatcher, even though they were in viorisk involved in the adjustment of a lation of the company's rules, the order portion of a machine while it is in moto start the train under such circumtion. Gorman v. Des Moines Brick Mfg. stances was so obviously wrong, and was Co. (1896) 99 Iowa, 257, 68 N. W. 674 quences, that it was manifestly negli- it is in motion). Or in the operation gent to act upon it without inquiring of wiping moving machinery with a the reasons for it. Wescott v. New piece of waste. Atlas Engine Works v. York & N. E. R. Co. (1891) 153 Mass. Randall (1884) 100 Ind. 293, 50 Am. 460, 27 N. E. 10. An employee who has just got off a hand car in safety before a rapidly approaching train is under no which the servant knows there is a deep obligation to comply with a hasty and well hole, without ascertaining whether impulsive request of the foreman to save it is guarded or not, is culpable neglithe hand car, in view of the obvious and imminent danger. Wright v. Southern R. Co. (1897) 80 Fed. 260. Wright v. A section hand well acquainted with his duties is guilty of contributory negligence in attempting, in response to an order of the foreman, while seated on the rear of a hand car rapidly descending a grade, to take hold of the rapidly moving brake handles, in the absence of a sudden emergency. Jones v. Galveston, H. & S. A. R. Co. (1895) 11
Tex. Civ. App. 39, 31 S. W. 706. A section hand is not bound to obey an order of the section boss to get on to and help propel an obviously overcrowd- Shiekle (1879) 69 Mo. 336. ed hand car; and no recovery can be had consequence of his obeying the order. negligence of a superior servant, a rail-

man is guilty of contributory negligence man, was guilty of contributory negliprecluding recovery for injuries received gence in standing upon a side track rein attempting to uncouple cars having pairing a car, and cannot recover for double deadwoods, which render the act injuries from the car being put in mospecially dangerous, while the train is tion by the moving of other cars by an in motion, even if ordered to do so by engine which entered on the side track the foreman. Davis v. Western R. Co. on the end which was not guarded by (1894) 107 Ala. 626, 18 So. 173. A conthe signals furnished for such purpose, ductor who is injured by a collision will where he was an experienced railroad be denied recovery where he consented hand, and had worked in his present

likely to involve such frightful conse- (adjusting portion of machinery while

To go to work in a dark cellar in gence which will prevent him from recovering for injuries caused by the want of a guard, even though he was ordered to "hurry up the work." Taylor v. Carew Mfg. Co. (1885) 140 Mass. 150, 3 N. E. 21.

It is negligence to obey orders to clear out the débris from a mining shaft by making an excavation from a lateral tunnel which enters it at the bottom. Robinson v. Dininny (1898) 96 Va. 41, 30 S. E. 442.

It is negligence to go on to a scaffold after having observed circumstances indicating that it is unsafe.

But under the doctrine prevailing in for his being thrown off and killed in Kentucky as to the effect of the gross rily fail to make good his contention, unless he shows that the order was actually one of this description.5

443. — nor where the servant fully appreciated the danger.— In view of the general principles developed in chapter xviii., ante, it is clear that the fact of the servant's having acted under a direct order is immaterial, if it is apparent that he fully appreciated the danger which he was required to encounter. Under such circumstances the essential question to be decided,—viz., whether a prudent man would have undertaken the work,—is determined with reference solely to the proper deductions to be drawn from his appreciation of the danger,<sup>1</sup> except, of course, in so far as the order may have temporarily produced a forgetfulness of the danger, or a confusion of the mental faculties. See § 440, subd. d, supra, and compare remarks in § 438, supra. In this point of view a few cases which, upon a superficial inspection, would seem to negative the doctrine that a differentiating effect is to be ascribed to an order, will be found quite consistent upon the facts with the rest of those cited in this chapter.2

Greer v. Louisville & N. R. Co. (1893)
94 Ky. 169, 21 S. W. 649.

5 An employer is not liable for an injury to an employee using a circular saw, merely by reason of an order that ter, the order must be immediate and upon a sudden emergency or exigency. The shall not waste so much time in cleaning the logs before sawing them, when he does not in any wise so command him to proceed as to preclude him from the exercise of due care in putting the logs into proper condition to the effect that to justify the effort of a servant to obey the order of a superior in a hazardous matter, the order must be immediate and upon a sudden emergency or exigency. Chattanooga Electric R. Co. v. Lawson (1898) 101 Tenn. 406, 47 S. W. 489.

1 White v. Newport News Shipbuilding & Dry Dock Co. (1897) 95 Va. 355, ing & Dry Dock Co. (1897) 95 Va. 355, E. 577, denying recovery where it was not known to the directing employee, and was known to the injured employee, that the ring at the end of a shout by the gang foreman of "All ashout by the gang foreman of "All ashout by the gang foreman of "All chain wrapped round a heavy object was aboard" is not an order of that peremptoon small to be used with the hook which was to support the object which subordinates in taking such a manifest it was being lifted. risk as that of mounting a moving train.

Novock v. Michigan C. R. Co. (1886)

Mich. 121, 29 N. V. 525. An order lated the rule that the fact that the em-

way company is not relieved from liapart. Last Chance Min. & Mill. Co. v. bility for injuries to a brakeman, in-Ames (1896) 23 Colo. 167, 47 Pac. 382. curred in uncoupling cars in obedience In a case where a servant, in attempto an order, caused by the gross negling to get on the front platform of a gence of the conductor or other superior trolley car moving at the rate of 3 or 4 employee in the control and manage miles an hour, slipped and fell under ment of the train, by the fact that the the car, the court held that no imperadanger of going between the cars to un- tive order demanding instant action was couple them was open and visible. proved, and affirmed the correctness of Greer v. Louisville & N. R. Co. (1893) an instruction to the effect that to jus-

by the skip tender of a mine, whose duty ployee knowingly undertook to use a it is, under a rule of the mine, to pre-dangerously defective tool under the imthe skip at once, to an employee to get ployee did not give him the right to on the skip after ten other persons are recover. But the report shows that the on. does not relieve such employee from plaintiff had known for several months contributory negligence where no emerthat the sledge hammer which caused gency called for sudden action on his the injury was out of repair. The same

444. — nor where the servant executed it in a negligent manner.— The doctrine discussed in the present chapter is a protection to the servant pro tanto, only in so far as it relieves from the charge of culpability in the actual undertaking of the work which he was ordered to do. It does not relieve him of the duty of avoiding particular danger.1 The necessary connection between the order and the act of the servant is not established, where the injury occurred owing to the manner in which the servant executed a general order which left him free to choose his own methods of carrying it out, and which might, so far as appears, have been safely performed by the selection of a different method.2 Hence, a servant who relies on the orders of his su-

doctrine was again laid down in Bell v.

Western & A. R. Co. (1883) 70 Ga.
566, where the plaintiff knew that the hand car on which he was ordered to ride was defective. See also Nelling v.
Industrial Mfg. Co. (1886) 78 Ga. 260

Minn. 86, 52 N. W. 1068 (charge to the effect that orders would not justify a Industrial Mfg. Co. (1886) 78 Ga. 260

Servant in going into known dangers (doctrine laid down, arguendo, on the was held not to be prejudicial error); authority of the two cases just cited);

East Tennessee, V. & G. R. Co. v.
Central R. Co. v. Haslett (1884) 74 Ga.
Spridges (1893) 92 Ga. 399, 17 S. E.
Sp (brakeman knew that cogwheel of brake was defective); Roul v. East Tennessee, V. & G. R. Co. v.
Central R. Co. (1887) 97 N. C. 11, 2 S. E. 659; Smith v. Roul v. St. Paul & D. R. Co. (1887) 51 w.
Minn. 86, 52 N. W. 1068 (charge to the effect that orders would not justify a servant in going into known dangers was held not to be prejudicial error); authority of the two cases just cited);

East Tennessee, V. & G. R. Co. v.
Central R. Co. (1886) 85 Ga.
Something which is a part of the regular routine work of the servant, and which man of a roundhouse will not justify does not increase the hazards which he man of a roundhouse will not justify does not increase the hazards which he a fireman in attempting to mount a locois required to undergo, implies an asmotive running 6 or 8 miles an hour); surance of safety, irrespective of the Duval v. Hunt (1894) 34 Fla. 85, 15 manner in which the work may be done, So. 876 (brakeman on a construction is erroneous. McArthur Bros. Co. v. So. 876 (brakeman on a construction is erroneous. McArthur Bros. Co. v. train removed all the stanchions except Nordstrom (1899) 87 Ill. App. 554. afterwards rode on it by the order of own control the manner of using an the foreman), following Georgia decisions.

Another reason why these cases are not to be regarded as being essentially inconsistent with those decided in other states is that they are all founded on Western & A. R. Co. v. Adams (1875) 55 Ga. 279, where the extent of the dedistinction between the several grades of employees, the court was not authorized to recognize any such dis-

of securing safety if he chooses to employ them, if he neglects the means of security to himself he elects to take the risk. In such a case, it cannot in reason be said that the employee has acted upon the confidence reposed in the employer, and that he is, therefore, entitled cision was simply that a servant suing to remuneration. Jenney Electric Light under the Georgia statute abolishing & P. Co. v. Murphy (1888) 115 Ind. the doctrine of common employment in 568, 18 N. E. 30. A brakeman is not the case of railway companies cannot relieved from contributory negligence in recover damages, unless he is himself attempting to uncouple cars while a free from fault, even though, in doing train is in motion by the order of the the act which caused the injury, he was foreman to cut off a car, in the absence complying with the orders of a superior of any emergency requiring prompt accemployee. The rationale of the ruling tion, as it will be presumed that it was was that, as the legislature had made intended that the order should be complied with in a safe manner, even if the order, if construed as one to uncouple the cars while in motion, would have tinction, the effect of which would be to such effect. Davis v. Western R. Co. enable the servant to recover in spite of his contributory negligence. (1895) 107 Ala. 626, 18 So. 173. A general order from a conductor to a

perior as an excuse for pursuing a dangerous course of conduct must show, not merely that he was ordered generally to go to work, but that he was ordered to pursue that particular course of conduct.3 Even an order which is couched in words indicating that it is desired to have the work performed promptly will not excuse a servant for needlessly putting himself into a dangerous position, or doing the work in a dangerous manner.4

splice in a manner not required either by order or the character of the work. Wiggins Ferry Co. v. Heilig (1892) 43 Ill. App. 238. An employee whose arm is caught in uncovered gearing while he is feeling the shaft, according to his instructions, to see if it is hot, is not, as a matter of law, guilty of contributory negligence. Thompson v. Edward P. Allis Co. (1895) 89 Wis. 523, 62 N. W.

flagman, to "catch" a car about to be obedience, as was alleged, to an unqualikicked, did not justify the latter in attempting to do so when the car was a certain place, it was held error to removing at an unusual and obviously diangerous rate of speed, especially where the conductor, when giving the order, did not know that the speed would be unusual, and was not present when the unusual, and was not present when the car. Co. (1893) 104 Ga. 764, 30 S. E. 1003. The theory that the plaintiff's injury was caused by that the plaintiff's injury was caused by injumping from a train while responding to a hasty summons to supper, where the cafendant's request for an unqualified order of the conductor to do this at certain place, it was held error to removing at an unqualified order of the conductor to do this at certain place, it was held error to removing at an unusual and obviously fuse the defendant's request for an instruction that, if the jury found that the conductor said to the hands, "If the defendant were accustomed to Example of the conductor and the plaintiff's injury was caused by the hands were accustomed to getting off and on moving trains, and a discretion was left to them whether they would jump or not, then the plaintiff could not recover on account of the conductor's order. Louisville & N. R. Co. v. Pitt ing to a hasty summons to supper, where there was no command to jump from verdict for the defendant was held to the train, and he determined for him- have been properly directed, where a self the particular manner in which the brakeman, upon the signal for brakes order should be carried out. Piquegno being given, undertook, without any imv. Chicago & G. T. R. Co. (1883) 52 perative necessity, and without any spelich. 44, 50 Am. Rep. 243, 17 N. W. 232. cial request from any person in control A foreman's order to splice a short rope of the train, to ascend a side ladder, just to the winch end of a longer rope to as the train was going on to a bridge make it reach a pile lying on the ground, the side timbers of which were, to his which was to be hauled into position by knowledge, dangerously close to the a pile-driver, will not render the master track. Illick v. Flint & P. M. R. Co. liable for injuries to the employee so (1888) 67 Mich. 632, 35 N. W. 708. ordered, where he undertook to make the Where, in removing the bents of a falsework, an employee, in obedience to an order of the boss of the gang, put his feet against a bent, and pushed it off, whereupon its lower end struck the bent on which he was sitting, knocking it down, and injuring him, the negligence is that of the employee and not of the master. Carnagie v. Penn Bridge Co. (1900) 47 Atl. 355, 197 Pa. 441.

\*\*Allis Co. (1895) 89 Wis. 523, 62 N. W. Where a laborer on a work train is 527.

\*\*The mere fact that a laborer engaged in excavating a bank had been ordered to return to work, after the foreman had been trying unsuccessfully to prise of the engine. Baltimore & P. R. Co. off a portion of it, has been declared not v. Jones (1877) 95 U. S. 439, 24 L. ed. to be a justification for his taking up 506. to be a justification for his taking up 506. An order to go ahead and start a dangerous position under the bank, machinery used to hoist coal on cars a dangerous position under the bank. machinery used to hoist coal on cars Songstad v. Burlington, C. R. & N. R. which were pushed down an incline to Co. (1889) 5 Dak. 517, 41 N. W. 755. the place of loading does not justify the In a case where a laborer was injured in getting off a slowly moving construction of a moving car. Kansas & T. tion train (speed not mentioned), in Coal Co. v. Reid (1898) 29 C. C. A. 475

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Where the master orders a thing to be done by a servant, he will not be exonerated from liability for injuries to the servant arising from doing the act merely because the servant does not do it in the particular way directed by the master. The question in every such case is whether the servant pursues the less dangerous course.<sup>5</sup>

57 U. S. App. 464, 85 Fed. 914. See <sup>6</sup> Citizens' Gaslight & Heating Co. v. also Wanner v. Kindel (1893) 4 Colo. O'Brien (1886) 118 111. 174, 8 N. E. App. 168, 34 Pac. 1014, § 442, note 5, 310. supra.

## CHAPTER XXIV.

## EFFECT OF A STATEMENT BY THE MASTER OR A COEMPLOYEE THAT CERTAIN WORK MAY BE DONE SAFELY.

446. Introductory.

447. Necessity of proving that an assurance of safety was given.

448. - and given by the master or an employee who represented him.

449. — and was given negligently.

450. General doctrine as to the effect of an assurance of safety.

451. Rationale of doctrine.

452. Assumption of the risk, when available as a defense.

453. When the servant is chargeable with negligence in undertaking or continuing the work.

a. Negligence a question for the jury.

b. Negligence predicable as matter of law.

454. Contributory negligence in respect to the manner of performing the work.

- 446. Introductory.—A subject closely connected with that which is discussed under the last chapter is the effect produced upon the servant's right of recovery by evidence that he received from his master or some superior coemployee an express assurance that the work undertaken by him involved no danger, or that proper precautions would be taken to protect him while he was doing the work. In many of the cases a specific order and an assurance of safety are both factors to be reckoned with (see § 453, note 10, infra); but, as this circumstance is not invariable, and each factor obviously has its own characteristic significance, it has been deemed better to treat the latter separately, even though, by so doing, we shall find ourselves brought once more into contact with conceptions similar to those already dealt with in connection with the former.
- 447. Necessity of proving that an assurance of safety was given.— It is very seldom that any question can arise as to the actual meaning of the expressions which are relied upon by the servant as amounting to a declaration that he might safely proceed with his work.<sup>1</sup>

¹The language used may sometimes ity, or an assurance that the instrumenbe such as to leave it doubtful whether tality in use was a safe one. It has it should be construed as embodying a been held that, under such circumpromise to procure a new instrumental-stances, the inference from the servant's

As a master is under the duty of keeping the instrumentalities reasonably safe, or of giving notice of their insecurity, the invitation which is inferentially extended to servants to make use of any instrumentality which is required for the due performance of their duties may be regarded as being accompanied by an implied assurance that they will not be exposed to any danger from which ordinary care can protect them.2

448. — and given by the master or an employee who represented him. -There is distinct and explicit authority for the view that an assurance of safety is binding upon an employer only when it was given by a vice principal. This would seem to be the only logical doctrine in cases where the defendant explicitly denies the representative character of the employee from whom the assurance proceeds. Compare § 435, ante. But if this plea is passed over, and the defense of contributory negligence is relied upon, it seems not unreasonable to say that the employer ought not to be protected by the mere fact that the assurance was not given by a vice principal.<sup>2</sup> The essential question to be determined under such circumstances is simply whether the servant was justified in acting on the assumption that the statement made as to the conditions was correct. Such an assumption may, it would seem, be warrantable in some instances where the action would indisputably be barred if the defense of a want of authority to give the

47 S. W. 311.

2 In Murphy v. Boston & A. R. Co. (1876) 61 Mo. 528. It was remarked that "the placing of a locomotive on the road for use would be an assurance that it was fit and safe." See also Salem Stone & Lime Co. v. Griffin (1894) 139 Ind. 141, 38 N. E. 411, for an instance of the same point of view.

1 "If the conductor who quieted the plaintiff's apprehensions of danger, and reassured him of his safety and the sufficiency of the rope, was a vice principal, the movement of engines, that he would acting for, and in lieu of, the master in protect him from injury while engaged

acting for, and in lieu of, the master in protect him from injury while engaged the control of the hands, and the superin his work, which is relevant on the intendence of the work and machinery, question of contributory negligence, been liable notwithstanding the plaininstruction withholding any consideratiff may have believed the rope to be tion of it on the question of negligence
unsafe. . . If the conductor did of the company; but the jury should not
not occupy the position of master to the be expressly instructed that they may plaintiff at the time of his injury, then consider it in deciding the question of

immediately proceeding to use such appliance is that he did so, not in the belief that a new one would be furnished, ter than the words or conduct of any but because he put faith on the master's assurance. Purcell Mill & Elevator Co. v. Kirkland (1898) 2 Ind. Terr. 169, the plaintiff." MoGowan v. St. Louis & I. M. R. Co. (1876) 61 Mo. 528. It

we think the defendant would have should be submitted to the jury by an

assurance were specifically put forward. It must be admitted, however, that the authorities with regard to this aspect of the matter are not as explicit as might be desired.3

449. — and was given negligently.— The essence of the culpability alleged in cases where the servant seeks to recover on the ground that

struction might impress the jury that 20 Mo. App. 463 (section foreman); the court regarded it as of material Richards v. Hayes (1897) 17 App. Div. weight on that question. Missouri, K. 422, 45 N. Y. Supp. 234 (foreman in-& T. R. Co. v. Collins (1896) 15 Tex. trusted with the duty of constructing a

Civ. App. 21, 39 S. W. 150.

<sup>3</sup> In some cases the assurances were, who, under the doctrine of the court of this fact was not specifically considof this fact was not specifically considered. Harder & H. Coal Min. Co. v. ceived. But apparently they were reschmidt (1900) 43 C. C. A. 532, 104 garded by the courts as agents of the Fed. 282 (superintendent); Young v. employer ad hanc vicem.

Mercantile Steam Laundry Co. (1901) A workman is entitled to rely on the 198 Pa. 553, 48 Atl. 497 (manager); representation of a feliow servant whose O'Brien v. Nute-Hallett Co. (1901) 177 province it is to inform the workmen Mass. 422, 59 N. E. 65 (superintendwhelm); Nelson v. St. Paul Plow Works a given place. Paterson v. Wallace (1894) 57 Minn. 43, 58 N. W. 868 (su-1854) 1 Macq. H. L. Cas. 748, 28 Eng. Paterson et al. & Eq. 48 (underground manager of perintendent); Stomne v. Hanford Produce Co. (1899) 108 Iowa, 137, 78 N. W. 841 (superintendent); Scullane v. Kellogg (1897) 169 Mass. 544, 48 N. E. 622 (superintendent); Sopherstein v. Bertcls (1896) 178 Pa. 401, 35 Atl. 63 S. W. 827 (foreman of factory); Foundry Co. v. Van Dam (1894) 149 Ill. 337, 36 N. E. 1024 (foreman of fac-47 Atl. 1085 (toreman of construction); been arrived at where the assurance was Goggin v. D. M. Osborne & Co. (1896) given by a foreman of a gravel train. 115 Cal. 437, 47 Pac. 248 (local man-Haus v. Balch (1893) 6 C. C. A. 201, ager); Monahan v. Kansas City Clay 12 U. S. App. 534, 56 Fed. 984. And by & Coal Co. (1894) 58 Mo. App. 68 a foreman of track laborers. Northern (foreman of mine); Atchison, T. & S. P. R. Co. v. Amato (1892) 144 U. S. P. R. Co. v. McKcc (1887) 37 Kan. 592, 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740, 15 Pac. 484 (superintendent); Jones v. Afirming (1892) 1 C. C. A. 463, 1 U. S. St. Louis, N. & P. Packet Co. (1890) App. 113, 49 Fed. 881, Affirming 46 Fed. 43 Mo. App. 398 (second mate of ship); 561.

contributory negligence, as such an in- Rowland v. Missouri P. R. Co. (1886) scaffold).

In other cases the status of the emas a matter of fact, given by an employee ployees who gave the assurance was certainly not that of a vice principal, acwhich rendered the decision, was a vice cording to the doctrine established by principal; but the evidential significance the majority of the decisions in the jurisdictions in which the injuries were re-

L. & Eq. 48 (underground manager of mine). A track master, as incident to his right to employ laborers for a rail-road company, is authorized to give them an assurance that he will warn them of the approach of trains. Brad-1000 (superintendent): Duerst v. St. ley v. New York C. R. Co. (1874) 3 Louis Stamping Co. (1901) 163 Mo. 607, Thomp. & C. 288. The master was held liable in Pool v. Chicago, M. & St. P. R. Co. (1882) 56 Wis. 227, 14 N. W. 46, Burnside v. Novelty Mfg. Co. (1899) R. Co. (1882) 56 Wis. 227, 14 N. W. 46, 121 Mich. 115, 79 N. W. 1108 (foreman where a servant in charge of a hand car of factory); Chicago Drop Forge & assured a detective in the company's employ that he might safely sit on it with his feet hanging down. But in tory); American Wire Nail Co. v. Con- this case, as the injured servant was in nelly (1893) 8 Ind. App. 398, 35 N. E. a different department, the decision 721 (foreman of factory); McIntyre v. might be placed on that ground. An as-Empire Printing (o. (1898) 103 Ga. surance given by the foreman of a 288, 29 S. E. 923 (foreman of printing switching crew in a railway yard was establishment); Schmit v. Gillen (1899) held to warrant a finding that the serv-41 App. Div. 302, 58 N. Y. Supp. 458 ant was not negligent. Burnham v. (foreman of construction); Lambert v. Concord R. Co. (1897) 69 N. H. 280, Missisquoi Pulp Co. (1900) 72 Vt. 278, 45 Atl. 563. A similar conclusion has 47 Atl. 1085 (foreman of construction); been arrived at where the assurance was he was injured by reason of his reliance upon the statement of his master or some coemployee, that he might, without undue peril, perform a certain piece of work, or go into a certain place, is that the party making that statement, being actually or constructively aware of the real conditions, exercised, by means of the statement made, a specific influence over the mind of the servant, and thus induced him to adopt a certain course of conduct from which he would possibly, or probably, have abstained if the statement had not been made. appropriate domain of the obligation the breach of which is thus indicated is obviously found in situations identical with or closely resembling those which are presented in actions of which the gravamen is the nonperformance of the duty of instruction. See chapter xvi., ante. The giving of the assurance merely introduces an additional element, which enables the servant to charge the master with an act of positive misfeasance in imparting erroneous information, when, in the absence of such an assurance, he would have been compelled to rely upon the mere nonfeasance which consists in withholding information which should have been given. It will be found, therefore, that all the decisions cited in this chapter exhibit the servant as a person who was either excusably ignorant, or chargeable with knowledge of the danger in question, for one or other of the reasons explained in chapter xxi. ante.1

450. General doctrine as to the effect of an assurance of safety.— The doctrine applied in the cases cited in this chapter may be enumerated in its most general form as follows:

If the servant is shown to have entered upon the performance of

To assure a servant that an unlight-detendant's negligence is a question for all bin into which he was ordered to go the jury where the evidence is that the was "all right," when in fact it had no floor, and the uncovered joists were of the trench in which he was working dangerous to a person jumping into it, might fall, but that, being a man of is negligence. O'Brien v. Nute-Hallett very limited experience in that kind of Co. (1901) 177 Mass. 422, 59 N. E. 65. work, he continued in the employment, It is a question for the jury whether relying upon the assurance of the foreman in charge of the work that the same negligent and whether his negligence were entirely safe. Walker v. Scott megligent, and whether his negligence were entirely safe. Walker v. Scott was the proximate cause of injury to a (1900) 10 Kan. App. 413, 61 Pac. 1091. miner, where there is evidence to show Where plaintiff, while operating dethat he not only failed to warn the later feedbank's machinery, being startled by ter of the known presence of gas in the an unusual sound, stopped work, observter of the known presence of gas in the an unusual sound, stopped work, observmine in such quantities as might cause ing which the defendant asked: "What an explosion, but that the latter was is the matter?" and was answered, "The thrown off his guard and led not to expect the presence of gas by the assurance of those who employed him that if made would have disclosed defects, the mine was safe and free from gas. he assured plaintiff that there was no Govern v. Bush (1896) 22 C. C. A. 196, danger, and ordered him to "go ahead for Fed. 349, 40 U. S. App. 349. The

'To assure a servant that an unlight-defendant's negligence is a question for

certain work, or continued to perform that work, relying upon an assurance of his master or his master's representative that such work would not unduly imperil his safety, the mere fact that, before he received the assurance, his apprehensions as to the possibility of injury had been excited by circumstances which had come to his knowledge, will not, as matter of law, render him chargeable, either with an assumption of the risk involved in the work, or with contributory negligence.<sup>1</sup> A reference to the ensuing sections will show that, in the great majority of the cases in which the effect of an assurance of safety has been discussed, the latter defense has been the one actually raised.

451. Rationale of doctrine. In Missouri it has been declared that an assurance from one representing the master that the machinery or apparatus being used is all right, and an order from him to his servant to use it, notwithstanding a complaint of the servant as to its sufficiency, amount to a guaranty of safety. But this conception, which would obviously place the master in the position of having taken upon himself the whole risk of what might happen, irrespective of the prudence or imprudence of the servant in exposing himself to the danger, is inconsistent with the general principle stated in § 24, ante. A more satisfactory theory, recognized in Missouri itself, as well as in other states, is that, as the knowledge and means of knowledge possessed by the servant are, under normal circumstances, inferior to those possessed by the master (compare §§ 407, 440, ante), the former is, as a general rule, justified in relying upon any express statement made by the former in respect to the extent of the danger of the employment.<sup>2</sup> In view of this disparity of information, an as-

inflicted by the subsequent breaking of v. Jacob Dold Packing Co. (1900) 84 the chain. Hoffman v. Dickinson Mo. App. 565. (1888) 31 W. Va. 142, 6 S. E. 53. Testimony given by the plaintiff that

called the attention of his foreman to the condition of the instrumentality in question, and of the danger which might result therefrom; that defendant, through such agent, assured plaintiff that it was all right, and to go ahead; (1876) 61 Mo. 532; Sullivan v. Hannithat it was unnecessary to do anything bal & St. J. R. Co. (1891) 107 Mo. 66, with it; and that plaintiff, relying on such representations, was induced to continue to operate the machine,—is not insufficient in failing to show plaintiff's ignorance of the conditions of the danger to which he was exposed. Stalzer

(1888) 31 W. Va. 142, 6 S. E. 53. Testimony given by the plaintiff that 'A petition averring that plaintiff he believed there was no danger after called the attention of his foreman to his foreman's assurance that there was

surance of safety, like a specific order, may be regarded as having had the effect of lulling the servant into a feeling of security and given him good reason to believe that there was no need for the vigilance which he would otherwise have exercised.3

this judgment, is set the judgment of a used in *Helfenstein* v. *Medart* (1896) superior one, too, whom, from the na- 136 Mo. 595, 36 S. W. 863, 37 S. W. ture of the callings of the two men and S29, 38 S. W. 294; *Warner* v. *Chicago*, of the superior's duty, seems likely to *R. I. & P. R. Co.* (1895) 62 Mo. App. make the more accurate forcest, and if 191; *Duerst* v. St. Louis Stamping Co. to this is added a command to go on (1901) 163 Mo. 607, 63 S. W. 827. with his work and to run the risk, it (1896) 167 Mass. 69, 48 L. R. A. 542, the risk. 44 N. E. 1071. "Hoffin

under the projecting bank, and protest-thing about the gas. Acting on that command, under the cira superior having every means and with
cumstances surrounding, and the declarations of the agent of safety, and gogiven to one not having equal means or
ing to the place ordered by the foreman, were facts presented to the jury, having no definite knowledge of any
on which they should find whether the
ground of danger, inspiring confidence
act of the plaintiff in going under the and a feeling of security."

The general principle here involved in

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The fact that there was nothing to becomes a complex question of the par- put the servant on inquiry as to the ticular circumstances whether the inexistence of danger was emphasized in ferior is not justified as a prudent man Chicago Edison Co. v. Hudson (1896) in surrendering his own opinion and 66 Ill. App. 639 (uninsulated wires obeying the command. The nature and near place where a carpenter was put the degree of the danger, the extent of to work). In Chadwick v. Brewsher the plaintiff's appreciation of it, and (1891) 39 N. Y. S. R. 718, 15 N. Y. the exigency of the work, all enter into Supp. 598, the court speaks of the "inconsideration, and no universal rule can terposition of the master's superior be laid down." McKee v. Tourtellotte knowledge," leading the servant to take

Hoffman v. Dickinson (1888) 31 W. In Chicago Anderson Pressed Brick Va. 142, 6 S. E. 53 (arguendo). In Co. v. Sobkowiak (1894) 148 Ill. 573, Grahum v. Newburg Orrel Coal & Coke 36 N. E. 572, the court thus defined the Co. (1893) 38 W. Va. 273, 18 S. E. 584, position of the injured servant: "He where the plaintiff was injured by an was not on the same footing with the explosion of gas in a mine, the evidence master or its agent. His primary duty was that the boss asked and urged him was obedience, and if, in discharge of to work on the night in question, saythat duty, he was injured, it is obvi- ing he would have a nice night's work; ously just and proper, and is but meet, and that the boss made this statement that he should be recompensed. Whilst when he had not been in the mine for believing that it was dangerous to go hours, and therefore could not know any-The court said: ing to the agent of the defendant that "Now whether we consider this statethere was danger, yet the agent sought ment an order or a request, Graham was to allay his fears and induce obedience lulled into a feeling of security by it; to his commands by declaring that there and unless we could find, as we cannot, was no danger of the bank falling, that the danger was known to Graham, Keily had superior opportunities of and was patent and manifest, so as to knowing the condition of the bank and deter any reasonably prudent man, it had superior experience, and the serv- frees Graham from contributory negliant had the right to assume that the gence. . . I regard it tantamount foreman would not misrepresent the to an order to work. Had he refused, probability of danger, and order him would he have been retained? But if into a place dangerous to life and limb. not a command, it was an assurance by

bank, behind the cart, to shovel, was a The general principle here involved is reckless act, or whether it was such as that a person who by the breach of some might have been done by a reasonably duty has caused another person to relax prudent person acting with reference to his own personal safety."

To the same effect is the language sequences of his act to the latter perval I M & S 90

452. Assumption of the risk, when available as a defense.— The effect of the servant's knowledge where his assumption of the risk is relied upon is open to no doubt. If that knowledge is imperfect, and excusably so, the action is, upon general principles, not barred.1 See §§ 257, 271, ante. But an assurance that appliances are in good condition manifestly cannot prevent the operation of a defense which is regarded as completely made out, when it has been proved that the risk was known to and comprehended by the servant.2

way of analogy are cited in § 59, ante. ployer liable for an injury. Lowcock

Nelson v. St. Paul Plow Works v. Franklin Paper Co. (1897) 169 Mass.

(1894) 57 Minn. 43, 58 N. W. 868 (su- 313, 47 N. E. 1000 (verdict for plainperintendent told servant that a matiff set aside). See also Rohrabacher chine, the defects of which he had preve. Woodward (1900) 124 Mich. 125, 82 viously discovered, had been repaired- N. W. 797 (experienced employee had case held to be for jury); Harder & H. operated planer for eleven months, know-Coal Min. Co. v. Schmidt (1900) 43 C. ing it to be defective); Howey v. Lake C. A. 532, 104 Fed. 282 (roof of mine Shore & M. S. R. Co. (1895) 13 Misc. declared by superintendent to be safe). 641, 34 N. Y. Supp. 1089.

<sup>2</sup> A servant "assumes the risk when Commenting upon the circumstances he voluntarily enters into danger apparent to him, notwithstanding an 56, the court said: "This case is not agent of his employer tells him there analogous to that upon which so many the additional risk, and is not relieved untarily continues at such work. where he says nothing about their hav- voluntarily assumes." ing been repaired, -especially in the ab- In Morris v. Pfeffer (1898) 77 Ill.

son's want of vigilance. See Pcnnsylold employed on a pasting machine, that vania R. Co. v. Ogicr (1860) 35 Pa. 60, it was foolish to use a split stock to put 78 Am. Dec. 322. Compare also the the paper between the belt of felting language used in Kinncy v. Folkerts and a heated cylinder, and that he could (1889) 78 Mich. 687, 44 N. W. 152 (§ use his hands without danger, is not 453, note 3, infra): Gowen v. Bush an assurance that his hand would not (1896) 22 C. C. A. 196, 40 U. S. App. be drawn into the machine if it came in 349, 76 Fed. 349 (§ 449, note 1, supra). contact with the surface of the belting Other cases which will be useful by and cylinder so as to render the em-Other cases which will be useful by and cylinder, so as to render the em-

agent of his employer tells him there analogous to that upon which so many is no danger." Toomey v. Eurcha Iron authorities have been cited, of defective & Steel Works (1891) 89 Mich. 249, 50 machinery, and notwithstanding such N. W. 850. An employee operating a condition the employee is urged by the planing machine with which he is faemployer that he can safely proceed with miliar assumes the risk of the belt by it; but it is a case as to the mode of which it is run breaking apart, when he proceeding with machinery that was not observes that the fastening have partially given way, and continues to op- of safely operating it, there was an hongrate although he calls the foreman's est difference of oninion between the erate, although he calls the foreman's est difference of opinion between the attention to it, and is told that the belt employer and employee. It cannot be, is all right and to go on. Anderson v. after such difference of opinion has man-H. C. Akeley Lumber Co. (1891) 47 ifested itself, that the employer there-Minn. 128, 49 N. W. 664. An employee after becomes an insurer of the employee who knows that the lights about the ma- against an accident, even if it should chinery he works on are defective, and occur through a mistaken judgment of continues in the employment, assumes the employer, where the employee volfrom such assumption by the statement such case it would seem that the hazof another employee in response to his ard, if any, thereafter would be inciinquiry, that the lights are all right, dent to the employee's service, which he

sence of evidence that the latter em- App. 516, where the defendant asked for ployee represents the master. Colorado an instruction that the servant as-Fuel & Iron Co. v. Cummings (1896) sumed the risk if he knew of it, and 8 Colo. App. 541, 46 Pac. 875. A state-that under such circumstances it was ment by a foreman to a boy fifteen years wholly immaterial that the order which

453. When the servant is chargeable with negligence in undertaking or continuing the work.— a. Negligence a question for the jury.—A large number of decisions are reported in which the contributory negligence of the servant was held to be for the jury on the ground that he relied upon an expression of opinion as to the safety of the conditions to which he would be exposed if he undertook or continued to perform the work in question.1 Other groups of cases governed by

the instruction had been rightly retion for the jury, where the foreman of fused, inasmuch as these elements were the crew had told him when he went material in regard to the question of to work, "to look out for himself in gothe servant's negligence. This ruling ing through the arch on big, high cars; would certainly not be accepted as good that on common ears he would be all law in every state. It is clear that, if right." Burnham v. Concord R. Co. the master elects to rely on the defense of an assumption of the risk, he cannot brakeman induced to make a coupling be compelled to deal with facts which by the promise of his superior to stop would be material only on the supposition that the defense of contributory is justified in relying upon such promise negligence was the one relied upon by until it becomes apparent that the sulim, or the only one available under the perior will fail to perform his duty; and circumstances.

he obeyed was coupled with a threat of projecting above the car, knew or ought discharge in case of disobedience, and to have known that the arch was so that his foreman assured him that situated as to expose him to danger there was no danger, it was held that while he was on such a car, is a questhe instruction had been rightly retion for the jury, where the foreman of him, or the only one available under the perior will fail to perform his duty; and his right to recover for an injury sus-An employer who ties two ladders to-tained depends upon whether he could, (1896) 136 Mo. 619. 37 S. W. 829 promises to furnish him with nothing (1896) 136 Mo. 619. 38 S. W. 294. A but gentle teams, and assures him that carpenter employed by an electric company has a right to rely on a statement it is in the habit of running away, is by the foreman that uninsulated wires liable for personal injuries sustained by near which he is required to work are the employee, without his fault, by the not dangerous, where there is nothing team becoming suddenly frightened and to indicate that any electrical current running away. Wrought-Iron Range Co. is passing through them. Chicago Edi- v. Martin (1894: Tex. Civ. App.) 28 S. son Co. v. Hudson (1896) 66 Hl. App. W. 557. Where defendant's superintend 632. Whether an experienced brokeman ent assured plaintiff that an unlighted who was struck by an overhanging arch bin was "all right," and afterwards or in defendant's freight house while he dered him to get into it to empty sacks was riding on the side ladder of a car of grain, and plaintiff, in jumping over of average height, with his body partly the side of the bin, was injured by fallthe same principle are those in which there had been an explicit assertion by the master, or some agent for whose statements he was respon-

ing on a joist, from the fact that the and familiar with the machine, and exbin had no floor in it, it was not error pressly charged by the employer with to refuse to direct a verdict for defend-the duty of inspecting and repairing it. (1901) 177 Mass. 422, 59 N. E. 65. 121 Mich. 115, 79 N. W. 1108. Where a servant who had little experience in the work took a hammer fur- See also Bradbury v. Goodwin (1886) ence in the work took a hammer fur- 108 Ind. 286, 9 N. E. 302 (master asnished him, which had chipped, to his sured servant that the appliances for foreman, and complained that it was not lowering a heavy safe were adequate for safe, and the foreman took it, and, in- the purpose); Lake Superior Iron Co. stead of testing it, made a superficial v. Erickson (1878) 39 Mich. 492, 33 Am. examination, and returned it to plain- Rep. 423 (miner injured); Daley v. tiff with an assurance that it was "all Schaaf (1882) 28 Hun, 314 (servant was right," plaintiff was held to be entitled assured that there was no danger of the to assume it was safe, and was allowed fall of bricks, of which he was appreto recover for an injury caused by a hensive); Chadwick v. Brewsher (1891) chip which subsequently flew therefrom. 39 N. Y. S. R. 718, 15 N. Y. Supp. 598 Duerst v. St. Louis Stamping Co. (1901) (servant, a house-painter, was injured 163 Mo. 607, 63 S. W. 827. In an ac-by the fall of a scaffold, the planks of tion for personal injuries to a girl four-which were not tied by him, in conseteen years old, while at work on a maquence of his reliance on the assurance chine used for setting up lids to boxes, of the master that they would hold withevidence that she objected when ordered out being tied); Stomne v. Hanford Proto work on the machine, stating that duce Co. (1899) 108 Town, 137, 78 N. she was afraid to work on it, and did W. 841 (servant, although aware that not know anything about it, and that an elevator cable was defective, held not the foreman told her that he had been to be necessarily chargeable with an aphurt on the machine, but that it was preciation of the danger of using it was now arranged so that she could not was safe); Gundlach v. Schott (1901) plaintiff's contributory negligence. Mc- attempting to place on a revolving pulley and who contracted the disease, may reperintendent's expression of opinion that cover damages, where he relied upon the the roof of a tunnel was safe); Jeffer-employer's assurance that the house had son & N. W. R. Co. v. Woods (1901; been thoroughly disinfected. Span v. Tex. Civ. App.) 64 S. W. 830 (engineer Ely (1876) 8 Hun, 255. An employer told by a section foreman that a track which had been reported to be defective chinery is not difficult to manage or had been repaired); Shadford v. Ann dangerous, and that he will "take all Arbor Street R. Co. (1899) 121 Mich. the risk of any accident" that may occur 224, 80 N. W. 30; Former Appeal 111 to her in operating it, is liable for an Mich. 390, 69 N. W. 661 (servant, after ordinary care in operating the ma- no danger in working on the inside of

O'Brien v. Nute-Hallett Co. Burnside v. Novelty Mfg. Co. (1899)

due to his carelessness, and that it where superintendent had told him it was now arranged so that she was hurt after 192 111, 509, 61 N. E. 332, Affirming working on it for a week, requires a sub- (1900) 95 III. App. 110 (servant was mission to the jury of the question of told that a defective belt which he was Intyre v. Empire Printing Co. (1898) was all right, and was ordered to go 103 Ga. 288, 29 S. E. 923. A servant ahead and put it on); Harder & H. Coal who was employed to whitewash a house *Uin. Co. v. Schmidt* (1900) 43 C. C. A. in which a person had died of smallpox, 532, 104 Fed. 282 (miner relied on suwho tells an employee that specified ma- which had been reported to be defective injury received by her while exercising being assured by foreman that there was chinery. Phillips v. Michaels (1895) the curve of a trolley wire which was 11 Ind. App. 672, 39 N. E. 669. held back by a vise, was injured by its A workman who has no knowledge slipping out); Watson Cut Stone Co. v. concerning the mechanism of a machine Small (1899) 181 Ill. 366, 54 N. E. with which he is working, and which 995, Affirming (1899) 80 Ill. App. 328 cannot be seen without taking the ma- (corbel stone fell, owing to conditions chine apart, may rely upon the repre- which servant could not see); Lasch v. sentations of the foreman as to its Stratton (1897) 101 Ky. 672, 42 S. W. safety, when the foreman is an expert 756 (die dropped unexpectedly owing to

sible, that certain dangerous conditions, of which the servant had acquired knowledge, had been remedied; or that certain precautions to secure his safety would be taken; 3 or that a certain future event which

defect in clutch); Schmit v. Gillen shoveling gravel into cars under an over-(1899) 41 App. Div. 302, 58 N. Y. Supp. hanging bank, noticed its appearance (1899) 41 App. Div. 302, 58 N. Y. Supp. hanging bank, noticed its appearance 458 (contributory negligence of servant held to be for the jury, where defendant safety. The foreman, who had previous and his foreman had declared that everything was all right about the trench, which caved in for lack of proper sheathwhich caved in for lack of proper sheathwhich caved in for lack of proper sheathwhich and plaintiff testified that he had observed nothing to warn him of danger); Purcell Mill & Elevator Co. v. order which he had given when he first Kirkland (1898) 2 Ind. Terr. 169, 47 S. W. 311 (servant assured that a wire loading of the cars. The court said: rope, the safety of which he suspected, "It certainly cannot be said, as a matter was safe); Wake v. Price (1900) 22 Ky. L. Rep. 696, 58 S. W. 519 (servant injured by a defective skid, while he was rolling a hogshead); Grant v. Drysdale (1893) 10 Sc. Sess. Cas. 4th Series, 1159 facts to be weighed in connection with (furnace of engine operating a crane the sarvances given by the foreman, (1883) 10 Sc. Sess. Cas. 4th Scries, 1159 facts to be weighed in connection with (furnace of engine operating a crane the assurances given by the foreman, was so placed that the live cinders flying from it were apt to fall on the charges of powder which were used for blasting); Anderson v. Steinreich (1900) as the composition of the bank, the charblasting); Anderson v. Steinreich (1900) as the composition of the bank, the charblasting); Anderson v. Steinreich (1900) at the overhanging crust, the fact that it had remained in its then condition since the previous day, and that it had resisted the efforts of the foreman, was not dangerous); Siedentop v. that it had remained in its then condition since the previous day, and that it had resisted the efforts of the foreman, was not dangerous v. Steinreich (1900) at the overhanging crust, the fact that it had remained in its then condition since the previous day, and that it had resisted the efforts of the foreman, was opposite to a structure of the overhanging crust, the fact that it had remained in its then condition since the previous day, and that it had resisted the efforts of the foreman, was opposite to a structure of the assurances given by the foreman, upon the question of contributory negligence on the part of the part of the assurances, we have composition of the bank, the charblast the composition of the part of the overhanging crust, the fact that it had remained in its then composition of the bank, the charblast the composition of the bank, the charblast the composition of the bank, the charblast the composition of the part of the assurances given by the foreman, when the as Mo. App. 192 (servant was assured that tributory negligence on the part of plainladder with worn rounds was safe); tiff were for the jury, and not for the Jones v. St. Louis N. & P. Packet Co. court, and that it was error to withdraw (1891) 43 Mo. App. 398 (plaintiff called them from the jury." the attention of the second mate to a <sup>2</sup> Atchison, T. & S. F. R. Co. v. McKee defect in a plank, and was assured that (1887) 37 Kan. 592, 15 Pac. 484 (superdefect in a plank, and was assured that (1887) 37 Kan. 592, 15 Pac. 484 (superit could be safely used); American Wire intendent told plaintiff that machine Nail Co. v. Connelly (1893) 8 Ind. App. 298, 35 N. E. 721 (foreman assured rence v. Hagemeyer & Co. (1892) 93 Ky. workman that a different and more dangerous kind of work was safe); Monator v. Kansas Cily Clay & Coal Co. only resumed work when informed by (1894) 58 Mo. App. 68 (miner injured the machinist that it was "all right"); by falling of unlined shaft had been as Coam v. D. W. Ochorne & Co. (1898) (1894) 58 Mo. App. 68 (miner injured the machinist that it was "all right"); by falling of unlined shaft had been as Goggin v. D. M. Osborne & Co. (1896) sured it was safe); Davies v. Grifith 115 Cal. 437, 47 Pac. 248 (same facts); (1892) 27 Ohio L. J. 180 (carpenter sopherstein v. Bertels (1896) 178 Pa. employed by a builder objected that a 401, 35 Atl. 1000 (employee, after discovering, but mounted it after the builder had assured him that it was all right); thereof, continued to operate it after the superintendent had assured him that it was all right); thereof, continued to operate it after the superintendent had done some work upon 422, 45 N. Y. Supp. 234 (servant inexperienced in the construction of scaffolds v. St. Paul Plow Works (1894) 57 Minn. perienced in the construction of scaffolds v. St. Paul Plow Works (1894) 57 Minn. was told by his foreman that the one on 43, 58 N. W. 868 (superintendent told which his work required him to be was servant that a machine the defects of safe).

In Haas v. Balch (1893) 6 C. C. A. been repaired). 201, 12 U. S. App. 534, 56 Fed. 984, the plaintiff, when called to engage in amine revolvers after they have been

which he had previously discovered had

<sup>8</sup> A servant whose business it is to ex-

was expected to happen would not happen before a certain time;4 or that an occurrence which would endanger his safety could only happen as a consequence of some particular thing's being done; or that he would not incur any hazard in operating an appliance in a certain manner.6

If the servant is otherwise entitled to rely upon the master's assurance that there is no danger, the mere fact that he was told by a fellow servant that there was danger is not enough to render him chargeable, as matter of law, with contributory negligence.7

In some cases the doctrine has been laid down that, although a defect is apparent, yet, if the servant proceeds to work, on an assurance given by the master that it is safe to do so, the master is liable for u resulting injury, unless the extra hazard is so palpable that no man of

on the tester's assurance that he would engine would come over a certain bridge leave no unexploded cartridges in the reuntil a certain hour may properly be volvers. Anderson v. Duckworth (1894) taken into consideration by the jury in 162 Mass. 251, 38 N. E. 510. Compare determining whether he was negligent in Bradley v. New York C. R. Co. (1874) not seeing the engine which injured him 3 Thomp. & C. 288 (laborer entitled to while he was crossing the bridge before rely on assurance of track master that that hour, in the dark, although coming

be given).

such vigilance on the part of the plainputting his hand through the casing to pulling of a rope). adjust the pipe, by the employer's startand without giving him notice, after intitled to recover for such injury. Kin-lowered a certain distance. Knight v. ney v. Folkerts (1889) 78 Mich. 687, 44 Overman Wheel Co. (1899) 174 Mass. N. W. 152. 455, 54 N. E. 890.

Compare, generally, the cases in chapter XVI., ante, as to the master's duty Mass. 69, 48 L. R. A. 542, 44 N. E. to warn his servant; and also those cit-1071. ed in § 355, ante.

'That the boss or foreman of a rail-

tested has a right to rely to some extent road told a trackman that no train or warning of the approach of trains would in a direction opposite to that in which given). he himself was walking (Brewer and Contributory negligence of the servant Brown, J.J., dissented on the ground that Contributory negligence of the servant Brown, J.J., dissented on the ground that is for the jury upon evidence that the the plaintiff was negligent, as a matter employee was injured by the descent of of law.) Northern P. R. Co. v. Amato an elevator while he was at the bottom (1892) 144 U. S. 465, 36 L. ed. 506, 12 of the elevator well picking up paper, Sup. Ct. Rep. 740, Affirming (1892) 1 and that the superintendent had virtually promised to look out for him while 881, Affirming (1891) 46 Fed. 561; so engaged. Scullane v. Kellogg (1897) Floettl v. Third Ave. R. Co. (1896) 10 169 Mass. 544, 48 N. E. 622. On the App. Div. 308, 41 N. Y. Supp. 792 ground that, if the defendant by his own (workman went under track in reliance act has thrown the plaintiff off his grand on statement, of foremen, that no car act has thrown the plaintiff off his guard, on statement of foreman that no car and given him reason to believe that would pass until a time much later than vigilance is not needed, the lack of the time of the accident).

<sup>5</sup> Blanton v. Dold (1891) 109 Mo. 75, tiff is no bar to his claim, it has been 18 S. W. 1149 (plaintiff not negligent, held that one employed to fix the pipes as matter of law, in putting his hand inon a blower used for removing shavings side a machine which, he was assured by from a mill, and who is injured, while the foreman, would not start without the

6 The question of the servant's due ing the blower without his knowledge care is for the jury, where his injury resulted from his reliance upon the assurducing him to believe that it would not ance of his foreman that the jackscrew be started until he was notified, is en- which he was operating might safely be

ordinary intelligence and prudence would incur it.8 This doctrine would appear to be simply the logical equivalent of that which declares that the fact of a servant's incurring a known danger does not necessarily imply that he was negligent. See § 322, ante. If the language used means anything more than this, it cannot be reconciled with that which is found in the cases cited in the next subdivision of this section. But it is not amiss to notice that the decisions which embody this doctrine were all rendered in Missouri, a state in which the power of the courts to control or override verdicts seems to be more sparingly exercised than in most jurisdictions. See § 301, ante.

In one case it was argued that the rule as to the effect of an assurance of safety should be different where the appliance was of an extremely simple character, such as a ladder; but this contention did not prevail.9

The servant's position is, of course, proportionally strengthened where he was not only assured that the conditions complained of did not imperil his safety, but also that they would be altered for the better, 10 (see chapter xxII., ante); or where the fact of the servant's having acted under a specific order constitutes a distinct and additional element in the case 11 (see chapter XXIII., ante).

a ladder with worn rounds).

10 Where a miner complains of being exposed to danger from the possible fall of a large stone in the roof of a tunnel, to say whether an injury which he sufnegligent in obeying orders to go down, fers through going back to work before although reluctant to do so, when he the manager's promise is fulfilled shall was told that there was no danger); be considered due to his own rashness, Jackson v. Georgia R. Co. (1886) 77 or to his having implicity relied on the Ga. 82 (section hand, after inquiry as assurances so given him. Paterson v. to danger, was ordered, with a curse, Wallace (1854) 1 Macq. H. L. Cas. 748, to obey or leave, and told there was no 28 Eng. L. & Eq. 48.

dry Co. v. Van Dam (1894) 149 III. 337, App. 317, Affirming (1894) 148 III. 573, 36 N. E. 1024, Affirming (1893) 50 III. 36 N. E. 572 (servant, after protest, App. 470 (inexperienced servant went on had gone to dig under a bank of earth using a defective machine after the fore-man had assured him that it was all right, and that he would shortly be sup-plied with a contrivance which would di-plaintiff was held to be for the jury

\*Aldridge v. Midland Blast Furnace minish the peril); Warner v. Chicago, Co. (1883) 78 Mo. 559; Monahan v. R. I. & P. R. Co. (1895) 62 Mo. App. Kansas City Clay & Coal Co. (1894) 58 191 (ladder with worn rounds); Young Mo. App. 68; Jones v. St. Louis, N. & P. v. Mercantile Steam Laundry Co. (1901)
Packet Co. (1891) 43 Mo. App. 398.

198 Pa. 553, 48 Atl. 497 (servant as-198 Pa. 553, 48 Atl. 497 (servant as-\*Warner v. Chicago, R. I. & P. R. Co. sured that certain promised repairs in a (1895) 62 Mo. App. 192 (servant used mangle had been completed before she

resumed work).

11 McKee v. Tourtellotte (1896) 167
Mass. 69, 48 L. R. A. 542, 44 N. E. 1071; Keegan v. Kavanaugh (1876) 62 and is not only assured by the under- Mo. 230 (held to be a question for the ground manager of the mine that there jury whether a hod carrier engaged in is no risk, but receives a promise from helping to build a wall at the foot of the same official that the stone will be an embankment of earth 20 or 30 feet very shortly removed, it is for the jury deep, and not shored or propped up, was Beng. L. & Eq. 48.
See also Chicago Drop Forge & Foun-Brick Co. v. Sobkowiak (1892) 45 III.

b. Negligence predicable as matter of law.—Contributory negligence is said to be predicable, as a matter of law, of the undertaking or continuance of work involving exposure to an abnormal danger, whenever the condition to which the assurance related was apparent to a person in the exercise of ordinary care; 12 or where the inadequacy of the appliances was palpable; 13 or where the servant had equal means of knowledge, as compared with those of the person giving the assurance.14

where the evidence was that he was en- chine, as the knives were visible, and the thick, up to 14 feet in height, with an L. Rep. 1113, 64 S. W. 729. 8-inch fire wall and gable built on top

peremptory instruction in their favor where the injury was caused by the fall That the assurance of the person in of a scaffold, and it was in evidence that charge of the work that he would see dered plaintiff to go on with his work, and not ask so many questions. Lam-

Vt. 278, 47 Atl. 1085. <sup>12</sup> Lawrence v. Hagemeyer & Co. (1892) operate the machine by himself without tension R. Co. v. Carstens (1898) 19 danger, the defendant was held not to be Tex. Civ. App. 190, 47 S. W. 36. liable for an injury resulting from a board turning over and pushing plaintiff's hand into the knives of the material and the decaded a rettal. Botal and Expression R. Co. v. Carstens (1898) 19 danger, the defendant was held not to be Tex. Civ. App. 190, 47 S. W. 36. liable for an injury resulting from a Bradbury v. Goodwin (1886) 108 liable for an injury resulting from a large fragment of the material and the decaded a rettal. Botal and Expression R. Co. v. Carstens (1898) 19 danger, the defendant was held not to be Tex. Civ. App. 190, 47 S. W. 36. liable for an injury resulting from a large fragment of the subject of the material and the subject of the subject of

gaged in laying a 4-inch wall in front danger to plaintiff from putting his of an old wall, and tying the two togeth- hands close to the knives was perfectly er; that the old wall was 13 inches apparent. Reis v. Struck (1901) 23 Ky.

Where the servant knew that the place of it; that, after building the 4-inch of work was unsafe, it is erroneous to wall up 12 feet, defendant ordered plain- give an unqualified instruction to the tiff and others to take a course of brick effect that he is entitled to recover if he from the old wall; that, when plaintiff had been assured by the master's repreinquired, "Aren't we getting pretty sentative that it was safe. Breckinridge high?" defendant replied, "No; that's all & P. Syndicate v. Murphy (1897) 18 Ky. right;" that, in consequence of removL. Rep. 915, 38 S. W. 700. An instrucing such course, the gable wall fell on tion is erroneous which gives the jury to plaintiff; and that plaintiff had worked understand that a mason employed by for defendant two years prior to the in- a contractor is not absolved from any jury, and according to his own testicare in inspecting the construction of a mony did not know where the 8-inch scaffolding on which he is directed to wall began. Starr v. Kreuzberger work, merely because the foreman tells (1900) 129 Cal. 123, 61 Pac. 787. The defendants are not entitled to a him to work on. Bannon v. Sunden remptory instruction in their favor (1896) 68 Ill. App. 164.

the accident occurred when plaintiff was that the plaintiff was guarded against helping three others carry a timber near danger was not sufficient to justify the the place on a scaffold where he had latter's continued exposure to the known been making repairs a short time prev-risk of the environment,—at all events iously, and that, fearing for the strength where the circumstances were such that of the staging, he had asked the foreman if it was safe, who said it was if the plaintiff such warning as would ennot loaded down with timbers, and orable him to escape the peril,—is deducible from the decision in Reese v. Clark (1892) 146 Pa. 465, 23 Atl. 246 (injury bert v. Missisquoi Pulp Co. (1900) 72 caused by the fall of some heavy iron plates, propped up by bricks which the plaintiff was removing). One ordered 93 Ky. 591, 20 S. W. 704; Graham v. by his superior to make a car coupling, Newburg Orrel Coal & Coke Co. (1893) under such circumstances that the dan-38 W. Va. 273, 18 S. E. 584. In a case ger was great and apparent, although where plaintiff, who was employed by de-induced to act by a promise that the car fendant to operate a machine used for should be stopped in time to avoid ac-planing boards, asked for an assistant, cident to him, cannot recover for injury and his request was refused, the fore-sustained, if ordinary prudence would man assuring him that he could have dictated a refusal. Louisiana Ex-

454. Contributory negligence in respect to the manner of performing the work.—Although the servant may have been justified in relying upon the assurance of the employer that no abnormal danger would be incurred, his action will nevertheless be barred if it is shown that,

Y. Supp. 265. Where the evidence shows that a man employed to do work on a shaft employed the deceased, who was a man of experience as a miner; master or his representative to place that it was for that reason he was employed; that the matter of gas was talked over between them; that they both knew that the shaft was making a little would not be any danger by using care,—an instruction to the effect that if the jury believe that deceased went upon a platform in the shaft by request of and that before he went thereon defendant or his agents informed him that it was for his agents informed him that it was fer from explosive gases, and that he had reason to believe it was safe, as defendant had informed him, then he did not go thereon voluntarily,—is not applicable to the testimony. Cold Run Coal Co. v. Jones (1889) 127 Ill. 379, 8 N. E. 865, 20 N. E. 89.

As a complaint alleging that the plaintiff, a carpenter, was injured by the giving way of a window casing by which he was supporting himself while doing some work on a roof shows that he was injured by a risk as open to his own observation as that of his employer, he cannot recover, although there are also allegations that his employer assured him of the safety of that manner of working, and commanded him to proceed in that way. Hencke v. Ellis (1901) 110 Wis. 532, 86 N. W. 171.

In Haas v. Balch (1893) 6 C. C. A. resentative has superior knowledge or 201, 12 U. S. App. 534, 56 Fed. 984, the cases which declare the general rule to be that, where the servant is of mature age, and of ordinary intelligence, he cannot recover for an injury caused by a agent or representative of the master ance may justify the servant in undertake a given work, such an assurate that there is no danger, have been thus commented upon: "In all, or nearly all, these cases the employee had equal knowledge of the risk to be apprehended with the master or his representative, and hence was not relieved from the duty of exercising his own judgment upon the question whether he would or would not subject himself to the known

edge or means of knowledge between the given is one to be weighed in each case. The weight to be given thereto is dependent upon the circumstances of the particular case. If, in a given instance, the servant, being of mature age and of ordinary intelligence, has equal knowledge with the master of the dangers to be apprehended, and he voluntarily subjects himself thereto, knowing of their existence, the mere fact that he had received an assurance that there was no risk to be dreaded or avoided might be of little avail in relieving him from a charge of contributory negligence. On the other hand, if the master or his representative has superior knowledge or means of knowledge of a given situation and of its safety, or the contrary, and he assures the servant that he can safely undertake a given work, such an assurwhile he was engaged in the performance of the work, he failed to exercise ordinary care in avoiding an obvious peril.<sup>1</sup>

stood between it and the end of a cart 309.

On this ground it has been held that which was standing in the trench, it was no action could be maintained where the held that he could not recover on the servant inserted his hand inside the theory that the foreman had assured fence which surrounded a saw, and came him that he could work in safety in the in contact with the saw, while he was trench while digging as directed, inasattempting to pick up a piece of chain much as the danger was not in the mannear it. Schultz v. C. C. Thompson Lum- ner of the digging, but in undermining ber Co. (1895) 91 Wis. 626, 65 N. W. without leaving supports, which was un-498. Where a servant employed to dig derstood by him, and in taking his posiclay by undermining it was injured, tion between the wall and the cart, while digging a trench 8 feet wide where it was difficult to escape if the through a bank, by clay from the rear bank fell. Cisney v. Pennsylvania Sewwall falling and catching him where he er Pipe Co. (1901) 199 Pa. 519, 49 Atl.

## CHAPTER XXV.

LIABILITY FOR INJURIES RECEIVED BY THE SERVANT IN OBEYING AN ORDER TO PERFORM DUTIES OUTSIDE THE SCOPE OF HIS ORIGINAL CONTRACT.'

- 455. Introductory.
- 456. Necessity of showing that the servant was transferred to essentially new duties.
- 457. and that the order by which he was transferred was within the powers of the employee giving it.
- 458. and that the order was negligent.
- 459. Special grounds on which negligence is inferred.
- 460. Assumption of risks as a defense; generally.
- 461. Risks not assumed unless known.
- 462. Risks assumed, if known.
- 463. What risks fall within this description.
- 464. Indiana doctrine as to assumption of risks.
- 465. Doctrine of common employment qualified as regards servants working outside the scope of their employment.
- 466. Contributory negligence in undertaking the new work.
- 467. Absence of compulsion an essential element of assumption of risks and contributory negligence.
  - a. Generally.
  - b. Protest or objection omitted or made.
  - c. Fear of discharge.
- 468. Contributory negligence in regard to the manner of performing the work.
- 469. Injuries due to risks entirely disconnected from the servant's duties; right of action for.
- 455. Introductory.—The risks with which we have hitherto been concerned fall into two categories,—viz., those ordinarily incident to the employment, and those which are extraordinary, in the sense that they would not have existed if the master had not been derelict in regard to his specific duties to furnish reasonably safe appliances and see that they are used according to a proper system. In the present chapter it is intended to collect the decisions relating to injuries caused by another class of extraordinary risks,—viz., those which fall into that category for the reason that, being incident to work which

was not within the scope of the original contract of hiring, they are not among those which he expected to encounter.1

456. Necessity of showing that the servant was transferred to essentially new duties.— The evidential prerequisites to the establishment of a right of action, and the defenses available to the master, are sufficiently indicated by the headings of the ensuing sections. To let in the application of the special principles appropriate to the class of cases now under discussion, it must, in the first place, be shown that the order really did take the servant outside the scope of his original employment, and did not merely direct the performance of duties somewhat different to those which were required from him in the regular course of his work.1

It should be noted that these principles have no application where

(1881) 130 Mass. 374. 39 Am. Rep. 457, was employed. Coal Valley Min. Co. v. it was contended that the case was taken Nelson (1900) 87 Ill. App. 180. out of the ordinary line of cases in Findings that the plaintiff was emwhich the servant is an adult, by the ployed to operate machinery in defend-fact that the plaintiff, who was fourteen ant's mill, and that it was his duty to and a half years of age, and had worked

 $^1$  "The hazards incident to the new been rendered on other prior occasions work may be considered extra hazardous by him and his fellows. Findaly v. Rusas being outside of the regular employment, and additional to the risks thereof." Consolidated Coal Co. v. Haenni
(1893) 146 Ill. 614, 35 N. E. 162.

Symmath and Flenows, Fundary V. 1885
Wheel & Foundry Co. (1896) 108
Mich. 286, 66 N. W. 50 (no duty to
warn). The servant is not shown to
have been injured in doing work outside That the element of nonanticipation the scope of his employment, where the (see § 273, ante) is the connecting link evidence is that he had worked in a between cases involving this and the mine for some time as a "bottom dig-other classes of extraordinary risks is ger," but that when rock fell from the other classes of extraordinary risks is ger," but that when rock tell from the clearly brought out in the arguments of roof of the mine he would be called to several cases. See, especially, Union P. help clean it up, and occasionally, where R. Co. v. Fort (1873) 17 Wall. 553, 21 there was loose rock overhead, he would L. ed. 739, as quoted in § 465, infra; be required to help pick it off; and that Northern P. Coal Co. v. Richmond (1893) 7 C. C. A. 485, 15 U. S. App. layer in the mine directed him to take 262, 58 Fed. Rep. 756.

1 In Curran v. Merchante' Mfa Co. a different place from that in which he <sup>1</sup> In Curran v. Merchants' Mfg. Co. a different place from that in which he (1881) 130 Mass. 374, 39 Am. Rep. 457, was employed. Coal Valley Min. Co. v.

adjust it and keep it in order, and that in the mill two and a half years, was of he was injured while repairing the mathe milit two and a half years, was on the was injured white repairing the material tender years, and was set to work in an ethinery, show that he was injured while unusual place, doing what he was not action the line of his employment. Errin customed to do. This argument was rejected on the ground that the evidence was that the work he was doing was that the work he was doing was through the negligible what he had been accustomed to do from time to time during any while he was engaged in work. tomed to do from time to time during ant, while he was engaged in work the whole term of his employment by the which, although it was outside the scope defendant, and that his injury did not of his regular employment, he had someproceed from the fact that he was working in dangerous proximity to other machinery over which he had no control.

It is not without the scope of employ
The fact that he was working in dangerous proximity to other machinery over which he had no control.

A complaint alleging that the injury

ment of one employed in a car shop to do general work,—such as lifting, carry-repairer, was traveling on a train from ing timber, painting, etc.,—to assist in one tunnel to another under the order lifting a car upon its trucks with a steam winch, where the like service had

the duties in which the servant was engaged at the time of the accident were being performed under a contract entirely distinct from that under which he first entered the employment. The same general reasons as those which are deemed to justify the doctrine of the assumption of the ordinary risks of an employment necessarily require the inference that the servant cannot recover for injuries due to the ordinary risks of such work, although they may be greater than those which he incurred in his former capacity.2

457. — and that the order by which he was transferred was within the powers of the employee giving it.— As in the case of an order given by a superior employee in respect to matters within the scope of the original employment of the injured servant (see § 435, ante), the master is not bound by an order of the kind considered in the present chapter, unless it was one which the directing employee had authority to give. See, generally, chapter xxxIII., post.

In one case the position is taken that an order by which one employee directs another to do work outside the scope of his employment is not binding on the master, unless the directing employee occupies the position of a vice principal, either by virtue of his official rank, or by reason of the fact that the order arises out of the exercise of some non-delegable duty of the master. If the doctrine embodied in the cases cited in § 465, infra, had not been enunciated, it might be desirable to adopt this theory as one which would furnish a convenient criterion by which to define the boundary line between authorized and unauthorized orders, and which would obviate the difficulty suggested

of employment. Capper v. Louisville, Wright (1897) 16 Ind. App. 630, 45 N. E. & St. L. R. Co. (1885) 103 Ind. 305, E. 817. 2 N. E. 749.

of a factory was allowed to recover for was laid down that where a servant signs injuries received while he was comply- a contract which binds him to obey all ing with an order to wipe the belts of orders, rules, and regulations, but in machinery in motion, there being no evi-which the general language applies dence to show that he appreciated the equally to all classes of employees, the

the servant was engaged, when injured, he is employed; and it does not emwas entirely different from that which power the company to assign him to he was employed to do, and was more other duties wholly disconnected theredangerous than such work, and had to with and differing therefrom. be performed with different workmen, operating under different rules and 28 Atl. 996 (one employed as a weaver methods, and with appliances and in a had been laid off until a new mill was place distinct from those of the work started up, and was meantime employed which the servant was employed to do, to assist in moving into the new mill and is sufficient to show that he was ordered making alterations). outside the scope of his original employ- Pillsburgh, C. & St. L. R. Co. v. ment. Clark County Cement Co. v. Adams (1886) 105 Ind. 151, 5 N. E. 187.

In Jones v. Lake Shore & M. S. R. Co. A servant employed to sweep the floors (1883) 49 Mich. 573, 14 N. W. 551, it danger. Norfolk Beet-Sugar Co. v. agreement to obey all orders must be Hight (1899) 59 Neb. 100, 80 N. W. 276. construed to apply to all which are is—An allegation that the work in which sued to him in the line of duty in which

<sup>2</sup> Rooney v. Carson (1894) 161 Pa. 26,

by the consideration that, if employees other than vice principals should be regarded as having authority to give an order to perform new duties, the anomalous result would follow that different conclusions might, in some instances, be arrived at, according as the defense of common employment was or was not specifically relied on. But the doctrine referred to, supposing it to be one of general application which is possibly not absolutely settled, renders it unnecessary to discuss the question thus raised.

A declaration is not demurrable on the ground that it fails to show that the agent of the employer, who commanded the employee to do the act resulting in the injury, had exclusive control and authority over the injured employee, as a master may appoint as many agents as he pleases to execute any particular work, and the acts of each, within the scope of his authority, are binding on the employer, unless the authority is a joint one only.2

Where the servant, in doing work outside the scope of his employment, was acting without proper authority, it is clear that the failure to give him instructions cannot be imputed to the master as negligence.<sup>3</sup> See § 459, ¶¶ a, b, infra.

458. — and that the order was negligent.— Another prerequisite to the maintenance of an action on the special ground that the injury was received while the servant was performing duties outside the scope of his employment is that the order by which he was required to perform those duties should be shown to have been a negligent one.1

The doctrine which is most consistent with general principles and which is supported by the great weight of authority is that such negligence is not predicable upon evidence which merely shows that a servant of mature years and of ordinary intelligence was directed to do a certain piece of work outside the range of the functions which he had agreed to perform, and that he consented to do such work without making any objection on the score of his unfitness or incapacity.2

<sup>&</sup>lt;sup>2</sup> Camp v. Hall (1897) 39 Fla. 535, 22 So. 792.

 <sup>\*</sup> Letsleitz v. American Zylonite Co.
 (1891) 154 Mass. 382, 28 N. E. 294;
 Gillen v. Rowley (1890) 134 Pa. 209, 19 Atl. 504; Hinckley v. Horazdowsky (1890) 133 111. 359, 8 L. R. A. 490, 24 N. E. 421; Stewart v. Patrick (1892) 5 Ind. App. 50, 30 N. E. 814; McCue v. National Starch Mfg. Co. (1894) 142 N. pair machinery, when it was his duty merely to report to a machinist when the necessity for repairs arose).

<sup>&</sup>lt;sup>1</sup> See, generally, the cases cited in this and the following sections.

In Galveston Oil Co. v. Thompson (1890) 76 Tex. 235, 13 S. W. 60, it was held proper to charge the jury that the plaintiff would be entitled to recover if the superintendent ordered him to perform a service which was dangerous, and not within the scope of his employment, if in this the superintendent did not use Y. 106, 36 N. E. 809 (no liability where due care, provided plaintiff was injured servant undertook proprio motu to re- while attempting, in the exercise of due

care, to obey the command.

<sup>2</sup> Cole v. Chicago & N. W. R. Co.
(1888) 71 Wis. 114, 37 N. W. 84, This

order that the servant may recover, therefore, it is necessary to prove that the order, in compliance with which he undertook the new duties, was culpable for some reason independent of the fact that his employ-In other words, where a servant is ordered into a ment was changed. service which is not within the scope of his employment, the question of the master's negligence depends upon the particular circumstances involved in the case.3 This principle is controlling even in cases where the injured person was a minor.4

case was approved in Hogen v. Northern doctrine intended to be put forward, it gan v. Lake Shore & M. S. R. Co. (1896) 110 Mich. 71, 67 N. W. 1097; Richardson v. Swift & Co. (1899) 37 C. C. A. 557, 96 Fed. 699; Chicago, R. I. & P. R. C. v. Kinnare (1901) 190 Ill. 9, 60 N.

"An employee of mature years who was removed from one line of employment and set to work in another, without objection, and was then injured while operating machinery with which he was unfamiliar, or which he did not know how to operate, cannot recover from his employer for such injuries, unless his employer knew that he did not know how to operate the machine, or, he having in- "This proposition is wrong, and the formed his employer of his inexperience, charge of the court correct. If an emthe latter failed to instruct him." Ar ployer should set an adult who had cucade File Works v. Juteau (1896) 15 pacity to take care of himself, and who

mere fact that an employee is ordered to ployee in doing the work. And it would perform work in addition to that which be the same if the employee were a he was originally employed to do will minor, but of sufficient capacity to avoid not of itself render the employer liable the danger, and who knew of the danger for an injury received while performing to be avoided. There could be no greatsuch work, unless the employer was er wrong in putting such a minor to do a guilty of negligence, and the employee work accompanied with risk, than in setfree from contributory Hillsboro Oil Co. v. White (1897; Tex. would be proper to put a minor to do

Civ. App.) 41 S. W. 874.

master is "not liable, unless the outside case,—upon the character and degree of work is more dangerous and complicat- the danger, and the capacity of the ed for the plaintiff to perform than that minor to comprehend and avoid it. Put-in which he was engaged." Martin v. ting the minor to do the work becomes Highland Park Mfg. Co. (1901) 128 N. a matter of discretion and care, to be ex-C. 264, 38 S. E. 876. This statement ercised with reference to such circumwould seem to involve, by implication, stances; and the employer can be held the converse doctrine, that the master liable only where he does not exercise may be liable in cases where the new such discretion and care,—that is, where work is shown to have been of the de- he is negligent. The case of Union P. scription designated in the last clause Co. v. Fort (1873) 17 Wall. 553, 21 L. of the sentence. If this were really the ed. 739 [see § 461, infra], proceeds upon

P. R. Co. (1892) 53 Fed. 519, which was would be erroneous according to most of followed in Richmond & D. R. Co. v. the authorities cited in this and the next Finley (1894) 12 C. C. A. 595, 25 U. S. sections. But the context shows that App. 116, 63 Fed. 228. See also Gavithe court was speaking of cases in which the master failed to warn an ignorant servant.

<sup>3</sup> Consolidated Coal Co. v. Haenni (1893) 146 Ill. 614, 35 N. E. 162, Affirming (1892) 48 III. App. 115; Cole v. Chicago & N. W. R. Co. (1888) 71 Wis. 114, 37 N. W. 84; and the cases cited in the

next section.

<sup>4</sup>In Anderson v. Morrison (1875) 22 Minn. 274, the court, in rejecting the contention that a cause of action arises in favor of a minor who is injured in consequence of being set at more dangerous work, whether this change in his duties was negligent or prudent, said: Ind. App. 461, 40 N. E. 818, 44 N. E. knew the risks, to do a dangerous work, of course the employer would not be li-The jury is properly charged that the ble for an injury occurring to the emnegligence, ting an adult to do it; and when it such work must necessarily depend upon In one case it was remarked that the the particular circumstances of each

In the absence of facts which were such as to indicate that the servant was not capable of performing the new duties, the master is entitled to presume that he was competent to discharge them.<sup>5</sup>

In § 464, infra, it will be shown that a theory which is to some extent inconsistent with the general principle just enunciated has been adopted.6

- 459. Special grounds on which negligence is inferred. A superadded element justifying the inference of culpability in respect to the order which transferred the servant to new duties is deemed to exist in the following situations:
- (a) Where the servant was, to the knowledge of the master or of the servant who gave the order, unfitted, on account of his tender years, physical or mental weakness, lack of technical skill, or inexperience. for the work to be done. The master's liability in this instance is

was an imprudent act, and not on the coupling cars, an operation outside the ground merely that the work was peril- scope of the work for which he had been ous and the employee a minor."

<sup>6</sup> In Cincinnati, H. & I. R. Co. v. Mad-

done is of a dangerous character, and one which requires peculiar skill in its performance, and the person directed to per-form such work has not the requisite knowledge or skill for doing the work with safety, and such want of skill or knowledge is known, or might be reasonably supposed to be known, to the for holding a stricter rule."

the proposition that the setting the (1869) 52 Ill. 401, 4 Am. Rep. 616, a minor in that case to do the perilous declaration alleging substantially that work for which he had not been employed the plaintiff's decedent was killed while hired, and one in which he had, as was <sup>6</sup> Arcade File Works v. Juteau (1896) known to the defendant's representative, 15 Ind. App. 461, 40 N. E. 818, 44 N. E. no experience, was held not demurrable. 326. The court said: "The deceased engaged to perform work only ordinarily hazardden (1893) 134 Ind. 462, 34 N. E. 227, ous; he was compelled to do other work negligence seems to be implied from the extra hazardous, by which he lost his mere giving of an order to perform new life, the superintendent knowing he was duties. The position of the court ap- unskilled and unacquainted with the parently is that the extra risks are not manner of doing such work when he orassumed, and that this fact, of itself, dered deceased to perform it. Admitting implies that the act of the master which the deceased was in the same general was the immediate occasion of the serv-service as the superintendent, his sphere, ant's being exposed to them must have however, was a special one, and so subbeen negligent.

however, was a special one, and so subordinate as to compel him to yield imi"If the particular work ordered to be plicit obedience to the command of the me is of a dangerous character, and one superintendent. The company was considered present, and the person directed to personate the person directed to personate the personate that t It was then, by the direct command of the company, the deceased was exposed to this peril, and one out of the line of the business he had contracted to perform."

employer, in that case the direction of Negligence may properly be found the employer to do the work might be where the evidence shows that a servant, justly held to be a violation of a duty after firing the boilers of a stationary which he owes to his employee, even engine for one year, had been ordered to though the employee undertook to do take charge of the engine, in spite of his the work without objection or protest protestations that he knew nothing about upon his part. None of the cases go fur- running it; and that he received no inther than this, and we can see no reason structions as to the manner in which it Cole v. should be run. Gulf, C. & S. F. R. Co. Chicago & N. W. R. Co. (1888) 71 Wis. v. Newman (1901; Tex. Civ. App.) 64 114, 37 N. W. 84.

In Lalor v. Chicago, B. & Q. R. Co. A servant employed as an oiler of en-

gines on one ferry-boat, in which the er, ordered, against his will, to drive a hatchways are always covered when not dump car). in use, and transferred temporarily to a different kind of work on another boat charged the jury that a higher degree out of commission, on which the hatchways are customarily left open under such circumstances, should be warned of that custom. Brown v. Ann Arbor R. Co. (1898) 118 Mich. 205, 76 N. W. 407.

For other cases in which the servant's action was sustained, for the reason that the person giving the order understood, or ought to have understood, the unfitness of the servant to do the work required, see Union P. R. Co. v. Fort (1873) 17 Wall. 553, 21 L. ed. 739 (foreman ordered a young, inexperienced boy who had previously worked as a helper at a moulding machine, or a common hand on the floor of a railway shop, to ascend a ladder and adjust displaced machinery while a shaft close by was rapidly revolving); Jones v. Old Dominion Cotton Mills (1886) 82 Va. 140 (boy of thirteen years hired to "sweep, carry water, and fill buckets with quills," ordered to mend a broken belt, in a position which required him to stand on a step-ladder near four belts in rapid motion); Newbury v. Getchell & M. Lumber & Mfg. Co. (1896) 100 Iowa, 441, 69 N. W. 743 (inexperienced minor ordered, without warning or instruction, to do work more dangerous than that for which he had been engaged); Norfolk Beet-Sugar Co. v. Hight (1899) 59 Neb. 100, 80 N. W. 276 (common laborer in sugar factory, hired to sweep the floor of one of the rooms, was injured while wiping water from a belt with a gunnysack); Foley v. California Horseshoe Co. (1896) 115 Cal. 184, 47 Pac. 42 (boy of fourteen years, employed to operate a punching machine, ordered to assist in screwing on a misplaced nut, had his sleeve caught in a cogwheel); Erickson v. Milwaukee, L. S. & W. R. Co. (1890) 83 Mich. 281, 47 N. W. 237 (common laborer ordered to uncouple cars, and injured by the fireman's negligence in letting off brakes without warning); Orman v. Mannix (1892) 17 Colo. 564, 17 L. R. A. 602, 30 Pac. 1037, (gang boss negligent in ordering a boy fourteen or fifteen years of age to run and throw away an ignited stick of giant powder); Brazil Block Coal Co. v. Gaffney (1889) 119 Ind. 455, 4 L. R. A. 850, 21 N. E. 1102 (inexperienced boy of ten years ordered to leave his ordinary work and assist in switching coal cars); Kehler v. Schwenk (1892) 151 Pa. 519, 25 Atl. 130 (boy of fourteen employed as slate pick-Vol. I. M. & S.—81.

A trial judge in a Federal court of care is required of the master in the case of a minor employee than in the case of an adult, especially in seeing that he does not assume risks without the scope of his employment. Robert-

son v. Cornelson (1888) 34 Fed. 716. In Chicago & N. W. R. Co. v. Bayfield (1877) 37 Mich. 205, the court upheld an instruction to the effect that, if they found that the deceased, at the time he was employed by the defendant, was a lad of seventeen or eighteen years of age, inexperienced in the handling of brakes; that he was unfitted for that work by reason of his unskilfulness, inexperience, and youth, and this was known to his foreman; that he was employed at the time of his death and for some months previous thereto in the capacity of a common laborer only, and was ordered by the foreman to brake on said train, out of the line of his duty as such common laborer; and that, while attempting to obey such order, he fell from the cars and was killed, without negligence on his part,—the case of the plaintiff was established and she was entitled to recover.

A complaint is not demurrable which alleges substantially that the plaintiff was employed to perform a certain service, unattended by danger; that while so employed he was ordered by defendant to perform a different and perilous service, in which he was inexperienced; that he was ignorant of the peril, and defendant negligently failed to warn him; and that the peril was not apparent to an inexperienced person. Consolidated Stone Co. v. Redmon (1899) 23 Ind. App. 319, 55 N. E. 454 (servant engaged as wheeler in a quarry was set to work on a channeling machine).

The fact that the servant had applied for and been given employment, and put to doing certain work, does not warrant the master in presuming that he knew the danger of other work, which, over his protest, he was thereafter, on the discharge of the person who had done it, told that he must do. Hillsboro Oil Co. v. White (1899; Tex. Civ. App.) 54 S.

A simple finding of a jury that the plaintiff did not comprehend the dangers incident to the work will not render the master liable. It must also be shown that this lack of comprehension was, or ought to have been, known to the massometimes put upon the specific ground of a breach of that duty of instruction or warning, which, as already shown in a former chapter (XVII.), is always predicable under such circumstances.2

the owner of a manufacturing establish- which the subordinate is directed to do ment, who causes a workman to perform is of a peculiarly dangerous character, very dangerous work, especially when and is aware, or under all the circumsuch workman is not accustomed to such stances should be aware, that the risks kind of work, and does not receive a sal- and hazards of the work, or the proper ary in proportion to the risk he runs, mode of doing the work to avoid the inis liable in damages for the death of the cident risks, are not obvious, or known workman. Price v. Roy (1898) Rap. and appreciated by the subordinate, by Jud. Quebec, 8 B. R. 170 (servant was reason of his youth, incapacity, or incordingly the resist in the test of contract the resist in the ordered to assist in the task of saving experience, it is the duty of the superior a bridge which was threatened by a to caution and instruct such disqualified flood). The broad doctrine thus laid servant sufficiently to enable him to undown obviously imposes a somewhat derstand the dangers he will encounter, larger responsibility upon the master and how to do the work with safety if than that to which he is subjected in he exercise due care himself." Felton common-law jurisdictions, though it v. Girardy (1900) 43 C. C. A. 442, 104 that a jury would doubtless have been of a railway company was directed to were not taken.

those pertaining to the particular serv- steam to escape. ice for which he has engaged, and The duty of instructing inexperienced against which the servant, through want servants was also recognized in the folguage in which it was asserted.

porary work beyond the work which he ticular service was ordered to warm a

ter. Cole v. Chicago & N. W. R. Co. had engaged to do, and the superior (1888) 71 Wis. 128, 37 N. W. 84. knows, or ought to know, from all the In Quebec it has been laid down that circumstances of the case, that the work would seem that, upon the testimony, Fed. 127, holding that a refusal to dithe decision rendered would not be con- rect a verdict for the defendant was sidered improper in view of the facts proper, where a helper in a repair shop warranted in finding that the servant go into the fire box of a locomotive, did not understand the danger, and that which had steam up, and tighten the adequate precautions to protect him plug in a leaking flue of the boiler, and who, not knowing that the plug was 2 "The master may not lawfully ex-screwed in, hammered it so that the pose his servant to greater risks than threads broke and thus allowed the

against which the servant, through want of skill, or by reason of tender age or physical inability, could not presumably defend himself, if unappraised of the danger. He is bound to warn the servant of the danger if it be not obvious, and to instruct him how it may be avoided." Reed v. Stockmeyer (1896) (minor nineteen years of age sud-20 C. C. A. 381, 34 U. S. App. 727, 74 denly called on to work with a trimmer Fed. 186. In this case the court declared that the proposition of plaintiff's counsel, that there was liability because the vice principal, acting for the master, directed the servant to engage in an employment other than that for which he was engaged, and also more hazardous, and that there was therefore a breach of positive duty by the master, in a railway office was directed to couple a breach of positive duty by the master, in a railway office was directed to couple could not be sustained in the broad lan- cars); Michael v. Roanoke Mach. Works The (1894) 90 Va. 492, 19 S. E. 261 (helper liability, it was laid down, did not arise in boiler shop assigned to duties where from the direction, but from the failure he was exposed to danger from a crane to give proper warning of the risks attendant upon the employment.

New York & M. V. Water Co. (1890)

"When a servant is ordered by one 55 Hun, 452, 8 N. Y. Supp. 717 (servhaving authority over him to do a tem- ant not employed to perform that par-

- (b) Where the master or his representative knew that certain specific hazards would be encountered by the servant in the new environment to which he was transferred, and the servant was not chargeable with knowledge of those hazards.3 Not infrequently in this instance, also, a material element of the negligence charged is the failure to caution the servant.4
- (c) Where new functions were superimposed upon those which the servant had been previously discharging, and the multiplicity of duties thus entailed produced a certain mental confusion and disturbance of judgment, which impaired his capacity for self-protection.<sup>5</sup>
  - (d) Where the superior employee who gave the order directly aug-

quantity of dynamite, and was injured ager of his department sends him to quantity of dynamite, and was injured ager of his department sends him to by its explosion); Newbury v. Getchel remove ashes and débris in a depot, and & M. Lumber & Mfg. Co. (1896) 100 he is injured by the giving way of the Iowa, 441, 69 N. W. 743; Hamilton floor, the unsafety of which was known Bridge Co. v. O'Connor (1895) 24 Can. to such manager, but not to the serv-S. C. 598; Gulf, C. & S. F. R. Co. v. ant. Cook v. St. Paul, M. & M. R. Co. Neuman (1991; Tex. Civ. App.) 64 S. (1885) 34 Minn. 45, 24 N. W. 311. W. 790; Quinn v. Johnson Forge Co. (1892) 9 Houst. (Del.) 338, 32 Atl. (1891) 87 Mich. 281, 49 N. W. 613; Leure v. Roselva & A. R. Co. (1885) 139

outside the sphere of his duty, and was 106. thus subjected to a risk with which he was not acquainted, or to a peculiar and out instructions, to a place in a ditch greater risk at that time, of which he where there were deposits of quicksand, was not informed or cautioned, the defendant would be liable. Mann v. Ori- v. Effingham (1895) 63 Ill. App. 223. ental Print Works (1875) 11 R. I. 152 For other cases dealing with the du (fireman was suddenly called upon to to instruct a servant who is ordered to assist in throwing on a belt).

<sup>3</sup> Rettig v. Fifth Ave. Transp. Co. 6-8, ante. (1893) 6 Misc. 328, 26 N. Y. Supp. 896; <sup>5</sup> In one

(arguendo).

was on the servant's shoulders was that, action, and two of which were outside the service was more hazardous than negligence, rendering the master liable that which he engaged for, this must for injuries which were the proximate have been better understood by the mas-result of the distraction of his atten-

ing, is entitled to recover where the man-

8. Leary v. Boston & A. R. Co. (1885) 139
Whether instructions should have Mass. 580, 52 Am. Rep. 733, 2 N. E. Whether instructions should have Mass. 580, 52 Am. Rep. 733, 2 N. E. been given was held to be a question 115; Union P. R. Co. v. Fort (1873) 17 for the jury in Hillsboro Oil Co. v. Wall. 553, 21 L. ed. 739; Gavigan v. White (1899; Tex. Civ. App.) 54 S. W. Lake Shore & M. S. R. Co. (1896) 110 432, where the servant used his hand Mich. 71, 67 N. W. 1097; Walker v. to clear away motes from under a linter, Lake Shore & M. S. R. Co. (1895) 104 a method especially dangerous under the circumstances.

Coal & R. Co. v. Chambliss (1892) 97 A jury is properly charged that if Ala. 171, 11 So. 897; Ft. Smith Oil Co. the servant was required to do work v. Slover (1893) 58 Ark. 168, 24 S. W.

> A laborer who was transferred, withwas held entitled to recover in Banks

> For other cases dealing with the duty undertake new duties, see § 248, notes

<sup>5</sup> In one case it was held to be for the (1893) of Misc. 20 N. J. Sapport of Mrs. R. Co. jury to say whether or not the allot-(1896) 110 Mich. 71, 67 N. W. 1097 ment to a boy nineteen years old, en-(arguendo). ployed in a sawmill, of three different In Chicago & N. W. R. Co. v. Bayfield tasks, to which a considerable extent (1877) 37 Mich. 205, one of the grounds were coincident in their requirements upon which it was denied that the risk upon his attention, caution, and prompt although it was apparent to him that of his regular employment, constituted tion by his diverse duties. Egan v. A minor servant, nineteen years of Sawyer & A. Lumber Co. (1896) 94 age, hired to spike rails and do shovel- Wis. 137, 68 N. W. 756.

mented, by a wrongful act amounting to an abuse of his power, the perils of the new duties.6

the contract between the plaintiff and contract with defendant.

\*In Rodman v. Miohigan C. R. Co. would have constituted such an abuse (1884) 55 Mich. 57, 54 Am. Rep. 348, of authority as to render the defend-20 N. W. 788, the court was equally diant liable. It was likewise an abuse vided upon the question whether a of his authority in the conductor to orbrakeman could recover for an injury der the brakeman to couple the cars in caused by the conductor's undertaking the absence of the engineer, while he to manage an engine in the absence of himself, being a person unfit, incompethe engineer. This division of opinion tent, and lacking the requisite skill and was due simply to a divergence of views experience, attempted to manage and as to the principle which should control operate the locomotive engine in makthe case, and not to any difference of ing such coupling. By the exercise of opinion concerning the doctrine stated his authority the conductor ordered the in the text. Champlin, J., took the plaintiff to perform services of inground that it was implied, as part of creased peril not contemplated by his The case is defendant, that the engine should be op- no different from what it would have erated by a competent engineer, and been had the defendant been a natural that the plaintiff did not assume the person, and, without possessing the risk which would be incident to the em-requisite skill and experience, and beployment in case the engine should be ing wholly unfit and incompetent, had operated by a person without the requi- himself undertaken to run and manage site skill and experience, as this would the engine, and had at the same time put him in a position of greatly in- ordered the plaintiff to couple the cars, creased peril. The learned judge then and the injury had resulted in conseproceeded thus: "In this case it is al- quence of the want of fitness, compeleged in the declaration that the contency, skill, and experience of defend-ductor was the agent of defendant, and ant. The defendant is equally as liable had charge of the train and command for the acts of his agent, the conductor, of the other employees of defendant on as if they were his own, when such acts the train, including the plaintiff. He are an abuse of his authority, or where was put, therefore, by the defendant, in he stands in place of the defendant." his place, to discharge the duty which Cooley, Ch. J., referring to the case of the defendant owed to the plaintiff, to Chicago & N. W. R. Co. v. Bayfield see that the employees of the defendant (1877) 37 Mich. 205 (see last note), were discharging the respective duties which had been cited as conclusively required of them; and in the discharge showing the right of the plaintiff to reof this duty the conductor was not a co-cover, said: "That case seems to us servant, but the representative of the de-altogether different from this. There, fendant, who in that respect is bound a common laborer on a railroad was orby the acts or omissions of the conductor dered by his superior to perform the the same as though such acts had been duties of a brakeman, and while doing done or omitted by defendant personally. so was injured. He was ordered into And the defendant, having placed the a different service to any in which he conductor in a position of authority over had ever engaged, and the order was the plaintiff and other servants, and plainly wrongful. But in this case the made them subject to his direction and plaintiff was put to no new or different control, while the defendant is not service, and the only complaint is that chargeable for the consequences of di- in the very service he agreed to perform rections given by such superior officer he was exposed to a risk not properly within the scope of the general employ-belonging to it, and therefore not comment, he is chargeable to plaintiff for templated by his contract of service. an abuse of such authority, as much as The risk was certainly unusual, and he would be to a stranger. . . . Sup- probably not in the minds of either pose the conductor had ordered a day party when the plaintiff was employed; laborer or an entire stranger to take but that fact would not of itself deterthe place of the engineer during his temmine the responsibility. Accidental in-porary absence, and through his neglijuries are often, perhaps most gener-gence, carelessness, and want of skill ally, the results of unexpected causes; plaintiff had received the injury com- but if these causes arise in the course plained of without fault on his part, it of a servant's employment, he must be

460. Assumption of risks as a defense; generally.—Since every risk which is not caused by the master's negligence is deemed to be an ordinary one (see § 3, ante), it is evident that the inference that the usual risks incident to new duties were assumed may sometimes seem to be a necessary deduction from the fact that there is no ground upon which the master can be charged with negligence in giving the order to undertake those duties. See § 458, supra. As long as the rights of the parties are examined from this particular standpoint, it is apparently impossible to dispute the applicability of the general principle thus invoked. But its introduction in this connection obviously entails an embarrassing conflict of results, inasmuch as such risks, although ordinary in relation to the new duties, are extraordinary in relation to the original employment. See § 270, ante. If this conception be treated as the controlling one, it is clear that the investigation in cases of this class must always start from the hypothesis that these risks are prima facie unknown to the servant, and that the fact of his knowledge must be established by positive proof. That this is the theory upon which nearly all, if not all, the cases proceed, is, we think, indisputable.

the conductor should take charge of the when he acts rightfully, it is contemengine for the time is undoubted. The plated in the employment of his subornecessity may sometimes be as urgent dinates that they, within their several as it is plain; and lives may depend upon it. This might happen from inunder obligation to avoid other trains, perience to do the work with safety to must act in the emergency as the necessities of the case shall require. His garded, if he obey [as chargeable] with highest and plainest duty in some cir- having assumed the usual and ordinary

deemed to have assumed their risks. cumstances will be to take possession And the only question there can be in this case is whether the plaintiff was ordered to do something which, under the circumstances, was outside of his employment, so that, had he been inclined to do so, he might rightfully have any circumstances, the conductor may refused obedience to the order. And this, as it seems to us, must depend upon whether, when the contingency appears to the conductor to render it necessary, that official may, for the occasion, take charge of the engine, and at safety and management of the train, must be allowed a certain discretion in continue to perform his service. That continue to perform his service. That deciding upon emergencies, and the precontingencies may and do arise in which sumptions must favor his action. And

gury to the engineer, or sudden illness; present to the mind of the court in the and when to leave the train where the following passage of the opinion in a disability of the engineer occurs would recent case: "If there is nothing parendanger some other train. But there ticularly dangerous in the new work, might be other reasons for the engineer and the master has no reasonable leaving his post, for which the com-ground for believing that the servant is pany would not be in fault; and the con-ductor, with the train in his charge and ter or has not the requisite skill and ex-

461. Risks not assumed unless known.— The theory just adverted to obviously involves, as a corollary, the doctrine that a master who seeks to escape liability on the ground of an assumption of the risk by the servant must prove something more than the mere fact that the latter vielded obedience to an order which required him to undertake duties different from those covered by the agreement under which he entered the employment.1 If the evidence is such as to warrant a jury in finding that the servant was neither actually nor constructively aware of the existence of the risk, a court cannot declare, as a matter of law, that the action is barred. This principle inures to his benefit where the risks to be encountered were those normally incident to the work undertaken; and, a fortiori, where those risks were of an abnormal nature.3

are clearly incorrect, unless it is assumed that the servant was conceived not specifically adverted to.

P. R. Co. v. Fort (1873) 17 Wall. 553, track was located, it was held that his 21 L. ed. 739 (see § 465, note 2, infra); appreciation of the danger was not a Leary v. Boston & A. R. Co. (1885) 139 conclusion of law, if he was called on Mass. 580, 52 Am. Rep. 733, 2 N. E. by his foreman to assist in this work, 115 (see § 467, note 3, infra); North- which was outside of the work which

risks incident to the employment." C. C. A. 485, 15 U. S. App. 262, 58 Fed. Felton v. Girardy (1900) 43 C. C. A. 756 (boy employed as "trapper" in 439, 104 Fed. 127. <sup>1</sup> In Ft. Smith Oil Co. v. Slover Helm v. O'Rourke (1894) 46 La. Ann. (1893) 58 Ark. 168, 24 S. W. 106, it 178, 15 So. 400 (workman killed by the was laid down, arguendo, that a serv-bursting of a boiler while it was beant, who, when requested by his suing tested, he having been called away perior to perform a new duty, volun-from his regular duties); Michael v. tarily undertakes it, assumes all the Roanoke Mach. Works (1894) 90 Va. risks incident to its performance; and 492, 19 S. E. 261 (boiler maker's helper risks incident to its performance; and 492, 19 S. E. 261 (boiler maker's helper also that when a servant voluntarily undertakes a duty outside the scope of his original employment, his rights and lia- (1893) 146 III. 614, 35 N. E. 162, Afbilities are measured by the same standfirming (1892) 48 III. App. 115 (blackard as if he had been specially engaged smith directed to assist in raising a to perform that duty. The court seems to smokestack); Mann v. Oriental Print have been led into this unqualified language by the fact that it was discussing as a fireman suddenly called on to assist on the print of the print and the print of the pri guage by the fact that it was discussing as a fremai studency carried on to assand condemning an instruction which sist the engineer in throwing a belt); followed verbotim the passage quoted in Felton v. Girardy (1900) 43 C. C. A. § 464, infra, from the opinion in Pitts-439, 104 Fed. 127 (boiler maker's helper, burgh, C. & St. L. R. Co. v. Adams who was ordered to repair a leaky plug, (1886) 105 Ind. 151, 5 N. E. 187. That work which should have been assigned passage, it may be conceded, is not a to an experienced boiler maker); Gulf, correct statement of the law, as it is C. & S. F. Ry. Co. v. Newman (1901; applied in most states. But the Ar- Tex. Civ. App.) 64 S. W. 790 (fireman kansas court has gone to the opposite of stationary engine ordered to take extreme of error in enunciating the charge of it); Ft. Worth & D. C. R. Co. propositions above set forth. In the v. Wrenn (1899) 20 Tex. Civ. App. 628, form in which they are expressed, they 50 S. W. 210 (engine wiper ordered to couple cars).

In Ferren v. Old Colony R. Co. of as one who appreciated the risks of (1887) 143 Mass. 197, 9 N. E. 608, the new duties; and this element was where a blacksmith, occasionally called out from a railway shop to push cars, <sup>2</sup> Chicago & N. W. R. Co. v. Bayfield was injured by being crushed between (1877) 37 Mich. 205. See also Union a car and a building near which the ern P. Coul Co. v. Richmond (1893) 7 he was employed to do and in a place

462. Risks assumed, if known.— The converse of the principle laid down in the last section is that a servant who undertakes new work with a full appreciation of the risks which its performance involves is deemed to have accepted those risks. In so far, therefore, as he comprehends, or ought to comprehend, them, he assumes all the ordinary and extraordinary risks of the new duties,2 whether he be a minor or an adult.3

where he had not before done such work, and if the peril was not obvious to him, edge and experience sufficient to comand he failed to take notice that the space between the car and the building was too narrow for him to pass through with safety, and if his attention was given to the work which he was doing, so that he did not discover the danger till it was too late to save himself.

<sup>8</sup>Chicago, R. I. & P. R. Co. v. Kinnare (1901) 190 Ill. 9, 60 N. E. 57, Affirming (1900) 91 Ill. App. 508 (watchman stumbled over a pile of gravel while trying to mount a moving freight train for the purpose of arresting trespasser thereon); Cummings v. Collins (1876) an unusual manner); Walker v. Lake ing of a reasonably safe appliance of Shore & M. S. R. Co. (1895) 104 Mich. the same character. 606, 62 N. W. 1032 (section foreman A trammer in a mine, who obeyed di-killed by the recoil of a trolley wire rections to help fix a roof and take which he was ordered by the roadmaster to cut. Grant, J., dissented on the ground that this consequence was a patent risk, as well as on the more general ground that no negligence on the part held to be chargeable with a comprehenof the company was established in regard to the supply of improper tools this temporary employment, as he had for the work); Hillsboro Oil Co. v. been tramming for four winters in this White (1899; Tex. Civ. App.) 54 S. W. and other stopes. Paule v. Florence 432 (servant ordered to clean motes out Min. Co. (1891) 80 Wis. 350, 50 N. W. of a linter while it was choked up with 189.

A servant who was ordinarily employed as the foreman of a gang of diggers, and had been temporarily placed far as the language goes, Foley v. Cali-under a foreman of carpenters to assist fornia Horseshoe Co. (1896) 115 Cal. in handling a "dolly" used for the trans-port of heavy timbers, was held entitled regards minors; but the case is one of to recover for injuries caused by the insufficiency of the number of men assigned to the work. Supple v. Agnew (1901) 191 111. 439, 61 N. E. 392, Reversing (1898) 80 Ill. App. 437.

1 "If the servant is possessed of knowlprehend the danger, and, without objection, undertakes the service, the master is not liable for injury received by the servant in such new and more dangerous employment." Reed v. Stockmeyer (1896) 20 C. C. A. 381, 34 U. S. App. 727, 74 Fed. 186.

<sup>2</sup> Hanson v. Hammell (1899) 107 Iowa, 171, 77 N. W. 839 (servant's hand caught while she was cleaning the rollers of a mangle); Prentiss v. Kent Furni-ture Mfg. Co. (1886) 63 Mich. 478, 30 N. W. 109 (plaintiff injured by a split-saw, which he had undertaken to op-61 Mo. 520 (complaint not demurrable erate, after being told that he could do which alleged that a heavy iron wheel, this or lay off); *Millar* v. *Madison Car* while it was being rolled, dropped into *Co.* (1895) 130 Mo. 517, 31 S. W. 574, while it was being rolled, dropped into Co. (1895) 130 Mo. 517, 31 S. W. 574, a concealed hole in the floor, and fell where the court remarked that by its over on plaintiff); Palmer v. Michigan ruling it did not mean that the servant C. R. Co. (1891) 87 Mich. 281, 49 N. assumed the risk of a defective appli-W. 613 (section man upon a railroad ance of which he knew nothing, or dandoes not assume the risks incident to gers which were not visible, but the loading rails upon a moving train in risks that ordinarily attended the work-

down some ground in a stope, and was injured by ore or rock falling from a roof which had just been tested in his presence and seemed to be solid, was sion and an acceptance of the risks of

<sup>3</sup> See the passage cited in § 458, note 4, supra, from the opinion in Anderson v. Morrison (1875) 22 Minn. 274. So

463. What risks fall within this description.— The risks thus deemed to be accepted are those susceptible of being described by the same words that are employed to designate those risks which, although extraordinary as respects the scope of the original contract, are held to have been undertaken, if they were appreciated. See chapter xxi., especially § 391,—ante. Thus, it is held that the servant cannot recover for an injury caused by a risk which was "apparent," or "obvious,"2 or so "open and manifest" that an ordinary man under the same circumstances could have ascertained them by the exercise of reasonable diligence.<sup>3</sup> So, also, it is held that no action is maintainable, where the servant had, as compared with the master, an equal,4 or a better,5 opportunity to see and know the extent of the danger.

As in all cases of extraordinary risks, the question whether the servant appreciated the risks of new duties is primarily for the jury. See § 390, ante.

Even where an assumption of the risk may be inferred, the servant may still recover if it appears that the master, by his failure to discharge his continuing duty to keep the appliances safe, had exposed the servant to additional risks after the new work had been undertaken.7

## 464. Indiana doctrine as to assumption of risks.— According to sev-

<sup>2</sup> Feely v. Pearson Cordage Co. (1894) at the command of the section boss, upon one of the cars to set the brakes thereon, and was injured by the act of the other hands in violently bumping said car with another).

\*\*Bast St. Louis Ice & Cold Storage
Co. v. Sculley (1896) 63 Ill. App. 147.

\*\*The fact that an employee in a "Nall v. Louisville, N. A. & C. R. Co. (1891) 129 Ind. 260, 28 N. E. 183, 611.

<sup>1</sup> Walker v. Lake Shore & M. S. R. Co. ment to that upon which he was engaged (1895) 104 Mich. 606, 62 N. W. 1032. at the time of the accident will not en-A servant "assumes the risk of any dan- able him to recover for injuries from ger which is plain, open, and apparent the fall on him of the stone under which to his mind, although engaged in doing he was drilling, such fall being due to of his employment." Chicago, R. I. & by the foreman upon the wedges at the P. R. Co. v. Kinnare (1900) 190 Ill. 9, top, where such employee was experienced in quarry work, knew the existence of seams and the danger therefrom, 161 Mass. 426, 37 N. E. 368; Leary v. and had an equal opportunity with the 161 Mass. 426, 37 N. E. 368; Leary v. and had an equal opportunity with the Boston & A. R. Co. (1885) 139 Mass. master and foreman of ascertaining 580, 52 Am. Rep. 733, 2 N. E. 115 (for whether there were seams in the particular see § 467, infra); Wormell v. lar stone. Reed v. Stockmeyer (1896) Maine C. R. Co. (1887) 79 Me. 397, 10 20 C. C. A. 381, 34 U. S. App. 727, 74 Atl. 49; Gavigan v. Lake Shore & M. S. Fed. 186. See also North Chicago Street R. Co. (1896) 110 Mich. 71, 67 N. W. R. Co. v. Conway (1898) 76 Ill. App. 1097 (experienced section hand engaged 621 (car oiler injured, while coupling with others in relaying a spur track, a trailer to a motor car, owing to the during the progress of which it became fact that the hook on the latter was necessary to move cars, was climbing, caught in the opening above the draw.

eral decisions in Indiana, the fact that the risk involved was as open to the observation of the servant as of the master will not, necessarily, as in cases where the work was within the scope of the employment, warrant the inference that it was assumed. In support of this doctrine two separate reasons have been assigned.

the following passage: implied assumption of risks is confined ened destruction of a bridge by a freshto the particular work and class of work et); Louisville, E. & St. L. Consol. R. for which he is employed. There is no Co. v. Hanning (1892) 131 Ind. 528, 31 implied undertaking, except as it ac- N. E. 187 (car repairer directed by his companies and is a part of the contract superior to repair a car on a switch of hiring between the parties. On the track, instead of on the tracks provided other hand, if the servant, by the orfor that special purpose and upon which ders of the master, is carried beyond the no trains are run or switched). In the contract of hiring, he is carried away last-cited case the court, in discussing from his implied undertaking as to the sufficiency of the complaint, laid risks. If the master orders him to work down the law as follows: 'The servant temporarily in another department of 'does not necessarily assume the addithe general business, where the work is tional hazard in undertaking to perform of such a different nature and character the unusual and extra service, even that it cannot be said to be within the although the dangers attending it are scope of the employment, and where he obvious." When a master orders a servis associated with a different class of ant to do something which involves enemployees, he will not, by obeying such countering a risk not contemplated in orders, necessarily assume the risks in- his employment, although the risk is cident to the work, and the risks of negequally open to the observation of both, ligence on the part of such employees. it does not necessarily follow that the Pittsburgh, C. & St. L. R. Co. v. Adams servant either assumes the increased (1886) 105 Ind. 151, 164, 5 N. E. 187 risk, or is negligent in obeying the or-(minor of twenty hired to work as secder. If the apparent danger is such tion hand was injured in coupling cars that a man of ordinary prudence would the first day that he was ordered to do not take the risk, the servant acts at his such work). By the Indiana court of peril. But unless the apparent danger appeals the effect of this case has been is such as to deter a man of ordinary said to be that the implied assumption prudence from encountering it, the servof risk does not extend to more haz- ant will not be compelled to abandon the ardous work outside of the servant's service, or assume all additional risk, contract of hiring, unless he voluntarily but may obey the order, using care in goes into such hazardous work. Indiana proportion to the risk apparently as Natural & Illuminating Gas Co. v. sumed, and if he is injured the master Marshall (1898) 22 Ind. App. 121, 52

N. E. 232 (defective spurs caused injury to a "trimmer" who was directed Madden (1893) 134 Ind. 462, 34 N. E. to climb a pole and adjust a wire).

The position of the supreme court was further defined in Brazil Block Coal Co. specifically adopted in National Enamelv. Hoodlet (1891) 129 Ind. 327, 27 N. ing & Stamping Co. v. Brady (1901) 93 E. 741, where it was held that a com- Md. 646, 49 Atl. 845, where the court plaint alleging that the plaintiff, a serv- approved of the refusal to give an inant who usually worked above ground, struction predicating a right to recover as a blacksmith, was sent down a shaft solely on the finding that plaintiff had to repair a pump, and was injured by been injured without fault of his own, falling down a shaft which was not pro- because of the machine's defective condivided with the protecting gates required tion. The condemnation of the instrucby statute, was not subject to demurrer tion was based on the theory that it is on the ground that it showed that the incumbent on a plaintiff to establish one risk was an obvious one.

<sup>1</sup> This theory was first enunciated in (1891) 129 Ind. 260, 28 N. E. 183, 611 The servant's (employee called out to avert the threat-

227 (§ 458, note 5, supra).

The doctrine of the above cases was of two alternatives.-either that he was The same doctrine was reiterated in injured while working outside the scope Nall v. Louisville, N. A. & C. R. Co. of his employment, or that the defend-

On the one hand the servant's nonassumption of such a risk is deduced from the consideration that, in the absence of specific evidence to the contrary, the supposition is that new duties are undertaken involuntarily.<sup>2</sup> But it is not apparent why coercion should be predicated where a risk is extraordinary in the sense of being outside the scope of the servant's employment, any more than it is predicated where a risk is extraordinary in the sense that it was caused by the master's negligence.

On the other hand, it is said that the master's order to a servant to do work outside the scope of his original employment operates as an implied assurance that the new duties may be performed without incurring any abnormal risks.3 Under this theory it would seem that

to follow the lead of the Indiana court, in this state. See Walker v. Lake Shore & M. S. R. Co. (1895) 104 Mich. 606, 62

95 Mich. 250, 54 N. W. 876.

2 In Brazil Block Coal Co. v. Hoodlet (1891) 129 Ind. 327, 27 N. E. 741, the court, in dealing with the contention that the plaintiff assumed the risk, said: "The complaint avers that he did this by machinery, etc., outside of his employ-the express command of the appellant. ment, the master impliedly assures him, But, it may be said, he need not have not only that he has exercised reasonable obeyed the command. He was free to care to have the place, machinery, etc., quit the service and thus avoid the dan- in a safe condition, but also that they ger; and that, by voluntarily continuing are in a safe condition and fit for the

ant was chargeable with notice of the in the service and obeying the command, it must be presumed that he consented In Jones v. Lake Shore & M. S. R. Co. to take the additional risk. While in (1883) 49 Mich. 573, 14 N. W. 551, it theory the employee whose master furwas held that an inexperienced servant, nishes appliances which both know are who consented, rather than lose his defective is at liberty to quit the service, place, to undertake a duty outside the and refuse to be subjected to the enscope of his employment, did not assume hanced danger, we cannot close our eyes the risk. But this decision really rests to the fact that the necessities of the upon the fact that the servant did not struggle for existence tend strongly to appreciate the risk which caused his independence and freedom of action. In Harrison v. Detroit, L. & N. R. While the service cannot be compulsory Co. (1890) 79 Mich. 409, 7 L. R. A. 623, in the sense that the employee can be 44 N. W. 1034, it was said, arguendo, compelled to work against his will, yet that when the offending servant, having the very nature of the relation existing general power and authority to employ between the parties carries with it the and discharge servants, and having autiresistible inference of dependence upon thority to direct and control the injured the one side." The following passage in servant, orders him to do an act not Cooley, Torts, \*555, was approved: "It within the scope of the injured servant's has been often, and very justly, remarkemployment, whereby he is exposed to ed that a man may decline any excep-danger not contemplated in his contract tionally dangerous employment; but if of service, and is injured in so doing, he voluntarily engages in it he should the master is liable for injuries received not complain because it is dangerous. while he was acting under the order of Nevertheless, where one has entered upon the superior servant. But the doctrine the employment and assumed the inci-thus indicated, if it be really intended dental risks, it is not reasonable to hold that other risks which he is directed by is not that which is at present accepted the master to assume are to be left to rest upon his shoulders, merely because he did not take upon himself the responsibility of throwing up the employment instead of obeying the order."

<sup>3</sup> This is very strongly put in the carliest of the Indiana cases cited above: "When a servant is thus ordered to work at a particular place, or with particular

the master is virtually converted, for the time being, into a guarantor of the servant's safety. Upon the assumption that this is the effect of the Indiana decisions, they have been condemned in Alabama.4

The disapproval thus expressed is, in the opinion of the present writer, well founded. There is no valid ground for departing in this instance from the general principle discussed in chapter x., ante. It should be observed, however, that the effect of the sweeping language used by the Indiana courts is considerably qualified by the fact that the defense of an assumption of the risks is conceded to be a bar to the action if the evidence shows that those risks were, as a matter of fact, appreciated.<sup>5</sup> For practical purposes, therefore, it would seem that

note 1, supra.

In Mary Lee Coal & R. Co. v. Chammaster to his servant. Does not the master fully discharge his obligation in scope of the employment; and there is this respect to all his employees when no apparent reason why such an assurhe exercises reasonable care and diligence in seeing that the ways, works, and machinery are such as are in genof the employment. eral use by well-regulated railroads, and that they are kept in proper condition. S. R. Co. (1896) 110 Mich. 71, 67 N. We know of no sound principle of law W. 1097 (§ 467 ncte 5. infra). which exacts a higher degree of care In Pittsburgh, C. & St. L. R. Co. v.

business for which they are used." and diligence on the part of the master Pittsburgh, C. & St. L. R. Co. v. Adams to his employee than reasonable care (1886) 105 Ind. 151, 5 N. E. 187.

By the court of appeals it has been dence shows that the employment is held that a cause of action is sufficiently stated by averments that the plaintiff scope of his employment, or that the was employed for no other purpose than to operate machinery in defendant's mill requires skill not possessed by the servand work on certain articles, and that and not in use in the regular course to operate machinery in defendant's mill requires skill not possessed by the servand work on certain articles, and that he was ordered to repair certain machinery; that the work was different from, and more dangerous than, the work he was employed to do; that defendant ries as may result from the increased knew the danger; and that, while doing the work, plaintiff was injured through no negligence of his own. Ervin v. would make the master an insurer that Evans (1900) 24 Ind. App. 335, 56 N. E. the ways, works, and machinery were absolutely perfect. It cannot be said See also the Maryland case cited in that the master has evercised reasonable care and diligence for the safety of his servant, when by his orders the servant buss (1892) 97 Ala. 171, 11 So. 897 is exposed to greater peril than that (fireman seventeen years old was or-which, by his contract of employment, dered to throw a switch which had a he assumed; or when the master exposes tendency to fly back), the court thus his servant of immature years, or one expressed its disapproval of the rule inexperienced and unskilled, without laid down in *Pittsburgh*, *C. & St. L. R.* proper instruction and warning as to *Co.* v. *Adams* (1886) 105 Ind. 151, 5 the peril of machinery or ways and N. E. 187: "We think the rule declared works dangerous in their use." The in the case cited . . . imports into passage cited from the Indiana case unthe contract of employment an obligadoubtedly lays down the rule too strongtion not within the contemplation of the ly against the master. That the imparties, and one which no prudent emplied "assurance of safety" deduced ployer would assume. . . A railfrom a specific order is merely an assenger than that here imposed upon the care can attain it has, we think, never master to his servant. Does not the been denied as regards risks within the master fully displayed his obligation in score of the amployment; and there is

See also Gavigan v. Lake Shore & M.

these decisions, when analysed, merely go to the extent of laying down the doctrine that the master is prima facie an insurer of the servant's safety at the moment when he is transferred to the new duties, and also, as may be supposed, though it is not expressly so stated, for a period sufficient to enable the servant to observe the conditions of his altered environment.

465. Doctrine of common employment qualified as regards servants working outside the scope of their employment.— An important exception to the doctrine of common employment is created by the rule that the giving of an order which requires a servant to perform duties not included in the original contract constitutes actionable negligence where such servant is plainly unfitted for the new duties. ture and extent of this exception may be stated thus: The principle that the master is not precluded from relying on the defense of common employment by the mere fact that the plaintiff's injury was received in consequence of his complying with an order given by a superior coservant having the right to control him as to the manner of doing his work. is not applicable in cases where that order required the performance of duties outside the scope of the plaintiff's original contract. Under these circumstances the sole question to be determined, in so far as the master's liability depends upon the representative character of the delinquent coservant, is whether the order which occasioned the injury was one which he had authority to give.2

Adams (1886) 105 Ind. 151, 5 N. E. gations to make reparation to an em-187, it was distinctly laid down that the ployee in a subordinate position for any liability to which the master was de-clared to be subject would be purged if of the person placed over him, whether the servant was competent to apprehend they were fellow servants in the same the danger.

(facts stated in § 459, note 1, supra), of railroad corporations. These corpothe court, after stating the rule as to rations, instead of being required to common employment, said: "This rule conduct their business so as not to enproceeds on the theory that the em-danger life, would, so far as this class ployee, in entering the service of the of persons were concerned, be relieved of principal, is presumed to take upon himall pecuniary responsibility in case they self the risks incident to the undertake failed to do it. A doctrine that leads ing, among which are to be counted the to such results is unsupported by reason negligence of fellow servants in the same and cannot receive our sanction. . . . employment; and that considerations of If the order had been given to a person public policy require the enforcement of of mature years, who had not engaged the rule. But this presumption cannot to do such work, although enjoined to arise where the risk is not within the obey the directions of his superior, it contract of service, and the servant had might, with some plausibility, be argued no reason to believe he would have to that he should have disobeyed it, as he encounter it. If it were otherwise, prinmust have known that its execution was cipals would be released from all obliattended with danger. Or, at any rate,

common service or not. Such a doctrine <sup>1</sup> See chapter XXVIII., post. would be subversive of all just ideas of <sup>2</sup> In Union P. R. Co. v. Fort (1873) the obligations arising out of the contract of service, and withdraw all pro- (1871) 2 Dill. 259, Fed. Cas. No. 4,952 tection from the subordinate employees It is apparent, therefore, that the practical effect of the decisions, when considered with relation to this particular phase of the doctrine of common employment, is to establish the principle that the act of

without apprehension of danger."

One of the grounds on which the decision in Chicago & N. W. R. Co. v. Bay-field (1877) 37 Mich. 205 (facts stated in § 459, note 1, supra), was based was thus stated by Cooley, Ch. J.: "We (section foreman killed by note 1) also think that where the control of the section foreman killed by note 1) also think that where the control of the section foreman killed by note 1) also think that where the control of the section foreman killed by note 1) also think that where the control of the section foreman killed by note 1) also think that where the control of the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) also the section foreman killed by note 1) and 1) also the section foreman killed by note 1) also the 1) ant, by means of an authority which he exercises by delegation of the master, wrongfully exposes the inferior servant to risks and injury, the master must respond. It is only where the risks properly pertain to the business and are incident to it that the master is excused from responsibility; and a risk of this nature not being one of the kind, the general rule applies, and he must answer for the misconduct of his agent." of the plaintiff that, if the master wrongfully sends his servant into a danmaster in person, the servant is thus wrongfully exposed to danger by one whom the master has placed over him, and to whose orders he is subjected, the responsibility is the same; the wrongful act of this superior being in law the wrongful act of the master himself.

The principle of this case was again

applied by two judges in *Rodman* v. *Michigan C. R. Co.* (1884) 55 Mich. 57, 54 Am. Rep. 348, 20 N. W. 788 (see §

458, note 5, supra).

237, the court held that a declaration child are not permitted to depend upon was not demurrable which stated that his ability to discriminate promptly as the plaintiff, a common laborer on a con- to the work required of him, or to restruction train, was ordered by the fore- fuse obedience to the command of his man of the train to pull a coupling pin superior. This limitation of the plain-

if he chose to obey, that he took upon while the cars were moving, and to himself the risks incident to the serv- jump from one of them to the other ice. But this boy occupied a very dif- when they separated; that the foreman, ferent position. How could he be ex- without any notice to the plaintiff, let pected to know the peril of the under- off the brake on one of the cars; that taking? He was a mere youth, without the speed of the car was thus suddenly experience, and not familiar with ma- accelerated and the distance to be chinery. Not being able to judge for jumped unexpectedly augmented; and himself he had a right to rely on the that the plaintiff was thus caused to fall judgment of Collett, and, doubtless, en- between the two cars. The court detered upon the execution of the order clined to pass upon the question whether the foreman was a fellow servant of the laborer, but the precise reason for this refusal is not specifically stated.

division road master), the court explained its position as follows (p. 612): "In determining whether a servant is called upon to do work outside the scope of his employment, the question does not turn upon that of whether the master would be liable for the personal negligence of a superior servant. It becomes a question of authority; and if one having authority over the servant directs him to do an act outside the scope of his employment, the servant, The court adopted the broad contention in the performance of such outside work, assumes the risk only if such danger is apparent. . . In order to bring gerous place, or exposes him to a risk the injured servant within the protecnot connected with the service, and in tion of the rule that, when called upon consequence he is injured, the rule which to perform a service outside of the scope exempts the master from responsibility of his employment, the master owes the has no application, because the risk is duty of warning him against all dannot one which the servant has assumed; gers except those which are obvious to and that if, instead of being sent by the a person of his capacity, skill, and experience, it is not necessary that the order to engage in outside service be given by the alter ego of the defendant; it is enough if the superior servant have, in

this respect, controlling authority."
In Hayes v. Colchester Mills (1894)
69 Vt. 1, 37 Atl. 269, the court argued
as follows: "If this service was beyond the plaintiff's capacity, and so outside the scope of his employment, he did not assume the risks attendant upon it. A person of mature years might have been In Erickson v. Milwaukee, L. S. & W. held to have assumed them by consent-R. Co. (1890) 83 Mich. 281, 47 N. W. ing to do the work; but the rights of a

ordering a servant into a new place of work is the act of the master. and that the employee who gives the order is, for this reason, a vice principal, whatever may be his official rank.3 See chapter xxxi., post.

In most of the cases in which this aspect of the master's liability has

defendant's service, the plaintiff assumed only such risks arising from the (1889) 119 Ind. 455, 4 L. R. A. 850, 21 negligence of his coemployees as might N. E. 1102, the court, in holding that relation. The defendant assigned Sturservice which was outside his employyears, strength, and judgment, the defendant is liable for the consequences of knowledge thereof."

order of the engineer to assist in throwing a belt, it was held that the jury were
rightly told that, if the fireman was v. Old Dominion Cotton Mills (1886)
placed under the engineer as his superior, and this superior had a right to
Orman v. Mannix (1892) 17 Colo. 564,
give orders in his department, the case
if L. R. A. 602, 30 Pac. 1037 (order
did not come within the principle regulating liability in cases of fellow serv
This conception emerges in Louis

This conception emerges in Louis

The conception emerges in same department,—e. g., if he had been 866 (laborer ordered by gang boss to placed under a superior fireman by thaw dynamite before a fire). whose neglect he had been injured,—the The language used in one South Caroauthority or control, but it was the ex- servant as to orders with respect to or-

tiff's risk renders the doctrine of fellow ercise of this delegated authority which

be incurred within the scope of his em- a mine boss who directed a ten-year old ployment. So it is not necessary to de- boy to leave his own work and undertermine whether the nature and extent take more dangerous duties, was not a a mine boss who directed a ten-year old of Sturgis' authority over the plaintiff fellow servant of the boy, said: "Nor were such as to exclude him from the do we rest our conclusion upon the relation of fellow servant. The effect maxim, Respondent superior. Mushett of his authority over the plaintiff is to (if not Haines), under the circumstanbe considered without reference to that ces of this case, was the agent of the appellant, and the superior of the appelgis to the care of the machinery and lee; it was his right to command, and placed the plaintiff under his orders. If the appellee's duty to obey, and, con-Sturgis, acting within the sphere of his sidering the immature age of the appel-own duty, required of the plaintiff a lee, we must assume that he obeyed the commands of his superiors, supposing ment, and which a prudent master would that it was his duty so to do, without not have imposed upon a person of his regard to the dangers or hazards that he would encounter, and without a

the improper order."

In Mann v. Oriental Print Works
(1875) 11 R. I. 152, where a fireman blesville Foundry & Mach. Co. v. Yeawas injured while complying with an man (1891) 3 Ind. App. 521, 30 N. E. order of the engineer to assist in throw-

given by gang foreman).

This conception emerges in Louis ants, and that the engineer must be ville, E. & St. L. Consol. R. Co. v. Hanlooked upon as representing the emning (1891) 131 Ind. 528, 31 N. E. 18 ployer. The court said: "If the per (car repairer ordered to repair a car son here injured had been an inferior which was not on the track set apart servant, and had been injured by the for such work); Gilmore v. Northern negligence of a superior servant in the P. R. Co. (1884) 9 Sawy. 558, 18 Fed.

case would have been different. And it lina case would also seem to indicate might then be argued that he must have the adoption of the theory that the known and calculated the risks of such transfer of a servant to work outside employment. In the present case the the scope of his original employment is fireman was not injured while working a nondelegable function of the master, in his own particular department, but and that any superior servant (in the was injured by the neglect of a superior case cited a section foreman) who unwhose department was more extensive, dertakes to order such a change of duincluding his (the fire) as a part of it. ties represents the master ad hanc vicThe engineer not only had a delegated em, although he may be a mere fellow come under consideration the injured servant has been a minor, and language has sometimes been used which indicates that the benefit of this qualification of the doctrine of common employment can only be claimed by minors.4 But with all deference to the eminent judges who have taken this view, the present writer ventures to express an opinion that it is neither consistent with the reason of the qualification, nor sustained by the case commented on.5

It should be observed that the principle thus laid down does not exclude the operation of the doctrine of common employment in cases where the injury was caused, not by the servant's compliance with the order to perform new duties, but by some subsequent act of negligence committed by a subordinate coemployee while those duties were in course of performance.6

\*In Randall v. Baltimore & O. R. Co. (1883) 109 U. S. 483, 27 L. ed. 1005, 3 Sup. Ct. Rep. 322, Gray, J., said that the principle of Union P. R. Co. v. Fort (1873) 17 Wall. 553, 21 L. ed. 739, was that, the servant "being a minor, he was that, the servant "being a minor, he was der age of the plaintiff is a controlling performing, by direction of his superior, factor in the cases which established work outside of and disconnected with this limitation of the doctrine of comthe contract which his father had made mon employment. Minority, in short, for him with the defendant." In Leary makes it more difficult for the master v. Boston & A. R. Co. (1885) 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115, also, it was remarked that the controlling factor was that plaintiff was a minor.

One of the grounds upon which the Supreme Court of the United States upbeld the servant's right of action in ily rebutted by specific evidence in the Union P. R. Co. v. Fort (1873) 17 Wall. case of adults than in the case of mi553, 21 L. ed. 739, was, as will be seen hy reading the extract from the opinion in note 2, supra, that he "had no reason to believe he would have to encounstant the wild the right which caused his injury to the right which cause of adults than in the case of mito the right was a specific evidence in the case of adults than in the case of mito the right was a specific evidence in the case of adults than in the case of mito the right was a specific evidence in the case of adults than in the case of mito the right was a specific evidence in the case of adults than in the case of mito the right was a specific evidence in the case of adults than in the case of mito the right was a specific evidence in the case of adults than in the case of adults than in the case of adults than a specific evidence in the case of adults than in the ter" the risk which caused his injury. Manifestly, this element of nonanticipation is of precisely the same evidential import in the case of adults, as in the case of servants, in so far as it operates prima facie to negative that knowledge which is supposed to exist with regard to the ordinary risks of work within the scope of the employment. Up to this stage of the inquiry, therefore, adults and minors stand on the same out objection, consents to work at the footing. The second question involved the case of servants, in so far as it oper-

dinary duties. Couch v. Charlotte, C. is that which is discussed in the latter & A. R. Co. (1884) 22 S. C. 557. But part of the opinion, viz., whether this the position of this court in regard to the "superior servant doctrine" overcome by the specific evidence which gard to the "superior servant doctrine" overcome by the specific evidence which is very obscure (see summary of decisions in chapter xxx., post), and it is structive notice of the risk. This questherefore difficult to say what is the precise effect of this ruling in the present connection. rial, for exactly the same reasons as where the extraordinary risk is one within the scope of the servant's employment. To this extent, therefore, and no further, it is submitted, the tender of the servant's extent. ultimately to prevail on the ground of an assumption of the risks of new duties; but this is only because the general inference of a nonassumption of those risks, which is drawn from the servant's nonanticipation, is more read-

> as appears, an adult: Mann v. Oriental Print Works (1875) 11 R. I. 152; Erickson v. Milwaukee, L. S. & W. R. Co. (1890) 83 Mich. 281, 47 N. W. 237; Walker v. Lake Shore & M. S. R. Co. (1895) 104 Mich. 606, 62 N. W. 1032.

466. Contributory negligence in undertaking the new work.— (Compare §§ 442 et seq., supra.)—The general rule applied by most of the authorities is that, where the master or his representative commands a servant to go outside of his regular employment to do a work which is attended with special danger, and the servant, in response to the commands so received, goes and does the work in the way, and at the time directed, the fact that the servant knew that it was dangerous does not render him, as matter of law, guilty of contributory negligence, unless the character of the danger be so patent and so extreme that no one but a foolhardy, reckless man would attempt it. Special reasons which have been assigned for not imputing negligence are the following: That the servant's excusable ignorance of the danger to be encountered is a reasonable inference from the fact that he had no

<sup>1</sup> English v. Chicago, M. & St. P. R. other, he undertakes to obey all lawful quences of even a correct decision might orders, and he subjects himself, for any be apparent insubordination, and, perfailure to do so, to the double liability haps, difficulty and litigation. It is of being expelled from the employment perfectly just under such circumstances and of being required to pay damages. To leave upon the master the responsibility he assumed in giving an unwardirect him to do anything not contemplated in the employment; but when one and is not blamable in yielding obedithus contracts to submit himself to the ence to his superior."

See also Galveston Oil Co. v. Thomps orders of another, there must be some presumption that the orders he receives son (1890) 76 Tex. 235, 13 S. W. 60; are lawful, the giving of the orders because it and the servant who refused (complaint not demurrable because it

received through the negligence of an spect for the master as well as a conother servant in operating it. Han-sideration for his own interest may very rathy v. Northern C. R. Co. (1876) 46 properly induce him to waive his own Md. 280. judgment for that of his superior, and instead of engaging in disputes, and be-Co. (1885) 24 Fed. 908, per Brewer, J. ing, perhaps, ejected from his employ-In Chicago & N. W. R. Co. v. Bay-ment, to leave questions of doubt for fufield (1877) 37 Mich. 205, it was argued ture settlement. Now, although we that, even if the superior servant who think, on the facts, as the jury has gave the order represented the company found them, there was no authority to ad hanc vicem (see §§ 457, 460, supra), send Williams to handle the brakes, yet the act of the plaintiff in obeying was the point was not so clear but that serithe act of the plaintiff in obeying was the point was not so clear but that serihis own voluntary act, and that the case ous question was made of it on the trial, was the ordinary one of contributory and it would be grossly unjust to comnegligence. This contention did not prepel the servant, at his peril, to decide vail. Cooley, Ch. J., said: "When one correctly on the validity of an order person engages in the employment of an presumptively lawful, when the consection, he undertakes to obey all lawful quences of even a correct decision might

to obey would take upon himself the shows undertaking of new and more burden of showing a lawful reason for dangerous duties); Pittsburgh, C. & St. the refusal. This, of itself, is sufficient L. R. Co. v. Adams (1886) 105 Ind. 151, the refusal. This, of itself, is sufficient L. R. Co. v. Adams (1886) 105 Ind. 151, reason for excusing the servant who declines the responsibility in any case in Cement Co. v. Wright (1897) 16 Ind. which doubts can possibly exist. He should assume that the order is given Saalfeldt (1898) 175 Ill. 310, 48 L. R. in good faith and in the belief that it is A. 753, 51 N. E. 645, Affirming (1897) rightful; and if, in his own judgment, 73 Ill. App. 151 (bottle washer nineit is unwarranted, it is not for the master years old was injured while operater to insist that the servant was in the ing a freight elevator); Kehler v. wong in not refusing obedience. Re-Schwenk (1892) 151 Pa. 519, 25 Atl. time for reflection or choice;2 that he relied upon the superior knowledge of the employee who gave the order; that, although he was aware of the material conditions which were the cause of his injury, he did not appreciate the danger created by them;4 that by reason of his youth and inexperience, he was incapable of determining whether the work required was actually within the scope of his employment, or believed himself bound to render obedience to the order. A servant, it is declared, is not required to weigh nicely the question whether any particular order is one which his superior has a right to give. 7 Nor will a servant who is charged with various duties be held, upon uncertain and refined distinctions, to have been negligent when, in good faith, he performed a service outside of the line of his duty.8 But clearly he can never be justified in obeying an order which takes him outside his regular duties, where he has been expressly instructed to

564, 17 L. R. A. 602, 30 Pac. 1037; So. 792.

<sup>2</sup> Rush v. Missouri P. R. Co. (1887) 36 Kan. 129, 12 Pac. 582; Dowling v. Allen (1881) 74 Mo. 13, 41 Am. Rep. 298 (boy of seventeen ordered to stop an engine, such work not being a part of his duty, and to hurry, was caught by an uncovered set-screw); Hale Elevator Co. v. Trude (1891) 41 Ill. App. 253 (servant, in hasty response, abandoned his regular work to add his strength to that of other employees to · overcome a present exigency).

A boy of fourteen who suddenly re-

ceives an order from his foreman to pick up and throw away a stick of giant powder which had caught fire is not, as matter of law, negligent in obeying, as he has neither time for the close weighing of chances, nor the opportunity to comprehend fully the danger of the service to which he was assigned. Orman v. Mannix (1892) 17 Colo. 564, 17 L. R. A. 602, 30 Pac. 1037.

\* Frank v. Bullion-Beck & C. Min. Co. (1899) 19 Utah, 35, 56 Pac. 419 (miner injured by a cave-in while he was complying with the order of his foreman to assist in carrying out a fellow workman who had previously been injured by another cave-in).

The fact that a boy of fourteen injured in a mine by stumbling over a was a man of all work and required to piece of coal lying upon the track, while assist in taking engines into and bring-

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130; Orman v. Mannix (1892) 17 Colo. a service outside the duty of his regular employment, and without the knowl-Camp v. Hall (1897) 39 Fla. 535, 22 edge of his parents, to throw off the brake upon a coal car, had seen such piece of coal before he was injured, does not render him, as matter of law, guilty of contributory negligence, since it does not follow, as a conclusion of law, that his judgment had reached such maturity that he was apprised of the danger of running alongside the tracks or setting or removing the brakes under such circumstances. Northern P. Coal Co. v. Richmond (1893) 7 C. C. A. 485, 15 U. S. App. 262, 58 Fed. 756.

<sup>5</sup> Hayes v. Colchester Mills (1894) 69

Vt. 1, 37 Atl. 269.

<sup>6</sup> Mary Lee Coal & R. Co. v. Chambliss (1892) 97 Ala. 171, 11 So. 897 (minor of seventeen years, employed as a fireman, was ordered to throw a switch).

<sup>7</sup> Orman v. Mannix (1892) 17 Colo. 564, 17 L. R. A. 602, 30 Pac. 1037.

<sup>8</sup> Grannis v. Chicago, St. P. & K. C. R. Co. (1890) 81 Iowa, 444, 46 N. W. 1067, where the court upheld the propriety of a finding that a wiper in a roundhouse, injured while attempting to couple an engine to a car, in assisting to take the engine out of the roundhouse, was acting in the line of his duty while making the coupling, the proof being that the plaintiff, although he had never attempted to do such work before, endeavoring, in pursuance of an order ing them out of the roundhouse; and it of the superintendent directing him to is shown that other wipers coupled cars, obey the orders of the superior servant only in so far as they related to his own department.9

The doctrine adopted in Georgia seems to be that contributory negligence is inferable as a matter of law, where the servant knew that the abnormal risk which caused his injury was incident to the new work which he had undertaken.<sup>10</sup> Compare §§ 298, 298a, ante.

A servant who is sent to do a piece of work with a machine with which he is not familiar is bound to inquire as to the proper method of operating it. The failure to seek this information will debar him from recovering for an injury caused by operating it, if it was free from defects.<sup>11</sup>

As to contributory negligence, as a deduction from evidence that the servant undertook work for which he was not fitted, see § 294, note 3, ante.

467. Absence of compulsion an essential element of assumption of risks and contributory negligence.— a. Generally.—As in cases of injuries from other kinds of extraordinary risks, neither an assumption of risks outside the scope of the original employment, nor contributory negligence in encountering those risks, can be predicated unless it is shown that the work was undertaken voluntarily. Actual compulsion will readily be inferred where the servant is a minor.1

the engineer except in the line of the new service against his will. former's employment, the engineer was An action is maintainable upon a authorized to call upon him for assist- complaint which alleges that a minor

generally, §§ 412, 413, ante.

This doctrine is deducible from the language used in Mann v. Oriental Pa. 505, 25 Atl. 130, one of the elements Print Works (1875) 11 R. I. 152, where it was declared that, unless the plaintiff verdict for the plaintiff, a boy of four-fireman had been instructed not to obey

ance in any matter within the engineer's was not engaged in the service which department, and that the defendant he was hired to perform, but that he would be liable, even if there was an- was "compelled" by a fellow servant to other person who might more properly labor at a business much more perilous, other person who might more properly be called upon.

The following headnote was written by Bleckley, J., for the case cited: A railway employee is in fault when he knowingly exposes himself to an extraordinary danger at night, by assisting to carry a train over the unsafe track of another railroad. The company does not insure his safety against reckless to conduct, with knowledge that it lies outside of (1867) 28 Ind. 30, 92 Am. Dec. 282. his regular employment, and that it is extra-hazardous on account of the unfitness of the appointments. Galloway v. nate promptly as to the work required ness of the appointments. Galloway v. nate promptly as to the work required Western & A. R. Co. (1876) 57 Ga. 512. of him, or to refuse obedience to the com-<sup>11</sup> Millar v. Madison Car Co. (1895) mand of his superior. Hayes v. Col-130 Mo. 517, 31 S. W. 574. Compare, chester Mills (1894) 69 Vt. 1, 37 Atl. 269. See also Patnode v. Warren Cot-

See §§ 289, 302, ante. But where he is an adult, involuntary action will presumably be ascribed to him only under the exceptional circumstances discussed in the sections just specified.

b. Protest or objection omitted or made.—The principle that the failure of the servant to protest against the maintenance of abnormally dangerous conditions due to the master's negligence is a circumstance which points strongly, and even conclusively, to the inference that the servant was willing to assume the resulting risks (see § 290, ante), is equally applicable where the peril is extraordinary in the sense with which we are now concerned.2

The evidential import of a protest actually made depends both upon the defense which has been raised, and upon the views of the court as to the economical and social principles discussed in chapter vii., subtitle B, ante. Where the defense raised is an assumption of the risks, the general principle, which is almost universally held in the United States, that the servant cannot countervail the effect of his appreciation of the risk by showing that he entered a protest before undertaking his duties, is considered to be equally applicable, whether the work to be done is within or outside the scope of the original employment. Accordingly, we find it laid down that

ton Mills (1892) 157 Mass. 283, 32 N. ter has the right to demand other service

orders of Drehoble, acted under compulsion, and should not be, therefore, held to have assumed the risks of the agreement that he is not to couple cars that he was coerced into compliance with the order through fear of discharge in the ground that the duty was outside case of disobedience. That, however, the scope of his employment, where he does not charge liability upon the master. In the absence of restrictive contract provisions, the master is at liberty to discharge the servant at any time. So, likewise, is the servant at liberty to abandon his service at will. The mas-

ton Mills (1892) 157 Mass. 283, 32 N. ter has the right to demand other service E. 161, where a servant of fourteen years of age and of less than ordinary gaged. The latter may accept or decline intelligence, injured while obeying peremptory orders, given with an oath, to assist in operating a machine at which he was not employed to work, was held not negligent, as matter of law. But there imperfect knowledge was also an element in the case, as the danger incident to operating the machine was partially concealed from view.

2 In Reed v. Stockmeuer (1896) 20 C. ter has the right to demand other service than that for which the servant has engaged. The latter may accept or decline than that for which the servant has engaged. The latter may accept or decline than that for which the servant has engaged. The latter may accept or decline than that for which the servant has engaged. The latter may accept or decline than that for which the servant has engaged. The latter may accept or decline than that for which the servant has engaged. The latter may accept or decline than that for which the servant has engaged. The latter may accept or decline than that for which the servant has engaged. The latter may accept or decline than that for which the servant has engaged. The latter may accept or decline than that for which the servant has engaged. The latter may accept or decline than that for which the servant has engaged. The latter may accept or decline than that for which the servant is not under guardianship. He servant is not under guardianship. <sup>2</sup> In Reed v. Stockmeyer (1896) 20 C. charged from employment, does not im-C. A. 381, 34 U. S. App. 727, 74 Fed. 186, pose liability upon the master because the court reasoned as follows: "It is of such demand, if he has otherwise perurged that Stockmeyer, in obeying the formed the duty which the law imposes

work he was directed to perform. It is except with a stick, and is, under no circonceded that he made no objection to cumstances, to go between cars havthe order, that he did not protest any ing an engine attached, cannot recover incapacity to comprehend the risk, but for injuries received in going between that he was coerced into compliance with the cars by direction of the engineer, on

a servant of full age and adequate experience cannot cast upon the master all the risk of accident in the performance of new duties by simply protesting against being called upon to perform those duties. Under such circumstances, he has the choice of either leaving the employment, or of remaining and assuming all the risks incident to the work he knows that he is expected to do.3

c. Fear of discharge.—In two of the cases just referred to it will be noticed that the effect of the servant's protest is considered with reference to the fact that dismissal from the employment must always be taken into account, as a possible, or rather probable, consequence of disobedience, and that the servant is presumed to be influenced by this consideration.4 Obviously, however, neither the making nor the omission of an actual protest is a necessary or invariable concomitant of this element; and in some cases its bearing

of the servant. See § 460, supra.

encounter only the dangers of that service, he may, perhaps, in the first instance, assume that the order given him by his superior is warranted by the legitimate scope of his employment. If, 573, 14 N. W. 551, where a brakeman on so assuming, he is induced to perform a passenger train was ordered to do duties which, by his contract, he is not bound to perform, and is thus injured, with the order, and was injured by a he should be able to maintain an action for the injury against the employer. But in the case at bar the plaintiff knew dence of the protest as indicating a want that the duty of aiding as fireman on of consent. In Cole y. Chicago & N. W. with the defendant, rather than lose his this case. position as a laborer. In so doing, he a servant to an employment, the risks of mond & D. R. Co. v. Finley (1894) 12 which he does not wish to encounter, by C. C. A. 595, 25 U. S. App. 16, 63 Fed. threatening, otherwise, to deprive him 228, as a ground for inferring acceptof an employment he can readily and ance of the risks, safely perform, may sometimes be

<sup>3</sup> Wheeler v. Berry (1893) 95 Mich. harsh; but when one has assumed an 250, 54 N. W. 876, distinguishing Chi-employment, if an additional and more cago & N. W. R. Co. v. Bayfield (1877) dangerous duty is added to his original 37 Mich. 205, as being a decision based labor, he may accept or refuse it. If he on the youth, weakness, and inexperience has an executory contract for the original service, he may refuse the addi-To the same effect is Leary v. Boston tional and more dangerous service, and & A. R. Co. (1885) 139 Mass. 580, 52 if, for that reason, he is discharged, he Am. Rep. 733, 2 N. E. 115 (freight may avail himself of his remedy on his truckman acting temporarily as fireman contract. If he has no such contract, was thrown off the footboard of a and knowingly, although unwillingly, switching engine by a jolt caused by the accepts the additional and more danger-passage of the engine over a frog). The ous employment, he accepts its inci-court said: "While a person who endental risks; and while he may require gages for a particular service agrees to of the employer to perform his duty, he encounter only the dangers of that serv- cannot recover for an injury which oc-

that the duty of aiding as fireman on of consent. In Cole v. Chicago & N. W. the engine was not within his original R. Co. (1888) 71 Wis. 114, 37 N. W. contract as a laborer. He determined to 84, the court referred to, but declined perform it as a part of his engagement either to affirm or disaffirm, the rule in

<sup>4</sup> The fact that there was no threat of must be held to have assumed its neces- dismissal in case of refusal to undertake sary risks. . . . Morally to coerce the new duties was emphasized in Rich-

upon the question of the servant's willingness is treated from a more general standpoint.5

468. Contributory negligence in regard to the manner of performing the work.—In cases where the injury resulted from the manner in which the work was performed, and not from the risks which were an essential incident of that work, it is clear that, under the general principle stated in §§ 319, 320, ante, contributory negligence is negatived by evidence which shows that the servant did not understand the danger which that method involved. On the other hand, he cannot recover if, with knowledge, actual or constructive, of the risks thereby incurred, he adopts an abnormally hazardous method of doing the new work, or fails to take the precautions against accident which would have suggested themselves to a prudent man as being appropriate under the circumstances.<sup>2</sup> This rule, is, of course, no less applicable to minors than to adults.3

<sup>5</sup> In Gavigan v. Lake Shore & M. S. iron rod, he having seen other employees R. Co. (1896) 110 Mich. 71, 67 N. W. doing this, and not being acquainted 1097, the court rejected the contention that, by consenting to perform the service, the plaintiff did not assume the risk, 79 Mc. 397, 10 Atl. 49 (workman whose forming extraordinary service by direcfear of discharge.

See also Dougherty v. West Superior

N. W. 274.

of Indiana has repudiated the theory that the servant is free to quit the service and thus avoid danger, and that, by a water tank and fell from a narrow, voluntarily continuing in the service ice-covered platform on which he stood), and obeying the command, he consents

An instruction that if the servant is to take the additional risk. Brazil

note 2, supra.

Boettger v. Scherpe & K. Architectural Iron Co. (1894) 124 Mo. 87, 27 S. W. 466 (servant hired as a common laborer is not required to possess such cise of ordinary care; and that, if he skill in choosing lumber for a scaffold uses such care, the master will be liaas will debar him from recovery for in- ble, -is not open to the objection that juries received through the breaking of it relieves the servant from the duty of a piece of timber used in erecting the exercising his faculties to protect himstructure); Gulf, C. & S. F. R. Co. v. self from the apparent dangers incident Newman (1901; Tex. Civ. App.) 64 to the work. Norfolk Beet Sugar Co. v. S. W. 790 (fireman directed to take Hight (1899) 59 Neb. 100, 80 N. W. charge of a stationary engine was in- 276. jured in trying to start it by lifting the

inasmuch as he might be discharged if ordinary duties were in a car shop was he refused to perform the service; or, in injured, while coupling cars under the other words, that the master is to be direction of his foreman, by placing his considered an insurer of the servant perhand where, as he could not help seeing, it must be caught by the buffer); Jenktion of a superior, whenever he chooses ins v. Maginnis Cotton Mills (1899) 51 to obey a direction of one in charge, for La. Ann. 1011, 25 So. 643 (servant attempted to remove flats from the endless chain of a carding machine while Iron & Steel Co. (1894) 88 Wis. 343, 60 it was in motion, and when the removal W. 274. of the fly plate had, as he knew, exposed On the other hand the supreme court a rapidly moving cylinder); English v. Indiana has repudiated the theory Chicago, M. & St. P. R. Co. (1885) 24 Fed. 906 (servant was ordered to repair

suddenly called on to perform a duty Block Coal Co. v. Hoodlet (1891) 129 not falling within the scope of his con-Ind. 327, 334, 27 N. E. 741. See § 464, tractual duties, and complies with the order, he will have a right to rely on the implied assurance of the master that the dangers to be encountered are such only as can be guarded against by the exer-

<sup>3</sup> Michael v. Stanley (1892) 75 Md. balance wheel off its balance with an 464, 23 Atl. 1094; Morewood Co. v.

469. Injuries due to risks entirely disconnected from the servant's duties; right of action for .- In one English case there was applied in favor of the servant a principle which, so far as it is susceptible of precise formulation, would seem to be this—that the servant's knowledge of a risk will not warrant the inference that it was assumed, where it arose from conditions which lay wholly outside the sphere of the duties which he was engaged to discharge, and had no connection whatever with those duties.1

essarily near cogwheels).

part of her service,-in fact, a mere responsibility was not satisfied.

Smith (1900) 25 Ind. App. 264, 57 N. good-natured act, it being something E. 199 (minor of seventeen went unnec- ultra her service to go to the kitchen. The dog then rushes out and bites her. This is apparently the rationale of Such a risk was not incidental to the the decision in Mansfield v. Baddeley service, nor one which, by her conduct, (1876) 34 L. T. N. S. 696, where it was she has undertaken to bear. If there held that a woman employed as a dress- was anything exceptional in the case, maker, who went into her employer's the onus of proving it lay on the defendkitchen on an errand which had nothing ant." It should be observed, however, to do with her work, was bitten by a that the same conclusion might have savage dog which she supposed to be been arrived at on the facts without intied up, as was usually the case, was voking any special principle, for it is held to have been wrongly nonsuited, evident that the dressmaker was not although she was aware of the character chargeable with the assumption of any of the dog. In the course of his opin-ion, Grove, J., said: "If the plaintiff, the proximity of the dog while it was when she entered her employment, knew tied up. The risk created by the fact the character of the dog, and that, in that it was running loose was, in any the ordinary course of her employment, view of the case, an abnormal one which she would have to go by the place where was not assumed unless it was proved it was tied up, it might, perhaps, be to have been known to her; and it is said she took the risk. But here she clear that, under the testimony, this conwas asked to do something which was no dition precedent to the transfer of the

